

# Chapter 3:

## Monitoring Human Rights

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

- examination and reporting on issues of race, age, sex and disability discrimination and human rights
- the assessment of legislative and policy proposals, resulting in submissions to governments, law reform bodies and parliamentary committees.

This chapter highlights the Commission'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 legislation and proposed legislation.

The Commission's submissions play an important role in fostering public debate and an awareness of human rights principles. The Commission 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.

A range of submissions made by the Commission during 2008-09 are listed in this chapter.

For further information about the Commission's submissions, refer to [www.humanrights.gov.au/legal/submissions.html](http://www.humanrights.gov.au/legal/submissions.html).

For further information about the process whereby federal legislation is made, refer to the Parliament of Australia website at: [www.apf.gov.au](http://www.apf.gov.au).

### 3.1 Submissions made by the Commission as part of its monitoring role in relation to human rights standards

#### 3.1.1 Native Title Amendment Bill 2009

During the first half of 2009, the Commission made three submissions to the federal Attorney-General about proposals to reform the native title system. These submissions were based on recommendations by the Aboriginal and Torres Strait Islander Social Justice Commissioner in Native Title Reports over a number of years.

The most significant of these submissions was to the Senate Legal and Constitutional Affairs Committee's inquiry into the Native Title Amendment Bill 2009. This Bill was introduced by the Attorney-General in March 2009 and contains changes designed to facilitate negotiated settlements in native title claims, rather than litigation.

The Commission supported the Government's objectives of ensuring that:

- parties to native title claims engage in effective negotiation and agreement-making
- native title contributes to closing the gap between Indigenous and non-Indigenous Australians through achieving agreements with broad benefits to Indigenous peoples.

The Commission made a number of recommendations for improvements to the Bill in relation to mediation, powers of the court and rules of evidence. The Commission also recommended that the Bill be amended to deal with additional matters including:

- shifting the burden of proof to the respondents for some elements of native title claims
- limiting extinguishment to the current tenure extinguishment and repealing the provisions that validate past extinguishment where those extinguishing acts no longer continue to have effect
- separating the right to negotiate from the progress of the native title claim
- reinstating the right to negotiate for all compulsory acquisitions of native title.

The Commission believes these further reforms are necessary if the native title system is to operate in a way that realises the human rights of Aboriginal peoples and Torres Strait Islanders.

### **3.1.2 Review of the *Sex Discrimination Act 1984***

The Commission made a substantial submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality.

The Commission made a number of recommendations for amendments to the *Sex Discrimination Act* to address problems which have emerged in the 25 years since its adoption, enhance its ability to progress substantive gender equality and promote systemic reform and fulfill Australia's international human rights obligations.

The Commission recommended a two-staged reform process. The first stage would see a number of amendments to strengthen the *Sex Discrimination Act* and improve associated institutional arrangements, for example:

- removing the comparator element of direct discrimination
- extending protection from discrimination on the grounds of family and caring responsibilities
- including breastfeeding as a separate protected ground of discrimination
- expanding the definition of 'marital status' to include those in same-sex couples
- ensuring equal protection for both women and men.

The second stage of reform would be aimed at achieving longer term change in relation to our national culture of equality and the roles of women and men in modern Australian life. This second stage of reform would take place over three years and involve holding a national inquiry about whether Australia should have

a comprehensive Equality Act; or alternatively, a reference to the Australian Law Reform Commission, or another suitable body, to consider adoption of a human rights based framework for the Sex Discrimination Act. The Commission also called for a review of the permanent exemptions under the Act, with a three-year sunset clause on the permanent exemptions that are currently in place.

### 3.1.3 Fair Work Bill 2009

In January 2009, the Commission made a submission on the Fair Work Bill 2009. The Commission welcomed many of the changes to the law proposed by the Fair Work Bill including the restoration of unfair dismissal rights to many employees, the facilitated bargaining framework for the low paid, and the extension of parental leave entitlements to same sex couples.

However, the Commission recommended that the Bill be amended to implement fully Australia's international human rights obligations. The recommended amendments included:

- broadening the right to request flexible working arrangements
- extending eligibility for unpaid parental leave to employees who have had a number of employers and to those in different types of employment, including part-time and casual employment
- reducing the minimum employment period to access unfair dismissal protections to three months for all employees
- providing some measure of protection for employees of small businesses from unfair dismissal.

### 3.1.4 Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

In January 2009, the Commission made a submission to the Senate Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008. This Bill contained a number of proposed changes to the Disability Discrimination Act and the Human Rights and Equal Opportunity Act designed to improve the effectiveness of both laws in promoting and protecting human rights.

The Commission strongly supported many of the proposed changes, including statutory recognition of the United Nations *Convention on the Rights of Persons with Disabilities* in the Disability Discrimination Act, the removal of the dominant reason test in the Age Discrimination Act, the change of the Commission's legal name to the Australian Human Rights Commission, and technical changes to provisions concerning the Commission's complaint handling functions.

However, the Commission had a number of concerns about proposed changes to the Disability Discrimination Act and made recommendations that:

- the explicit requirement for a 'comparator' in the definition of direct discrimination be removed
- the definition of indirect discrimination be amended to focus on disadvantage caused by a requirement or condition to persons with the aggrieved person's disability (similar to the Sex Discrimination Act)
- the provisions relating to the duty to provide reasonable adjustments be simplified.

### 3.1.5 Other submissions

During 2008-09, submissions were also made to the:

- Department of Prime Minister and Cabinet on the Information Commissioner Bill 2009 and the Freedom of Information Amendment (Reform) Bill 2009
- Committee on Economic, Social and Cultural Rights about its review of Australia's report under the *International Covenant on Economic, Social and Cultural Rights*
- Australia New Zealand Policing Advisory Agency on the guidelines for police issuing statements to the media containing descriptions of ethnicity of suspected criminals
- Review of Australia's Future Tax System on the consultation paper on the retirement income system
- Expert Mechanism on the Rights of Indigenous Peoples in its inquiry into the lessons learned and challenges to achieve the implementation of the right of Indigenous peoples to education
- Standing Committee on Legal and Constitutional Affairs inquiry into draft Disability (Access to Premises) Standards
- Standing Committee of Attorneys General on the Draft Model Spent Convictions Bill and consultation paper on the Model Bill
- Department of Families, Housing, Community Services and Indigenous Affairs on the National Disability Strategy
- Queensland Minister for Natural Resources and Water on the proposed Archer Basin Wild River Declaration, the Lockhart Basin Wild River Declaration and the Stewart Basin Wild River Declaration
- Senate Rural and Regional Affairs and Transport Standing Committee Inquiry into the Water Amendment Bill 2008
- Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*
- Department of the Environment, Water, Heritage and the Arts on Australia's potential ratification of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*
- Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee in its inquiry into human rights mechanisms and the Asia-Pacific
- 457 Visa Integrity Review on the *Issues Paper on 457 Visas: Integrity and Exploitation*
- Office of Indigenous Policy, Northern Territory Department of Chief Minister in its inquiry into outstations policy
- House of Representatives Standing Committee on Employment and Workplace Relations in its inquiry into pay equity and associated issues related to increasing female participation in the workforce

- Standing Committee on Legal and Constitutional Affairs inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008
- Community Affairs Committee on the Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Bill 2008
- Standing Committee on Legal and Constitutional Affairs on the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]
- United Nations Human Rights Committee on Australia's implementation of the *International Covenant on Civil and Political Rights*
- NSW Legislative Council's Standing Committee on Social Issues on its inquiry into overcoming Indigenous disadvantage
- Joint Standing Committee on Migration's inquiry into immigration detention in Australia
- Northern Territory Emergency Response Review Board
- Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) on its Discussion Paper: *Australia's Children – Safe and Well, A National Framework for Protecting Australian's Children*
- Legal and Constitutional Affairs Committee on its inquiries into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008; Evidence Amendment Bill 2008; and Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008
- Federal Attorney-General's Department on whether Australia should become a party to the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*
- Australian Government's Green Paper on Homelessness
- UN High Commissioner for Human Rights on combating of defamation of religions
- Standing Committee on Family, Community, Housing and Youth in its inquiry into better support for carers.