

Chapter 3:

Monitoring Human Rights Legislation and Policy

Along with its human rights education and promotion function, the Commission undertakes a monitoring role in relation to human rights. This monitoring role ranges across the work of the individual Commissioners who examine and report on issues of race, age, sex and disability discrimination and human rights, to the work of the Complaint Handling Section which examines individual claims about breaches of human rights and anti-discrimination legislation, to the assessment of legislative and policy proposals and presentation of submissions through the parliamentary committee process.

In this chapter, the Commission's contribution to policy development and legislative review is highlighted by the many submissions made to parliamentary committees and other bodies. Many of these submissions indicate breaches or potential breaches of human rights inherent in proposed legislation.

These submissions are used by lawyers as resource material; politicians and advocacy groups who can use them in the political process and in public debate; and students and other individuals who have an interest in human rights issues. The submissions are usually prepared on behalf of the Commission by the Commission's legal section or policy units, in conjunction with the complaint handling section.

A range of submissions made by the Commission during 2005–06 are summarised below. The summaries do not detail government actions or other responses to the submissions.

For further information about the Commission's submissions, refer to: www.humanrights.gov.au/legal/submissions/index.html. For further information about the progress of relevant federal legislation, refer to the Parliament of Australia website: www.aph.gov.au/.

Law and Justice Amendment Bill 2005

The Commission made a submission to the Senate Legal and Constitutional Legislation Committee on the Law and Justice Legislation Amendment (Video Evidence and Other Measures) Bill 2005 (Cth) ('the Bill') in relation to proposed amendments under the Bill to the *Crimes Act 1914* (Cth) ('Crimes Act') and the *Foreign Evidence Act 1994* (Cth) ('Foreign Evidence Act'). The relevant amendments related to the taking of video evidence in criminal proceedings for federal terrorism and related offences.

The Commission submitted that:

- The Bill's proposed amendments to both the Crimes Act and the Foreign Evidence Act in relation to the taking of video evidence favoured the prosecution over the defence;
- The Bill potentially impaired an accused person's right to a fair trial as provided for by Article 14(1) of the *International Covenant on Civil and Political Rights*, by denying the accused an equal right to the prosecution in calling and examining witnesses; and
- The Bill contained inadequate safeguards to ensure the exclusion of evidence procured by torture or other cruel or inhumane treatment, particularly in relation to video evidence received from foreign countries.

A copy of the Commission's submission is available at: www.humanrights.gov.au/legal/submissions/video_evidence_and_other_measures.html.

The Senate Legal and Constitutional Legislation Committee tabled its report in the Senate on 1 November 2005. A copy of the report is available at: www.aph.gov.au/Senate/committee/legcon_ctte/videolink_evidence/report/index.htm.

Migration Amendment (Designated Unauthorised Arrivals) Bill 2006

The Commission made a submission to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006. In its submission the Commission expressed concern that the Bill will:

- Breach Australia's obligations under the *Convention on the Rights of the Child* (CRC) including the obligation to act in the best interests of the child (Article 3(1)) and the principle that children should only be detained as a measure of last resort.
- Undermine Australia's obligations under the *International Covenant on Civil and Political Rights* ('ICCPR') by failing to act in accordance with the principle of non-discrimination (Article 26), failing to provide effective remedies for potential breaches of ICCPR rights (Article 2(3)) and exposing asylum seekers in Offshore Processing Centres (OPCs) to the risk of arbitrary detention (Article 9).

- Undermine the fundamental human rights principle of non-refoulement by failing to provide adequate procedural safeguards, including independent merits reviews, to ensure that cases in which a person has a fear of persecution are justly decided.
- Undermine Australia's commitment to the *Convention Relating to the Status of Refugees* ('the Refugee Convention').

The Commission submitted that if the unauthorised boat arrivals are processed offshore it is imperative that OPCs are subject to the same level of independent scrutiny that applies to immigration detention centres in Australia.

A copy of the Commission's submission is available at: www.hreoc.gov.au/legal/submissions/migration20060522.html.

The Senate Legal and Constitutional Committee tabled its report on 13 June 2006. The report is available at: www.aph.gov.au/senate/committee/legcon_ctte/migration_unauthorised_arrivals/report/index.htm.

Administration and operation of the *Migration Act 1958* (Cth)

The Commission made a submission to the Senate Legal and Constitutional References Committee's Inquiry into the administration and operation of the *Migration Act 1958* (Cth) ('Migration Act'). In its submissions, the Commission directed the Committee to relevant aspects of reports prepared by the Commission in relation to the Migration Act, particularly *A last resort?* (2004) and *Those who've come across the seas* (1998).

The Commission addressed the following particular concerns:

- The Minister's discretionary power to grant asylum is problematic and inadequate;
- The amendments to the Migration Act by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) are inadequate to address the concerns raised in the Commission's reports on immigration; and
- The Commission raised concerns about the adequacy of health care and related services to people in immigration detention, as well as concerns about the outsourcing of management and service provision at immigration detention centres.

A copy of the Commission's submission is available at: www.humanrights.gov.au/legal/submissions/administration_and_operation_of_the_migration_act_1958.html.

The Senate Legal and Constitutional Committee tabled its report in the Senate on 2 March 2006. A copy of the report is available at: www.aph.gov.au/Senate/committee/legcon_ctte/migration/report/index.htm.

Proposed Victorian Charter of Rights

The Commission made a submission to the Human Rights Consultation Committee (Victoria) on a proposed Victorian Charter of Rights. The Commission's recommendations included the following:

- The Charter should apply to acts of the Legislature and the Executive, and public authorities should be expressly required to perform their duties in a manner consistent with the Charter;
- The Charter should embody the rights conferred by *both* the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*;
- A mechanism should be established to scrutinise all legislation to ensure compatibility with the Charter. Where time does not permit such scrutiny, sunset clauses should be inserted to expire legislation that has not been scrutinised after a certain period;
- The Charter should expressly state that all legislation should be interpreted in a manner consistent with the Charter; and
- The Charter should provide a mechanism for individuals to seek enforceable remedies for breaches of the Charter, with a broad provision granting standing.

A copy of the Commission's submission is available at: www.humanrights.gov.au/legal/submissions/hr_consultation_committe.html.

A copy of the final report prepared by the Human Rights Consultation Committee is available at: [www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Report/\\$file/HumanRightsFinal_FULLL.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Report/$file/HumanRightsFinal_FULLL.pdf).

Extradition Review Discussion Paper

The Commission was invited to make a submission in response to the Attorney-General's Department (AGD) discussion paper, *A new extradition system – a review of Australia's extradition law and practice*. The Commission made 21 recommendations in response to the reform proposals canvassed in the AGD Discussion paper. These recommendations emphasised the importance of human rights safeguards in the extradition process and, in particular, the importance of review mechanisms.

A copy of the Commission's submission to the Attorney-General's Department is available at: www.hreoc.gov.au/legal/submissions/extradition200604.html.

A copy of the Attorney-General's Department extradition review discussion paper is available at: www.ag.gov.au/agd/WWW/agdHome.nsf/AllDocs/CC14F9A3D7692FB6CA25715E00269159?OpenDocument.

Anti-Terrorism Bill (No.2) 2005

The Commission made a submission to the Senate Legal and Constitutional Committee's inquiry into the Anti-Terrorism (No.2) Bill 2005 (Cth). The submission considered the human rights implications of several aspects of the Bill and recommended:

- The enhancement of review mechanisms for preventative detention and control orders;
- The enhancement of the provision of information to people seeking to challenge preventative detention and control orders;
- Additional safeguards for the exercise of the powers to issue preventative detention and control orders;
- Additional safeguards regarding the treatment of people in detention pursuant to a preventative detention order; and
- The amendment of the proposed sedition offences.

A copy of the Commission's submission is available at: www.humanrights.gov.au/legal/submissions/terrorism_sub_12-11-2005.html.

The Senate Legal and Constitutional Committee tabled its report in the Senate on 28 November 2005. A copy of the report is available at: www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/index.htm.

Submission to Security Legislation Review Committee

The Commission made a submission to the Security Legislation Review Committee ('the Sheller Inquiry') on 10 January 2006 in relation to the terrorism offences in Part 5.3 of the *Criminal Code 1995* enacted by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

The Commission recommended that the current executive process by which an organisation is proscribed as a terrorist organisation should be replaced by a judicial process. In the absence of a judicial process being adopted by the legislature, the Attorney-General's wide discretion to proscribe an organisation ought to be circumscribed and merits review available. The Commission also made recommendations for the circumscription of certain other terrorism offences contained in Part 5.3 of the *Criminal Code 1995*.

A copy of the Commission's submission is available at: www.humanrights.gov.au/legal/submissions/security_legislation_review.html.

The Report to the Sheller Inquiry was tabled in the Parliament by the Attorney-General on 15 June 2006 and is available at: www.ag.gov.au/agd/WWW/agdhome.nsf/0/C2CE3EBE73794EF8CA2570A5001FAB3C?OpenDocument.

Australian Citizenship Bill 2005

The Commission made a written submission to the Senate Legal and Constitutional Legislation Committee ('the Committee') inquiry into the Australian Citizenship Bill 2005 ('the Bill'). The Commission also appeared before the Committee at a public hearing on 30 January 2006. The Bill is intended to replace the *Australian Citizenship Act 1948* (Cth).

The Commission submitted that certain provisions of the Bill affected human rights recognised under the *International Covenant on Civil and Political Rights*, the *Convention on the Reduction of Statelessness* and the *Convention on the Rights of the Child* and should be amended to provide adequate protection of those rights.

The Commission made additional recommendations relating to the exercise of executive power under the Bill, rights to review of decisions under the Bill, and the rights of children of former Australian citizens and same-sex partners of Australian citizens.

The Commission's submission is available at: www.humanrights.gov.au/legal/submissions/citizenship_bill_2005.html.

The Committee made several recommendations consistent with the Commission's submissions relating to stateless persons and children and recommended that the Bill be further reviewed in relation to stateless persons, in consultation with HREOC and the UNHCR. The Committee's report was tabled in Parliament on 27 February 2006. As at 30 June 2006, the Government had provided no response to that report.

A copy of the Committee's report is available at: www.aph.gov.au/Senate/committee/legcon_ctte/citizenship/report/report.pdf.

Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005

The purpose of the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 was to permit the utilisation of the Australian Defence Force to protect states and territories against domestic violence, and to protect Commonwealth interests. The Bill also provided additional powers to members of the Australian Defence Force in certain circumstances.

The Commission's principal concern with the Bill was that the new provisions, providing additional powers to members of the Defence Force, may not adequately safeguard the right to life under article 6 of the ICCPR.

The Commission made a submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Bill. The Commission's principal submission was that for Australia to comply with its international human rights obligations, additional safeguards should be placed on these new powers. The Commission

recommended a number of amendments to the Bill. A copy of the Commission's submission is available at: www.humanrights.gov.au/legal/submissions/defence_leg_aid_civilian2006.html.

The Committee's report was tabled in Parliament on 7 February 2006. A copy of the report is available at: www.aph.gov.au/Senate/committee/legcon_ctte/defence/report/index.htm.

Workplace Relations Amendment (WorkChoices) Bill 2005

On 10 November 2005, the Sex Discrimination Commissioner, on behalf of the Commission, made a submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005.

The Commission expressed concerns that the Bill:

- may undermine the capacity of employees to balance their work and family responsibilities
- did not contain sufficient mechanisms to advance pay equity or ensure equal remuneration for work of equal value and
- may not adequately protect vulnerable employees.

The Commissioner along with representatives of SDU and Legal Section appeared before the Senate Committee in relation to the Commission's submission on 17 November 2005. The Commission's submission and the Commissioner's appearance generated significant media and public interest.

The submission can be found at: www.humanrights.gov.au/legal/submissions/workplace_relations_amendment_2005.html.

Submission on the Family Law Amendment (Shared Parental Responsibility) Bill 2006

On 24 February 2006 the Commissioner, on behalf of the Commission, made a submission to the Senate Legal and Constitutional Committee's Inquiry into the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2006.

The submission outlined a number of concerns with the Bill including:

- that the views of the child would in future be given reduced weight
- that the Bill could go further in protecting family members from violence, particularly during and after separation and
- the failure to include a reference to a same sex parent in the definition of a relative.

The submission also identified the difficulties inherent in expecting fathers to play a significant and ongoing role in their children's lives after separation, without implementing laws and policies which allow them to play a more significant role with their children in intact relationships.

The Committee report referred to HREOC's concerns about the division of considerations for determining the best interests of the child into primary and secondary considerations and the Committee recommended that this issue be clarified in the final Bill.

The submission can be found at: www.humanrights.gov.au/legal/submissions/shared_parental_responsibility.html.

Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005

The Commission made a submission to the Commonwealth Senate Finance and Public Administration Committee regarding the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005.

The submission expresses particular concern about the provisions in the Bill relating to: (a) the right of prisoners to vote; and (b) the early closure of the rolls.

The submission highlights that those provisions will prevent the following groups from exercising their fundamental human right to participate in the political process:

- prisoners (a population in which Indigenous people, people with mental illness and people with intellectual disability are overrepresented)
- young people
- people in rural and remote areas (many of whom are Indigenous people).

The Commission recommends removal or amendment of those provisions from the Bill.

The Senate Committee report noted the Commission's concerns but did not take up the Commission's recommendations. The Bill was passed by Parliament on 21 June.

The submission can be found at: www.humanrights.gov.au/legal/submissions/electoral20060309.html.

Villawood Immigration Detention Centre Redevelopment

The Commission made a submission to the Commonwealth Parliamentary Standing Committee on Public Works regarding the Villawood Immigration Detention Centre Redevelopment.

The submission focuses on the right of all detainees to be treated with humanity and respect. In particular, the submission assists the Standing Committee to identify how the infrastructure of an immigration detention facility can have an impact on those fundamental rights.

The submission refers to the extensive findings and recommendations in the Commission's numerous reports regarding immigration detention centres. In particular, the submission highlights the infrastructure-related conditions which have led to a breach of Australia's human rights obligations in the past.

The Commission recommends that the infrastructure of the Villawood Immigration Detention Centre be re-designed with a view to protecting the human right of every detainee to be treated with humanity and dignity. The submission also recommends using the Human Rights and Equal Opportunity Commission's Immigration Detention Guidelines as a point of reference.

The Standing Committee's report was not tabled in Parliament by 30 June.

The submission can be found at: www.humanrights.gov.au/legal/submissions/villawood.html.

Other Submissions

Other submissions were made to the:

- Senate Community Affairs Legislation Committee Inquiry on the Employment and Workplace Relations Legislation Amendment (Welfare to work and other Measures) Bill 2005 and the Family and Community Services Amendment (Welfare to Work) Bill 2005 (16 November 2005)
- Department of Workplace Relations review of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (5 May 2006)
- COAG Health Working Group regarding the National Action Plan on Mental Health 2006–2011 (30 June 2006)
- Australian Government Award Review Taskforce (the Taskforce) in relation to its discussion papers *Award Rationalisation and Rationalisation of Award Wage and Classification Structures* (in January 2006)
- Australian Industrial Relations Commission (AIRC) during the hearing of the Family Provisions Test Case. A decision on the case was handed down by the Full Bench of the AIRC (8 August 2005). New provisions were introduced which provides the right for an employee to request:
 - ◇ an increase in the period of simultaneous unpaid parental leave up to 8 weeks;
 - ◇ an extension of unpaid parental leave from 12 months to 24 months; and
 - ◇ a return from unpaid parental leave on a part-time basis.