

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 2007-08 are listed in this chapter. 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.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 Legal and Constitutional Affairs Committee on the Australian Citizenship Amendment (Citizenship Testing Bill) 2007

HREOC has made three submissions at various stages during the Australian Government's introduction and implementation of a formal test for applying for Australian citizenship. Throughout these submissions, HREOC has argued that testing for citizenship should not be introduced because of the discriminatory impact it is likely to have, especially on people from non-English speaking backgrounds and with low literacy levels.

On 6 July 2007, HREOC made a submission to the Legal and Constitutional Affairs Committee in its Inquiry into the Australian Citizenship Amendment (Citizenship Testing) Bill 2007 (the Bill). The Bill introduced the citizenship test as an amendment to the *Australian Citizenship Act 2007* (Cth).

In addition to its threshold argument that the test was likely to have a discriminatory impact on many applicants, HREOC argued that the Bill gave too much discretion to the Minister for Immigration and Citizenship in determination of the nature and form of the citizenship test. In addition, the amendments provided insufficient alternatives for applicants who, because of their particular circumstances, were disadvantaged by the test.

The citizenship test was introduced in October 2007. The new Australian Government issued a report on the operation of the test in the first six months after its implementation, entitled *Australian Citizenship Test: Snapshot Report, April 2008*. It also established the Australian Citizenship Test Review Committee. The report showed that applicants from Non-English Speaking Background (NESB) and applicants with low literacy levels are disadvantaged by the test in its current form.

HREOC's submission to the Review Committee, dated 5 June 2008, recommended that the content and the format of the test should be modified to diminish its discriminatory impact.

A copy of HREOC's submissions on the citizenship test are available at www.humanrights.gov.au/legal/submissions/indexsubject.html

3.1.2 Senate Legal and Constitutional Affairs Committee on the Northern Territory National Emergency Response Legislation

On 10 August 2007, HREOC made written and oral submissions to the Senate Legal and Constitutional Affairs Committee in its inquiry into legislation implementing the Northern Territory 'National Emergency Response' (the NTNER laws).

HREOC strongly supported the aims of the laws, namely to improve the well being of certain communities in the Northern Territory and to protect children. However, HREOC stressed that the laws and action taken under the laws must be consistent with the fundamental right to racial equality. HREOC opposed the removal of the provisions of the NTNER laws that are discriminatory. It also opposed the NTNER laws being exempted from the Racial Discrimination Act.

HREOC noted that the NTNER laws have a number of significant actual and potential negative impacts upon the rights of Indigenous people which are discriminatory. HREOC also identified a number of unintended negative consequences of the NTNER measures that adversely impact upon the rights of Indigenous people.

HREOC argued that the absence of effective consultation with the intended beneficiaries of the NTNER laws meant that they could not be justified as 'special measures'. HREOC also noted that the success of the laws and their implementation depended upon effective consultation.

HREOC therefore recommended ongoing monitoring and an independent and public parliamentary review after 12 months to seek to ensure that the goals of the proposed legislation are achieved in a manner that is consistent with human rights. HREOC stressed that monitoring must actively involve the Indigenous peoples in relevant communities and be able to measure the progressive realisation of the economic and social rights of Indigenous people.

The submission is available at www.humanrights.gov.au/legal/submissions/2007/NTNER_Measures20070810.html

3.1.3 The United Nations Committee Against Torture

HREOC made submissions to the United Nations Committee Against Torture in February 2007 and March 2008.

These submissions were made to help the Committee assess Australia's compliance with its obligations under the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT).

HREOC recommended that Australia:

- ratify the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (OPCAT);
- introduce a system of complementary protection for asylum seekers;
- introduce an offence of torture with extraterritorial jurisdiction; and
- end the practice of offshore processing and close offshore processing centres.

Many of HREOC's recommendations were reflected in the Committee concluding observation on Australia's compliance with the CAT.

The Australian Government has indicated it intends to ratify OPCAT and is considering introducing an offence against torture. The practice of offshore processing has ended and HREOC is hopeful that its recommendations to introduce a system of complementary protection for asylum seekers that require protection under CAT will be acted upon by government.

The submissions are available on our website at www.humanrights.gov.au/legal/submissions/united_nations/index.html.

3.1.4 The Senate Legal and Constitutional Affairs Committee Inquiry into the Stolen Generation Compensation Bill 2008

In April 2008, HREOC made a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Stolen Generation Compensation Bill 2008 (Cth).

The submission:

- commended the Bill, which proposed to introduce a uniform national scheme to compensate members of the stolen generations and their families;
- noted the joint responsibility of state, territory and Commonwealth Governments for the removal of Aboriginal and Torres Strait Islander children from their families and communities;
- recommended that the Commonwealth, through the Council of Australian Governments (COAG), engage with state and territory governments to develop a nationally consistent approach with joint funding mechanisms in the provision of financial redress for the stolen generations; and

- recommended the additional allocation of funding to healing centres as a collective approach to redress for stolen generations members and their families and communities.

A copy of the Commission's submission is available at www.humanrights.gov.au/legal/submissions/2008/080409_compensation.html

The Senate Legal and Constitutional Affairs Committee tabled its report in the Senate on 16 June 2008.

3.1.5 The Clarke Inquiry into the case of Dr Haneef

In May 2008, HREOC made a submission to the Clarke Inquiry into the case of Dr Mohamed Haneef.

The Clarke Inquiry was established to inquire into the circumstances surrounding the prosecution of Dr Haneef in July 2007, the cancellation of his Australian visa and the issuing of a criminal justice stay certificate.

HREOC raised the following concerns in its submission to the Clarke Inquiry:

- That pre-charge detention under Part IC, Division 2 of the *Crimes Act 1914* (Cth) permits violations of:
 - the prohibition on arbitrary detention (article 9(1), *International Covenant on Civil and Political Rights* (ICCPR))
 - the right of an individual to be informed, at the time of arrest, of the reasons for his or her arrest and be promptly informed of any charges against him or her (article 9(2), ICCPR); and
 - the right of any person arrested or detained to be brought promptly before a judge or other officer authorised to exercise judicial power to rule on the lawfulness of that detention (article 9(3), ICCPR).
- That section 102.7 of the Criminal Code, which outlines the offence of providing support to a terrorist organisation, is unduly broad, particularly in respect of the lack of a materiality threshold for the provision of 'support' or 'resources' to a terrorist organisation.
- That s 501(3) of the *Migration Act 1958* (Cth) grants the Minister for Immigration and Citizenship an overly broad power to cancel a visa on the ground of character, and a decision by the Minister to cancel a visa on the basis of s 501(3) is subject to only limited grounds of review.
- That the Clarke Inquiry should recommend the establishment of an Independent Reviewer for Australia's terrorism law regime. In the Commission's view, an Independent Reviewer should:
 - have the power to obtain, from any agency or person, information that he or she considers is relevant to the review, including intelligence agencies; and
 - be required to consider the human rights impact of counter terrorism laws.

A copy of the submission is available at www.humanrights.gov.au/legal/submissions/2008/200805_haneef.html

The Clarke Inquiry is due to issue its report on 14 November 2008.

3.1.6 Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave

In June 2008 HREOC made a submission to the Productivity Commission's *Inquiry into Paid Maternity Leave, Paternity Leave and Parental Leave*.

The submission outlined the key national objectives that a national scheme of paid leave for parents should meet, including: ensuring the health and well being of mothers, babies and fathers; addressing women's workplace disadvantage as a result of their maternal role; and promoting gender equality by fostering shared responsibility between men and women for the care of children.

HREOC proposed a two-staged approach to progressively realise a comprehensive national scheme of paid leave for parents. Stage One would provide 14 weeks of federally-funded paid maternity leave, and two weeks of supporting parent leave, to be implemented immediately. Following an independent review two years after implementation, the Commission recommended that Stage Two introduce an additional parental leave component of 38 weeks, of which four weeks are reserved for the supporting parent on a 'use it or lose it' basis.

HREOC also recommended that the Productivity Commission model the economic impact of both stages in its draft report, due September 2008.

A copy of the submission is available at www.humanrights.gov.au/legal/submissions/2008/20080602_productivity.html

3.1.7 Other submissions

During 2007-08, submissions were also made to:

- the NSW Attorney-General's Department seeking responses to its discussion paper on *The Law of Consent and Sexual Assault* and an Exposure Draft of the Crimes Amendment (Consent—Sexual Assault Offences) Bill 2007;
- the United Nations Committee against Torture on a draft general comment on article 2 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;
- the United Nations Committee Against Torture on the Committee's review of Australia's compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Department of Human Services on its exposure drafts of the Human Services (Enhanced Service Delivery) Bill 2007 and the Human Services (Enhanced Services Delivery) (Consequential Provisions) Bill 2007;
- the Consultation Committee for a proposed WA Human Rights Act on the *Human Rights for WA* Discussion Paper and Draft Human Rights Bill 2007;
- the Australian Law Reform Commission on its discussion paper entitled *Review of Australian Privacy Law*;
- the Australian Law Reform Commission's *Inquiry into Client Legal Privilege and Federal Investigatory Bodies*;
- the 2020 Summit on its *Inquiry into Future Directions for the Australian Economy – Education, Skills, Training, Innovation and Productivity*;
- the Attorney-General's Department on its *Homeland and Border Security Review*;

- the Legislative Instruments Act Review Committee on its review of the *Legislative Instruments Act 2003* (Cth);
- the Joint Standing Committee on Electoral Matters *Inquiry into the 2007 Federal Election*;
- the Joint Standing Committee on Migration *Inquiry into Immigration Detention*;
- Australian Government Department of Education, Employment and Workplace Relations on discussion paper, *National Employment Standards Exposure Draft (2008)*;
- the Senate Standing Committee on Environment, Communications and the Arts on the *Inquiry into the Sexualisation of Children in the Contemporary Media Environment*;
- the NSW Legislative Council's Standing Committee on Law and Justice on the *Inquiry into the Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*.