

Chapter 5

Legal Services

.....

5.1 RESPONSIBILITIES AND OVERVIEW

The Legal Section provides legal advice to and representation for HREOC, the President and Commissioners. Its work includes:

- Advising on human rights, discrimination and other laws relevant to the work of HREOC;
- Preparing notices and reports under the Human Rights and Equal Opportunity Commission Act concerning complaints of breaches of human rights or discrimination in employment;
- Representing HREOC in proceedings in which it intervenes to make submissions about human rights issues;
- Representing Commissioners as *amicus curiae* in unlawful discrimination proceedings;
- Legal education and promoting awareness of developments in human rights and discrimination law;
- Representing HREOC in external litigation such as review proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth);
- Preparing and advising on submissions to government and law reform bodies concerning the human rights implications of changes or proposed changes to the law;
- Assisting HREOC to consider applications for exemptions under the Sex Discrimination Act and Age Discrimination Act;
- Responding on behalf of HREOC to applications for access to information under the *Freedom of Information Act 1982* (Cth); and
- Assisting in international technical assistance work undertaken by HREOC.

5.2 REPORTS CONCERNING BREACHES OF HUMAN RIGHTS OR DISCRIMINATION IN EMPLOYMENT

The Human Rights and Equal Opportunity Act gives HREOC the function of inquiring into complaints concerning breaches of human rights by the Commonwealth (or persons/organisations acting on behalf of the Commonwealth) and discrimination in employment.

HREOC attempts to resolve such complaints through conciliation, where appropriate. If the matter is not resolved through conciliation and the President is satisfied that a breach of human rights or an act of discrimination has occurred, the President reports on the matter to the

federal Attorney-General. The President can make recommendations to compensate for loss or injury suffered by the complainant, but these are not legally enforceable. Between 1 July 2007 and 30 June 2008, the President reported to the Attorney-General on two matters.

5.2.1 HREOC Report No. 38

Report of an Inquiry into a complaint by Mr Frank Ottaviano of discrimination in employment on the basis of criminal record against South Australia Police (State of South Australia)

In this matter, the President found that Mr Ottaviano was discriminated against by South Australian Police on the basis of his criminal record.

Mr Ottaviano was convicted in 1991 for receiving stolen goods. He was ordered to complete 200 hours of community service, which he completed at the Fort Largs Police Academy ('the Academy'), a division of SA Police. Following completion of that community service, he was employed by SA Police as a groundsperson at the Academy and subsequently promoted to a supervisory groundsperson position.

In 2001, Mr Ottaviano's position was made redundant. He was placed with the Police Security Services Branch ('the PSSB'), another division of SA Police, as a security guard. He obtained the necessary TAFE certification for the position and worked in a security guard role for three months. However, prior to being formally employed in the role, SA Police undertook a criminal record check as part of its standard employment procedures. This check revealed his conviction. He was advised that he would not be offered a position as a security guard because of that criminal record.

The President concluded that Mr Ottaviano possessed the requisite level of integrity and character for the position, notwithstanding his criminal record. Amongst other factors, Mr Ottaviano had provided approximately 10 years of service to SA Police, during which time his employment and integrity had been praised highly by his supervisors.

The President recommended that SA Police (or the State of South Australia):

- pay Mr Ottaviano \$20 000 in compensation;
- provide Mr Ottaviano with an apology; and
- not further exclude Mr Ottaviano from being considered for the position of security guard with the PSSB.

SA Police has indicated that it chooses not to make any public statement as to its response to HREOC's findings and recommendations.

The report is available on-line at www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_38.html

5.2.2 HREOC Report No. 39

Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia (Department of Immigration and Citizenship, formerly the Department of Immigration and Multicultural and Indigenous Affairs) and GSL (Australia) Pty Ltd

In this matter, the President found that the Commonwealth and GSL (Australia) Pty Ltd ('GSL') breached the human rights of Mr Nguyen and Mr Okoye, as well as three other immigration detainees, in connection with their transfer between Maribyrnong Immigration Detention Centre and Baxter Immigration Detention Facility on 17 September 2004.

The President concluded that the vehicle in which the detainees were transported was inappropriate for the journey (lasting 6½ – 7 hours), particularly that:

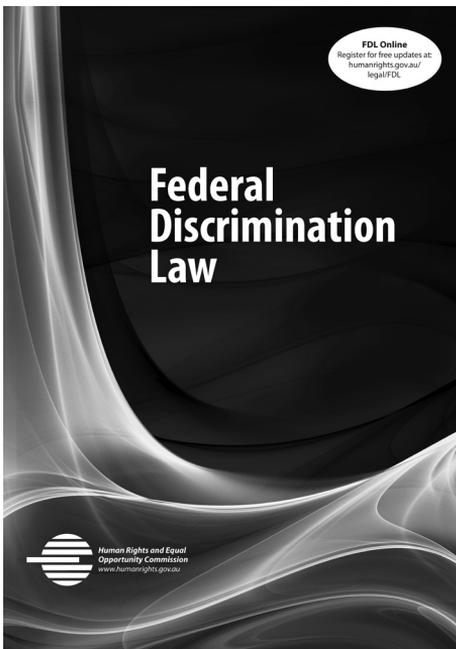
- the detainees were locked into separate, cramped and claustrophobic steel compartments in which they were unable to move around to any extent;
- the air-conditioning unit was not properly functioning and caused the compartments to overheat;
- there were no direct windows to the outside and the compartments were generally dark; and
- there were no toilet facilities on board.

Furthermore, the President concluded that the above conditions were exacerbated by the manner in which the transfer was carried out by the officers involved, including that:

- the officers did not provide the detainees with any food for the journey and, with the exception of two detainees, no water or other liquids;
- the officers failed to take any breaks during the journey to Mildura; and
- the officers ignored obvious and repeated pleas from the detainees for water; and toilet/rest breaks, including seeing detainees urinating in their compartments via the CCTV feed.

The President concluded that the above circumstances amounted to:

- degrading treatment, in breach of Article 7 of the *International Covenant on Civil and Political Rights*; and
- treatment of persons deprived of their liberty with a lack of humanity and respect for the inherent dignity of the human person, in breach of Article 10(1) of the *International Covenant on Civil and Political Rights*.



.....
HREOC released the 2008 edition of *Federal Discrimination Law* during the reporting period.
See 5.7 EDUCATION AND PROMOTION

The President further found that Mr Okoye suffered the additional indignity of drinking his own urine in an attempt to relieve his excessive thirst during the journey. In addition, the President found the following further breaches of the human rights of Mr Nguyen:

- arbitrary interference with his family life, in breach of Articles 17(1) and 23(1) of the *International Covenant on Civil and Political Rights*, by failing to give adequate consideration to his family ties in Melbourne before transferring him to Baxter; and
- use of excessive force, in breach of Article 10(1), immediately prior to the transfer to Baxter.

The President recommended that all five of the detainees involved in the transfer be paid \$15 000 in compensation, as well as an additional \$5 000 to Mr Okoye and Mr Nguyen in respect of the additional findings noted above. The President further recommended that the Commonwealth provide formal apologies to the detainees, as well as take steps to improve human rights training for relevant personnel. The President also endorsed a detailed series of recommendations contained in a separate independent investigation into the incident, which were aimed primarily at improving policies and procedures relating to the transfer of detainees.

The report is available on-line at www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_39.html

5.3 INTERVENTIONS AND LEAVE GRANTED TO INTERVENE

HREOC has a statutory function of intervening, with the leave of the Court, in proceedings that involve issues of human rights, equal opportunity in employment and age, race, sex, marital status, pregnancy and disability discrimination.

HREOC's intervention functions are contained in:

- sections 11(1)(o) and 31(j) of the Human Rights and Equal Opportunity Commission Act;
- section 20(1)(e) of the Racial Discrimination Act;
- section 48(1)(gb) of the Sex Discrimination Act;
- section 67(1)(l) of the Disability Discrimination Act; and
- section 53(1)(g) of the Age Discrimination Act.

In deciding whether to seek leave to intervene, HREOC considers whether the human rights or discrimination issues are significant and central to the proceedings and whether these issues are being addressed adequately by the parties to the proceedings.

The guidelines that HREOC uses to determine if it will seek leave to intervene in a matter are publicly available on HREOC's website at www.humanrights.gov.au/legal/intervention_info.html

Through its interventions, HREOC seeks to promote human rights principles and encourage the development of Australian law in line with human rights standards. The intervention functions also serve an important educational purpose, by bringing a human rights perspective to the attention of courts and parties to litigation. HREOC seeks to further pursue this educational purpose by placing all of its submissions on its website. These are available at www.humanrights.gov.au/legal/intervention_info.html

In 2007-08, HREOC was involved as intervener in four matters.

5.3.1 Qantas Airways Ltd v Gama

This matter was an appeal to the Full Federal Court by Qantas Airways Ltd ('Qantas') and cross appeal by Mr Gama from a decision of Raphael FM: *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767.

Raphael FM found that Mr Gama had been discriminated against by Qantas on the basis of his race and disability. His Honour did not, however, find in favour of Mr Gama in relation to all of his allegations of discrimination.

The main focus of HREOC's submissions in the appeal was the standard of proof in discrimination proceedings and the 'principle in *Briginshaw*'. HREOC submitted that discrimination cases should be treated similarly to other civil proceedings, rather than starting from a position of discrimination being an 'inherently serious' allegation requiring evidence of a higher probative value, as had been held in some cases. HREOC also addressed an issue raised by Qantas in the appeal that a single racist remark was insufficient to constitute discrimination.

The Full Federal Court dismissed both the appeal and cross appeal (with the exception of one of Raphael FM's findings, which did not impact upon the result). The separate judgment of Branson J (with whom French and Jacobson JJ generally agreed) clarified the application of *Briginshaw*, consistently with HREOC's suggested approach.

Also consistent with HREOC's submissions, the Court accepted that a single racist remark in the workplace could constitute discrimination, even in the absence of additional evidence of adverse effects being felt within the workplace, such as lack of promotions or training. The Court held that, whilst it would depend on the facts of the case, the infliction of a racist insult was sufficient to adversely affect the conditions of employment so as to give rise to an act of discrimination.

5.3.2 Proceedings in the Family Court of Australia concerning medical treatment for a child

The applicants in this matter sought an order from the Family Court that they may lawfully authorise the medical treatment of their child, in respect of the condition of transsexualism, without an order of a court. Such treatment is proposed to include both reversible and irreversible treatment of a hormonal nature.

The proceedings therefore raised issues that include the scope of parental power to consent to such treatment. In the alternative, the parents sought an order that the court authorise such treatment and empower them to provide the authorities and consents that are necessary for the treatment to proceed.

HREOC intervened to make submissions on important issues of human rights, especially in relation to those rights recognised in the *Convention on the Rights of the Child*. HREOC was granted leave to intervene on 7 March 2006 and the matter was heard by a single judge of the Family Court from 5-9 November 2007.

Judgment was reserved at the time of publication.

Note that pursuant to s 121 of the *Family Law Act 1975* (Cth), HREOC is unable to disclose any details that may disclose the identities of the parties to the proceedings.

5.3.3 R v Wei Tang

HREOC was granted leave to intervene in the High Court in *The Queen v Wei Tang* on 14 May 2008.

HREOC sought leave to make submissions on a point of legal principle – the correct interpretation of the definition of slavery under the *Criminal Code Act 1995 (Cth)* in light of international prohibition on all forms of slavery. HREOC's submission did not comment on the facts of Wei Tang's case.

The slavery offences in the Criminal Code were introduced in 1999 and are intended to implement Australia's international treaty obligations to prohibit all forms of slavery.

The definition of slavery in the Criminal Code is based (in large part) on the definition of slavery in the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery.

HREOC made written and oral submissions that the definition of slavery in the Code should be interpreted consistently with international law. HREOC argued international law recognises that the absolute prohibition on slavery has evolved from the historical concept of 'chattel slavery' to encompass various contemporary forms of slavery which are based on the exercise of any or all of the powers attaching to the right of ownership.

HREOC submitted that the indicia of contemporary forms of slavery may include the restriction of freedom of movement and the denial of personal autonomy. Deception, physical or psychological abuse, and false promises may render consent either irrelevant or impossible.

Judgment was reserved at the time of publication.

5.3.4 Bropho v Western Australia

HREOC was granted leave by the Full Federal Court to intervene in this matter on 14 November 2007. The proceedings were an appeal against the decision of Nicholson J in the Federal Court of Australia in *Bropho v State of Western Australia* [2007] FCA 519.

The applicant, on behalf of the members of the Swan Valley Nyungah Community Aboriginal Corporation, claimed that the *Reserves (Reserve 43131) Act 2003 (WA)* ('Reserves Act') and actions taken under that Act by an administrator breached sections 9, 10 and 12(1)(d) of the *Racial Discrimination Act 1975 (Cth)*. The effect of the Reserves Act and the actions of the administrator was to close the Reserve.

At first instance, Nicholson J found that neither the Reserves Act nor the administrator's actions were racially discriminatory. This decision was upheld on appeal. However, the Court corrected certain errors in the approach to sections 9 and 10 of the Racial Discrimination Act that had been identified by the submissions of HREOC.

The Court said HREOC's submissions were 'helpful' and had 'considerable force'. Significantly, the Court agreed with HREOC that the approach of Nicholson J to determining the content of the human right to own and manage property for the purposes of section 10 was too narrow. The Court found human rights to own property should be interpreted in light of international law which recognise the proprietary nature of communal rights in several Latin American Indigenous communities.

Ultimately, the Court held that section 10 did not apply to the Reserves Act because the property rights in question were not absolute. Therefore, it was not inconsistent with section 10 to limit property rights in accordance with the legitimate public interest to protect the safety and welfare of women residing at the Reserve.

5.4 AMICUS CURIAE

Section 46PV of Human Rights and Equal Opportunity Commission Act gives HREOC Commissioners an *amicus curiae* ('friend of the court') function. The role of an *amicus curiae* is to provide special assistance to the court in resolving issues raised by the case and to draw attention to aspects of the case that might otherwise have been overlooked.

Under this function, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, the Human Rights Commissioner, the Race Discrimination Commissioner and the Sex Discrimination Commissioner, may seek the permission of the Federal Court or Federal Magistrates Court, to assist the court as *amicus curiae* in the hearing of unlawful discrimination applications.

Guidelines for the exercise of this function are publicly available on HREOC's website at www.humanrights.gov.au/legal/amicus_info.html

As with HREOC's intervention functions, the Commissioners attempt to enhance the educational role of their *amicus curiae* function by placing all submissions on HREOC's website.

During 2007-08, Commissioners were granted leave to appear as *amicus curiae* in three matters, which are summarised below.

5.4.1 Vijayakumar v Qantas

The applicant, Mr Vijayakumar, requires the use of a number of disability aids which, cumulatively, weigh approximately 20 kilograms. He purchased a flight with Qantas from Sydney to Mumbai (India) return. The conditions of carriage included a term which limited him to carrying one mobility aid free of charge, but any other aids were included as part of his normal baggage limit.

Mr Vijayakumar alleged that, upon his return flight home, Qantas staff in India strictly applied the above terms of his conditions of carriage, by requiring him to pay excess baggage fees for his disability aids. As Mr Vijayakumar could not afford these fees, he was effectively required to abandon most of his personal belongings at the airport.

As a preliminary point, Qantas challenged the jurisdiction of the court to hear the matter on the basis that the alleged discrimination occurred in India and was therefore outside the territorial scope of the *Disability Discrimination Act 1992* (Cth). By contrast, Mr Vijayakumar alleged that the relevant discrimination occurred by virtue of the conditions of his flight, which was purchased in Australia.

The Acting Disability Discrimination Commissioner made written and oral submissions in the interlocutory hearing before Scarlett FM dealing with the jurisdictional challenge. The Commissioner submitted that no jurisdictional issue arose if part of Mr Vijayakumar's case involved alleged discrimination occurring within Australia. In particular, the relevant sections of the Disability Discrimination Act (sections 23 and 24) are breached upon the communication or imposition of discriminatory terms upon which the premises are made available or the service is provided which, in this case, appeared to have occurred in Australia, not India.

At the time of publication, the decision of Scarlett FM had not been handed down.

5.4.2 Darina Maslauskas v Queensland Nursing Council

The applicant alleged that she had been discriminated against by the Queensland Nursing Council ('QNC') on the ground of an imputed disability (a florid psychotic illness and delusional disorder) by suspending her registration as a nurse contrary to section 19 of the Disability Discrimination Act.

On 20 February 2008, the Acting Disability Discrimination Commissioner was granted leave to appear as an *amicus curiae*. The Commissioner had filed written submissions in relation to the following issues raised in a summary dismissal application that had been filed by the respondent:

1. the application of the Disability Discrimination Act to state qualifying bodies that are alleged to have breached section 19 of the Disability Discrimination Act;
2. the factors that a court should take into account when considering an application for summary dismissal; and
3. the proper 'comparator' for the purposes of direct disability discrimination.

On 16 April 2008, prior to the hearing of the summary dismissal application, the applicant decided not to proceed with the matter and, by consent, the application was dismissed with no order as costs.

5.4.3 Maddison v Qualtime Association Inc

This matter involved two related proceedings brought by two members of Qualtime Association Inc, an incorporated, not for profit, community-based association which provides respite and support services to people with disabilities in the northern suburbs of Brisbane. The application concerned the decision by Qualtime to cancel/ revoke the membership of the applicants on the asserted basis of their lack of legal capacity due to them having an intellectual disability. The applicants alleged that this constituted disability discrimination.

The Acting Disability Discrimination Commissioner was granted leave to appear in the matter to make submissions as *amicus curiae* on the correct interpretation and application of the Disability Discrimination Act, particularly section 27 and the relationship between sections 5 and 6. The Commissioner also proposed to address the broader issues arising in the case relating to the relationship between disability discrimination and legal capacity, as well as the relationship between the Disability Discrimination Act and the *Guardianship and Administration Act 2000* (Qld).

The matter settled on confidential terms shortly prior to hearing.

5.5 REVIEW OF ADMINISTRATIVE DECISIONS MADE BY HREOC

People affected by administrative decisions made by HREOC may be entitled to seek a review of those decisions before a court or tribunal. HREOC staff are also sometimes party to such proceedings.

5.5.1 Judicial review

Judicial review of HREOC decisions generally involves an application to the Federal Court or the Federal Magistrates Court pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

In accordance with established legal principle, HREOC (as decision maker) usually does not play an active role in those proceedings. Instead, HREOC agrees to be bound by the decision of Court and leaves the substantive parties (usually the complainant and respondent to a complaint that was before HREOC) to argue the matter in Court.

HREOC was a respondent to 10 applications brought under the *Administrative Decisions (Judicial Review) Act* in 2007-08. All applications were unsuccessful.

5.5.2 Merits review

Some decisions of HREOC or HREOC staff (acting under instruments of delegation) are subject to merits review by the Administrative Appeals Tribunal. These include decisions made under the *Freedom of Information Act 1982* (Cth), and decisions on applications for temporary exemptions under section 44 of the *Sex Discrimination Act*, section 55 of the *Disability Discrimination Act* and section 44 of the *Age Discrimination Act*.

There were no new applications for merits review of HREOC decisions during the reporting period.

5.6 INTERNATIONAL ACTIVITIES

5.6.1 China-Australia Human Rights Technical Cooperation Program: Women's Law Workshop

From 8-11 April 2008, a senior lawyer participated in a Women's Law Workshop held in Hefei, Anhui Province in China. The workshop was organised by the All China Women's Federation and the International Projects Unit in HREOC as part of the *China-Australia Human Rights Technical Cooperation Program*. The workshop was attended by Chinese participants from a range of women's federations, government agencies and academic institutions with responsibility for implementing the Law of the People's Republic of China on the Protection of Rights and Interests of Women.

Over the course of four days, presentations were conducted by a range of Chinese and Australian experts in the protection of women's rights. Participants also engaged in group discussions in women's rights and gender awareness. The HREOC representative presented a paper on the *Sex Discrimination Act 1984* (Cth), the process for dealing with complaints made under that Act and the work of the Sex Discrimination Commissioner.

5.7 EDUCATION AND PROMOTION

The Legal Section plays a significant role in human rights legal education and the promotion of human rights principles. This is done in a number of ways, including through publishing regular journal articles, presenting seminar papers and speaking as guest lecturers to university students on discrimination and human rights law issues.

Two of the Legal Section's significant ongoing human rights education projects are listed below:

5.7.1 Federal Discrimination Law

On 26 June 2008, HREOC launched the 2008 edition of its publication *Federal Discrimination Law*, including the on-line version, *FDL On-line*. The publication was launched by the Hon. Justice Susan Crennan at a function in HREOC's offices in Sydney.

Federal Discrimination Law provides a comprehensive overview of the case law that has been decided in the field of federal unlawful discrimination law. In addition to detailed analysis of discrimination law jurisprudence, the publication also covers issues of practical concern for litigants and practitioners, with chapters on procedural issues, damages and remedies, and costs.

For details, see www.humanrights.gov.au/legal/FDL

5.7.2 Human Rights Law Bulletin and Seminars

The Legal Section continues to publish its *Human Rights Law Bulletin*, providing an update on domestic and international human rights law. The *Human Rights Law Bulletin* is published on HREOC's website and distributed through the Legal Section's e-mail list (see www.humanrights.gov.au/legal/mailing.html to subscribe).

The Legal Section also organises Human Rights Law seminars on topics of current interest in domestic or international human rights law. The seminars and speakers for 2007-08 were as follows:



.....
HREOC President, The Hon. John von Doussa QC and Hon. Justice Susan Crennan browsing *Federal Discrimination Law* at the launch on 26 June 2008



.....

The federal Attorney-General, the Hon. Robert McClelland MP, was one of two speakers at the Human Rights Law seminar on 23 May 2008 about Australia's international human rights engagement

17 September 2007: The Northern Territory Emergency Response Legislation: a Human Rights Analysis

This seminar focused on the Northern Territory Emergency Response. The panel consisted of two speakers; Ms Olga Havnen from the Combined Aboriginal Organisations of the Northern Territory and Dr Sarah Pritchard, a NSW Barrister. The session was chaired by Social Justice Commissioner Tom Calma.

7 April 2008: Homelessness and Human Rights

This seminar examined a human rights approach to homelessness. The panel consisted of three speakers: Cassandra Goldie, Director of the Sex and Age Discrimination Unit at HREOC, Robin Banks, Executive Director of the Public Interest Advocacy Centre and Sue Cripps, Executive Director of Homelessness NSW. The session was chaired by the Human Rights Commissioner, Graeme Innes.

23 May 2008: Australia's International Human Rights Engagement

This seminar explored the possibilities for Australia's engagement with international human rights mechanisms. It featured speeches by the federal Attorney-General, Robert McClelland and Professor Gillian Triggs, Dean of the University of Sydney Law School. The session was chaired by HREOC President John von Doussa QC.