

Chapter 3:

Monitoring Human Rights

HREOC plays a significant role in monitoring legislation and policy in Australia to assess compliance with human rights principles. This monitoring role includes:

- the work of the individual Commissioners, who examine and report on issues of race, age, sex and disability discrimination and human rights; and
- the assessment by HREOC of legislative and policy proposals, resulting in submissions to governments, law reform bodies and parliamentary committees.

This chapter highlights HREOC's contribution to policy development and legislative review through the many submissions made during the reporting period. Many of these submissions identified breaches or potential breaches of human rights in proposed legislation.

HREOC's submissions play an important role in fostering public debate and an awareness of human rights principles. HREOC makes the submissions available on its website for reference by governments, politicians, lawyers, academics, journalists, students and other individuals who have an interest in human rights issues.

HREOC's submissions are prepared on behalf of HREOC by HREOC's Legal Section, Policy Units and the Complaint Handling Section.

A range of submissions made by HREOC during 2006–07 are summarised below. The summaries do not detail government actions or other responses to the submissions.

For further information about HREOC's submissions, refer to: www.humanrights.gov.au/legal/submissions/sj_submissions/alra_amendments_senate_subjuly2006.html. For further information about the process of relevant federal legislation, refer to the Parliament of Australia website: www.aph.gov.au.

3.1 SUBMISSIONS MADE BY HREOC AS PART OF ITS MONITORING ROLE IN RELATION TO HUMAN RIGHTS STANDARDS

3.1.1 Provisions of Aboriginal Land Rights (Northern Territory) Amendment Bill 2006

In July 2006 HREOC made a submission to the Legislative Committee of the Senate Committee on Community Affairs Inquiry into the Provision of Aboriginal Land Rights (Northern Territory) Amendment Bill 2006 (Cth).

The submission outlined the following concerns:

- a lack of traditional owner participation in the development of the amendments;
- failure to inform traditional owners of the content of the proposed amendments;
- alienation of Indigenous lands for three generations or more under the proposed 99 years leases over townships;
- the use of the Aboriginal Benefits Account to pay the Northern Territory Government's rental on the 99 year leases;
- the potential loss of advocacy capacity under the proposed constitution of additional land councils; and
- poor processes for informing and seeking consent of traditional owners regarding agreements on land under section 19A of the proposed amendments.

A copy of HREOC's submission is available at:

www.humanrights.gov.au/social_justice/submissions/alra_amendments_senate_subjuly2006.html

The Legislation Committee of the Senate Committee on Community Affairs tabled its report in the Senate on 8 August 2006. A copy of the report is available at:

www.aph.gov.au/Senate/committee/clac_ctte/aborig_land_rights/report/index.htm

3.1.2 Unfinished Business – Indigenous Stolen Wages

In August 2006 HREOC made a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Indigenous Stolen Wages.

The submission brought to the attention of the Inquiry:

- the issue of underpayment of wages;
- relevant human rights principles relevant to the issue of stolen wages; and
- relevant developments in Queensland, including those cases under the Racial Discrimination Act (the *Palm Island Wages Case*, *Baird* and *Douglas*) in which HREOC was involved.

A copy of HREOC's submission is available at:

www.humanrights.gov.au/legal/submissions/2006/stolen_wages_2006.html

HREOC's Director of Legal Services and Director of the Social Justice Unit appeared before the Committee on 27 October 2006 to give oral evidence in support of HREOC's submission.

The Senate Standing Committee on Legal and Constitutional Affairs tabled its report in the Senate on 7 December 2006. A copy of the report is available at: www.aph.gov.au/Senate/committee/legcon_ctte/stolen_wages/report/index.htm

3.1.3 Crimes Amendment (Bail and Sentencing) Bill 2006

In September 2006 HREOC made a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Crimes Amendment (Bail and Sentencing) Bill 2006 (Cth).

The Bill was a response by the Commonwealth Government to concerns about violence in Indigenous communities. It sought, amongst other things, to exclude 'cultural background' as a specific relevant factor in sentencing and prevent a court from taking into account 'customary law or cultural practice' in sentencing.

HREOC's submissions opposed these changes as being an inappropriate response to the issue of Indigenous violence and potentially counter-productive. HREOC argued that the Bill undermined customary authority that may otherwise be important in improving Indigenous community governance and addressing problems of violence.

A copy of HREOC's submission is available at: www.humanrights.gov.au/legal/submissions/crimes_amendment.html

Aboriginal and Torres Strait Islander Social Justice Commissioner and Director of Legal Services gave oral evidence before the Committee on 29 September 2006 in support of HREOC's submission.

The Senate Standing Committee on Legal and Constitutional Affairs tabled its report in the Senate on 16 October 2006. A copy of the report is available at: www.aph.gov.au/Senate/committee/legcon_ctte/crimes_bail_sentencing/report/index.htm

3.1.4 Australian Citizenship: much more than just a ceremony Discussion Paper

In November 2006 HREOC made a submission to the Department of Immigration and Citizenship (DIAC) in response to its Discussion Paper on the introduction of formal citizenship testing titled *Australian Citizenship: much more than just a ceremony*.

HREOC's submission recommended that testing for citizenship should not be introduced. The submission argued that there was no adequate justification for the introduction of formal testing and there was a prospect that such a test may have a discriminatory impact on the ground of national or social origin and/or birth.

However, the submission did recommend that if testing were to be introduced, the government should carefully consider the format, content and implementation of the test and provide a number of safeguards and exemptions to avoid any discriminatory impact.

A copy of HREOC's submission is available at:

www.humanrights.gov.au/racial_discrimination/report/citizenship_paper_2006.html

DIAC prepared a Summary Report on the outcomes of its public consultation. A copy of this report is available at:

www.minister.immi.gov.au/media/responses/citizenship-test/summary_report_citizen_test_paper.pdf

3.1.5 Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

In November 2006 HREOC made a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) and the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006 (Cth).

HREOC's submission expressed concern that the Bills did not do enough to ensure that financial institutions adopt non-discriminatory criteria when determining the 'money laundering/terrorism financing risk' of providing a designated service to a customer. This is primarily because the Bills:

- failed to provide any objective criteria for financial institutions to use in determining 'risk' and gave them a broad discretion; and
- exempted financial institutions from liability under discrimination laws for conduct done in good faith and in compliance or purported compliance with the regime.

A copy of HREOC's submission is available at:

www.humanrights.gov.au/legal/submissions/anti_money_laundering_counter_terrorism.html

The Senate Standing Committee on Legal and Constitutional Affairs tabled its report in the Senate on 28 November 2006. A copy of the report is available at:

www.aph.gov.au/Senate/committee/legcon_ctte/aml_ctf06/report/index.htm

3.1.6 A Charter of Rights for Tasmania Discussion Paper

In December 2006 HREOC made a submission to the Tasmania Law Reform Institute in response to its Discussion paper titled *A Charter of Rights for Tasmania?*

HREOC's submission stated that a statutory Charter of Rights could, depending on its form and content, significantly improve human rights protection in Tasmania. The submission recommended that a Tasmanian Charter of Rights should refer to a number of key elements. A summary of these key elements is given below.

- Protect the rights set out in the *International Covenant on Civil and Political Rights* (ICCPR) and take steps to achieve the progressive realisation of rights set out in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).
- Protect the rights of every person in Tasmania's jurisdiction, regardless of immigration status.

- Create a culture of human rights compliance in law and policy making by providing that:
 - ◊ bills must be accompanied by a human rights compatibility statement; and
 - ◊ submissions to Cabinet with a direct or significant impact on human rights be accompanied by a human rights impact statement.
- Give courts the power to:
 - ◊ interpret legislation consistently with the Charter;
 - ◊ make a declaration of incompatibility if legislation is incompatible with the Charter; and
 - ◊ hear and determine actions brought against public authorities for acting unlawfully under the Charter.
- Establish an independent Tasmanian Human Rights Commission to monitor human rights protection under the Charter, advise the government on Charter compliance, and promote public understanding and awareness of the Charter.

A copy of HREOC's submission is available at:
www.humanrights.gov.au/legal/submissions/Tas_charter_rights.html

At 30 June, the Tasmania Law Reform Institute is in the process of preparing its report on the outcomes of its public consultation.

3.1.7 Older People and the Law

In December 2006 HREOC made a submission to the House of Representatives Legal and Constitutional Affairs Committee's Inquiry into Older People and the Law.

The Committee is investigating and reporting on the adequacy of current legislative regimes in addressing the legal needs of older Australians (65 years and over) in the following areas: fraud; financial abuse; general and enduring 'power of attorney' provisions; family agreements; barriers to older Australians accessing legal services; and discrimination. The Committee is also considering the relevant experience of overseas jurisdictions.

HREOC's submission provided a range of background material, including statistics about age discrimination complaints. It also made submissions on HREOC's concerns about the coverage of the Age Discrimination Act, consistent with previous submissions concerning the Act when it was before parliament as a Bill.

A copy of HREOC's submission is available at:
www.humanrights.gov.au/legal/submissions/2006/ADA_200612/older_people_and_the_law_dec06.html

HREOC President, Director of Legal Services and Director of the Sex Discrimination Unit appeared before the Committee to give oral evidence in support of HREOC's submission on 15 May 2007.

The House of Representatives Standing Committee on Legal and Constitutional Affairs will table its report in parliament later this year.

3.1.8 Migration Amendment (Review Provisions) Bill 2006

In January 2007 HREOC made a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Migration Amendment (Review Provisions) Bill 2006.

HREOC's submission expressed concern that the Bill created an unfair process for determining refugee and migration cases which may breach the human rights of applicants by:

- denying applicants a fair hearing; and/or
- leading to incorrect decisions which increases the likelihood of 'refoulement' of asylum seekers.

HREOC also submitted that, while the Bill may give the tribunals greater flexibility, this may not necessarily improve their efficiency. In any event, improved efficiency is not justified if it comes at the expense of applicants' human rights.

A copy of HREOC's submission is available at:

www.humanrights.gov.au/legal/submissions/2007/migration_amendment_bill_06.htm

The Human Rights Commissioner, Director of Human Rights Unit and a HREOC lawyer appeared before the Committee to give oral evidence in support of HREOC's submission on 31 January 2007.

The Senate Standing Committee on Legal and Constitutional Affairs tabled its report in the Senate on 26 February 2007. A copy of the report is available at:
www.aph.gov.au/Senate/committee/legcon_ctte/mig_review_provisions/report/index.htm

3.1.9 Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995

In February 2007 HREOC made a submission to the Parliamentary Joint Committee on Intelligence and Security on its review of the power to proscribe terrorist organisations under the *Criminal Code Act 1995* (Cth).

The submission expressed HREOC's concern that the Attorney-General's power to proscribe or de-list a terrorist organisation does not satisfy the international human rights law requirement that any interference with ICCPR rights (in this case, the right to freedom of association and freedom of expression) must be prescribed by law and be proportionate and necessary to achieve a legitimate end.

The submission argued that inadequate safeguards in the current proscription process create the potential for arbitrary and disproportionate decision making. HREOC's key concerns were:

- the absence of criteria for the exercise of the Attorney-General's discretion to proscribe or de-list a terrorist organisation;
- the lack of opportunities for organisations or individuals to oppose the proposed proscription of an organisation; and
- the absence of merits review of the Attorney-General's decision to proscribe an organisation as a terrorist organisation.

HREOC's submission endorsed the Security Legislation Review Committee's recommendations to create a more transparent proscription process. The fact that, as a result of proscription, a person associated with an organisation may be charged and convicted of serious criminal offences reinforces the need for a fairer proscription process.

HREOC recommended that the proscription process be a judicial rather than executive process. In the event that a judicial proscription process is not adopted, HREOC recommended existing proscription provisions should be amended to include the criteria to be taken into account by the Attorney-General in determining whether to proscribe or de-list a terrorist organisation. HREOC also recommended that the provisions should allow merits review of the Attorney-General's decision to proscribe an organisation.

A copy of HREOC's submission is available at:
www.humanrights.gov.au/legal/submissions/2007/proscription_powers_terrorist_org_feb2007.html

HREOC President and his Associate appeared before the Committee to give oral evidence in support of HREOC's submission on 4 April 2007.

The Report of the Parliamentary Joint Committee on Intelligence and Security will be tabled in Parliament later this year.

3.1.10 Human Services (Enhanced Delivery) Bill 2007

In March 2007 HREOC made a submission to the Senate Finance and Public Administration Committee's Inquiry into the Human Services (Enhanced Delivery) Bill 2007 (Cth). The Bill sought to introduce an 'access card' to replace some 13 other cards that are required to access federal benefits.

HREOC's submission drew the Committee's attention to how the access card might impact upon Indigenous Australians and made related recommendations. In particular, HREOC observed:

- as a result of their disadvantaged socio economic status, most Indigenous Australians will be required to register for the access card in order to gain or maintain access to social welfare payments, Medicare services, and the Pharmaceutical Benefits Scheme;
- a potentially significant number of Indigenous people will have difficulty providing the documents required to establish their 'legal name';

- a potentially significant number of Indigenous people will have difficulty meeting one or more of the requirements of the registration process for the access card as a result of cultural reasons or their disadvantaged socio-economic status. Special consideration should be given to their circumstances and appropriate exemptions granted or special arrangements made; and
- to ensure that the registration requirements for the access card do not unnecessarily disadvantage Indigenous Australians, it is important that they are consulted about the development of guidelines and other mechanisms that will determine eligibility.

A copy of HREOC's submission is available at:
www.humanrights.gov.au/legal/submissions/sj_submissions/human_services_bill_accesscards_Mar07.html

The Senate Committee on Finance and Public Administration tabled its report in the Senate on 20 March 2007. A copy of the report is available at:
www.aph.gov.au/Senate/committee/fapa_ctte/access_card/report/index.htm

3.1.11 Other Submissions

Other submissions were made to:

- the Australian Fair Pay Commission for consideration in determining the first national wage decision;
- the Joint Standing Committee on Treaties Inquiry into the Extradition and Mutual Assistance Treaties between Australian and Malaysia;
- the Attorney-General's Department second exposure draft of the Anti-Terrorism and Counter-Terrorism Financing Bill 2006;
- the Attorney-General's Department Discussion Paper *A better mutual assistance system: a review of Australia's mutual assistance law and practice*;
- the Attorney-General's Department draft model Children with Intellectual Disabilities (Regulation and Sterilisation) Bill 2006;
- the Attorney-General's Department Discussion Paper Two: *Technical amendments to the Native Title Act 1993*;
- the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Native Title (Amendment) Bill 2006;
- the Senate Committee on Employment, Workplace Relations and Education Inquiry into the Radioactive Waste Management Legislation Amendment Bill 2006;
- the Attorney-General's Department draft of Australia's Common Core Document for use before international treaty monitoring bodies;
- the Senate Standing Committee on Finance and Public Administration Inquiry into the Electoral and Referendum Legislation Amendment Bill 2006;

- the Parliamentary Joint Committee on the Australian Crime Commission Inquiry into the future impact of serious and organised crime on Australian society;
- the Department of Families, Community Services and Indigenous Affairs Discussion Paper *Access to Aboriginal Land under the Northern Territory Land Rights Act*;
- the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Native Title Amendment (technical amendments) Bill 2007;
- the Australian Law Reform Commission Discussion Paper on Legal Professional Privilege;
- the Attorney-General's Department Discussion Paper *Material that Advocates Terrorist Acts*;
- the Joint Standing Committee on Migration Inquiry into eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas; and
- the Queensland Industrial Relations Commission Inquiry into Pay Equity.

For further information about HREOC's submissions, refer to:
www.humanrights.gov.au/legal/submissions/.

