

Human Rights Amendment Bill 2011

**Submission to the Justice and
Electoral Committee by the
Public Service Association
Te Pūkenga Here Tikanga Mahi**

19 December 2013

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Introduction

1. The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (PSA) is the largest trade union in New Zealand with over 58,000 members. We are a democratic organisation representing members in the public service, the wider state sector (district health boards, crown research institutes and other crown entities, state owned enterprises), local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.
2. This submission represents the view of the PSA as a whole. In preparing this submission, we asked PSA members to contribute their views about the Bill.
3. As an affiliate of the New Zealand Council of Trade Unions Te Kauae Kaimahi (NZCTU), the PSA supports their submission. The PSA's submission does not reproduce the points made by the NZCTU but addresses the Bill from the particular perspective and experience of the PSA and its members.
4. The PSA wishes to appear before the Justice and Electoral Committee in support of our written submission.

Summary

5. The Human Rights Amendment Bill 2011 (the Bill) introduces some changes which are positive such as updating and clarifying the functions of the Human Rights Commission (the Commission). However, the provisions in the Bill which, in our view, weaken the Commission are a major concern.
6. We urge the Justice and Electoral Committee to seek cross-party consensus on the Bill as the Human Rights Act 1993 (the Act) is an important part of New Zealand's constitutional framework.
7. The PSA supports the proposed clarification and updating of the functions of the Commission proposed by clause 5.
8. The PSA strongly opposes the proposed disestablishment of the specified Equal Employment Opportunities (EEO) Commissioner and Race Relations Commissioner, and the proposal to not establish the Disability Rights Commissioner as a specified Commissioner in the Act. In our view, this will weaken the performance of the Commission in the three priority areas by weakening the specific mandate, visibility and autonomy of those Commissioners.
9. The PSA recommends that the EEO Commissioner and Race Relations Commissioner continue to be appointed to these specified roles as they currently are. The retention of specified Commissioners in law is critical because the persistent and complex issues these Commissioners deal with require specialist knowledge, and people with stature and strong relationships among the communities whose interests they are there to promote and protect.
10. The PSA recommends that the Disability Rights Commissioner also be appointed as a specified Commissioner and that a new section be added to the Act outlining the functions of the Disability Rights Commissioner.
11. The PSA supports the proposal to enable the Chief Commissioner to designate other priority areas of work, after consultation with the Minister of Justice and the other Commissioners.

12. The PSA strongly opposes the proposals to remove references in the Act to joint action between the Commissioners and Chief Commissioner, and to subject Commissioners to directions from the Chief Commissioner in the exercise of their functions.
13. The PSA recommends that provisions for the specified Commissioners to act jointly with, rather than under the direction of, the Chief Commissioner, be retained.
14. We recommend that there are no fewer than five full-time equivalent (FTE) Commissioners, including the Chief Commissioner, and that there is no maximum FTE cap to allow the Commission to determine the adequate number of Commissioners to fully discharge its statutory functions whilst giving the Commission the flexibility sought by these amendments.

Comments

Rationale for change

15. The PSA is concerned that significant changes are being proposed to the Commission based on insufficient evidence – on a limited review of the Commission looking at structural matters relating to the effectiveness and efficiency of the Commission, and with very limited consultation (see below).
16. The Regulatory Impact Statement (RIS) identified three problems:
 - the inefficiency and lack of effectiveness of the part-time Commissioner positions (composition)
 - the inflexibility resulting from the way specified Commissioner roles are provided for in the Act (governance arrangements)
 - the sometimes unclear and incomplete description of the functions of the Commission (functions).
17. Neither the RIS nor the Explanatory Note to the Bill provides an adequate rationale for the disestablishment of the specified EEO and Race Relations Commissioners in law. The Explanatory Note states that changing specified Commissioners to Human Rights Commissioners will reflect that “first and foremost the Commissioners are members of the Commission and operate at all times on behalf of the Commission.” In our experience, the Race Relations Commissioner and EEO Commissioner already act as members of the Commission and are perceived as doing so.

Consultation

18. Amendments to the Human Rights Act should have cross-party support before proceeding because the Act is an important part of New Zealand’s constitutional framework. It is an established convention that constitutional changes should be bi-partisan. Therefore, we recommend that changes to the Act must have the support of all the major political parties.
19. We note in the RIS that only limited consultation with government departments and the Human Rights Commission occurred during the development of the Bill. The proposed changes, and any other options for change, should have been widely canvassed with groups who will be affected such as Māori, Pasifika, ethnic groups, disabled people, women and workers. It is inadequate that the select committee process is the only avenue for public discussion and debate on the proposals contained in the Bill.

Human Rights Commission functions

20. The PSA supports the proposed clarification and updating of the functions of the Commission proposed by clause 5, in particular the proposals to clarify and make explicit the current functions or responsibilities of the Commission to:
 - make public statements commenting on the position of the Government in relation to matter that may affect or infringe human right (clause 5, inserting new section 5(2)(c))
 - make public statements promoting an understanding of and compliance with the Human Rights Act or New Zealand Bill of Rights Act 1990 (clause 5, inserting new section 5(2)(ca))

- promote the development of new international instruments on human rights (clause 5, inserting new section 5(2)(kb))
- promote and monitor New Zealand's compliance with and reporting on international instruments ratified by New Zealand (clause 5, inserting new section 5(2)(kc)).

Disestablishment of specified Commissioners

21. The Bill (clauses 12 and 13) proposes to disestablish the specified EEO Commissioner and Race Relations Commissioner by repealing sections 16 and 17 of the Act, which outlines the functions of these two roles, and replace them with Human Rights Commissioners appointed to lead work on the priority areas of equal employment opportunities, race relations and the new priority area of disability rights (clauses 6 and 9). The PSA strongly opposes these proposals.
22. The PSA recommends that the EEO Commissioner and Race Relations Commissioner continue to be appointed to these specified roles as they currently are, and that the Disability Rights Commissioner also be appointed as a specified Commissioner.
23. We recognise that the Bill explicitly refers to race relations, equal employment opportunities and disability rights as priority areas of the Commission, but this is not the same as having specialist Commissioners specifically appointed to these roles.
24. According to the Explanatory Note, the proposals in the Bill are intended to strengthen the performance of the Commission, thereby enhancing New Zealand's ability to comply with its international human rights obligations and benefit the implementation of domestic human rights legislation.
25. The PSA believes that the disestablishment of the specified Commissioners, combined with the proposal to elevate the leadership function of the Chief Commissioner (see below), will achieve the opposite. It will weaken the effectiveness and leadership of the Commission in the three priority areas by weakening the specific mandate, visibility and autonomy of those Commissioners.
26. The retention of specified Commissioners in law is critical because the persistent and complex issues the Commissioners deal with require specialist knowledge, and people with stature and strong relationships among the communities whose interests they are there to promote and protect. The human rights of some New Zealanders continues to be in a precarious state - including Māori, Pasifika, ethnic groups, disabled people, women and workers - and the removal of these specialised positions would weaken the protection afforded to these New Zealanders.
27. Our concern about the disestablishment of the specialised Commissioner roles and the implications for the effectiveness of the Commission is heightened by other factors which appear to pre-empt the passage of the Bill, including the:
 - restructuring of the Commission earlier this year which has reduced its capacity both in terms of specialist knowledge of race relations and equal employment opportunities and its ability to maintain strong connections with local authorities, community groups and government agencies
 - removal of specific outcomes relating to the Treaty of Waitangi, race relations and equal employment opportunities in the Commission's 2013-2016 Statement of Intent.
28. The RIS and Explanatory Note state that the proposed changes will provide more flexibility to enable new human rights activities for Commissioners to respond to new issues. However, Commissioners already rightly work across other areas than their own priority areas. For example, the last EEO Commissioner undertook extensive work in the area of disability and also into children's employment.
29. The PSA is concerned that the flexibility sought, which is already there, will come at the cost of losing specialist expertise. The RIS acknowledges the risk that people with specialist skills might be deterred from applying for a Human Rights Commissioner position and that advertising of such a position might only attract generalist human rights experts. The PSA supports this view.

30. The Bill also provides flexibility by enabling the Chief Commissioner to designate other priority areas of work, after consultation with the Minister of Justice and the other Commissioners (clause 6, inserting new section 8(1B)). The PSA supports this proposal.

Disability Rights

31. The PSA supports the proposal to add disability rights as a function and priority area of the Commission (clause 5(2)(e) and clause 6). The PSA recommends that the Disability Rights Commissioner also be appointed as a specified Commissioner and that a new section be added to the Act outlining the functions of the Disability Rights Commissioner.
32. There appears to be no regular monitoring and reporting about the experience of disabled workers in New Zealand, so we are hopeful the new Disability Rights Commissioner will help to address this gap. The Disability Survey by Statistics New Zealand provides valuable information about disabled people including their employment, but is only run following each Census. The State Services Commission ceased collecting information and reporting on disability as part of its annual Human Resource Capability survey in 2006.
33. The PSA has over 4,800 members in the community public service sector, which includes services such as disability support, home-based support for older people and social services. The PSA's campaign, Time to Care, has highlighted intractable and complex problems in this sector including, funding for home-care services, and the pay, conditions and training opportunities of home-care and support workers, including reimbursement for travel costs and pay for time spent travelling between clients.

Equal Employment Opportunities

34. The PSA recommends that the EEO Commissioner continues to be appointed as a specified Commissioner, given the persistent and complex equal employment opportunities issues which require the leadership and focus of an autonomous Commissioner with stature, specialised knowledge and experience in this area.
35. A gender pay gap persists in the public service, and in fact has widened over the previous year from 13.7% in 2012 to 14.2% in 2013. Until this year, the gender pay gap had been narrowing in the public service.¹ As the NZCTU submission notes, the topic of pay equity is a highly specialised area and the previous EEO Commissioner played an important role in the work to reduce the gender pay gap at the time of the Pay and Employment Equity Plan in the public service.

Race Relations

36. The PSA recommends that the Race Relations Commissioner continues to be appointed as a specified Commissioner, given the persistent and complex race relations issues which require the leadership and focus of an autonomous Commissioner with stature, specialised knowledge and experience in this area.
37. We have seen the submission on the Bill made by the New Zealand Federation of Multicultural Councils and support their submission.

Leadership function of the Chief Commissioner

38. The Act currently requires the Chief Commissioner to act jointly with the Race Relations Commissioner and EEO Commissioner to ensure that the activities of those Commissioners are consistent with the strategic direction of the Commission (section 15(1) (d) and (e), section 16(c) and (d), and section 17(g)). The proposed new functions of the Chief Commissioner and Human Rights Commissioners now make no reference to such joint action (clause 11, which proposes new section 15; clause 12, inserting new section 16; and clause 13 repealing section 17). In fact clause 12 (inserting new section 16(2)) explicitly states that a Commissioner is subject to directions from the Chief Commissioner in the exercise of their functions.
39. These proposals represent a significant move from the collegial practice of lead Commissioners acting jointly with the Chief Commissioner to a more hierarchical approach. These proposals, together with the

¹ State Services Commission (2013) *Human Resource Capability in the New Zealand State Services*, page 34, www.ssc.govt.nz/sites/all/files/HRC2013.pdf

disestablishment of specialised Commissioners, will weaken the specific mandate, visibility and autonomy of Commissioners, to the detriment of human rights in New Zealand. The PSA strongly opposes these changes.

40. The Explanatory Note states that “No major substantial change of the specialised Commissioner role is intended and in practice these Commissioners can operate as usual.” Given the proposed disestablishment of specialised Commissioners and weaker autonomy of the Commissioners, the PSA doubts the credibility of this statement.
41. The PSA recommends that provisions for the specialist Commissioners to act jointly with, rather than under the direction of, the Chief Commissioner, be retained.

Commissioner numbers

42. The Act currently provides for one full-time Chief Commissioner, two full-time specified Commissioners, and no more than five other part-time Commissioners (section 8).
43. The Bill proposes “not less than 3 and not more than 4 other Commissioners” and the Chief Commissioner (clause 6). At face value, this appears to be approximately equivalent to the total FTEs currently provided for by the Act. However, the new priority area of disability rights is proposed to be added to the functions of the Commission. The FTE resource available to the Commission should therefore increase to adequately resource the new priority area and not at the expense of important work in the other priority areas of the Commission.
44. We therefore support the NZCTU’s recommendation that the total number of Commissioners should be no fewer than five FTEs. The removal of the FTE cap also would also give the Commission flexibility to adapt and respond to emerging human rights issues.