

# **Changes to the Human Rights Jurisdiction**

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# CHANGES TO THE FEDERAL HUMAN RIGHTS JURISDICTION – NEW PROCESSES AND ROLES FOR HREOC <sup>1</sup>

## 1. Introduction

The *Human Rights Legislation Amendment Act No. 1 1999* (Cth) (“the Amendment Act”) was passed on 23 September 1999 and the provisions of it that are relevant to this presentation came into effect on 13 April 2000.

This presentation describes the background to the legislation, the main provisions of the Amendment Act in relation to complaint handling and hearings, and concludes with a short discussion of some of the important issues which may arise as a consequence of the changes.

## 2. Background

From 1992 the three discrimination statutes administered by HREOC (the *Racial Discrimination Act 1975* (Cth) (“the RDA”), the *Sex Discrimination Act 1984* (Cth) (“the SDA”) and the *Disability Discrimination Act 1992* (Cth) (“the DDA”), collectively referred to as the “discrimination Acts”) all contained a particular enforcement regime in relation to determinations made by HREOC following a public inquiry into complaints of discrimination.<sup>2</sup> This regime allowed a determination to be lodged in the Federal Court registry and obliged the Registrar to register it. If a respondent did not seek review within 28 days, the determination took effect as if it were an order of the Federal Court and could be enforced against the respondent.

In 1995 the High Court handed down its decision in *Brandy v HREOC and Ors* (1995) 183 CLR 245. Mr Brandy was a respondent in a matter before HREOC and sought a declaration that the enforcement provisions for Commission decisions were unconstitutional as they purported to vest the judicial power of the Commonwealth in HREOC.

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This paper is the basis of a presentation on 7 June 2000 of the seminar “*Changes to the Human Rights Jurisdiction*” a joint initiative of HREOC and NSW Young Lawyers and has been prepared by Susan Roberts (Director of Legal Services at HREOC), Ronni Redman (Senior Legal Officer at HREOC) and Rocky Clifford (Director of Complaint Handling at HREOC).

Prior to this *de novo* proceedings had to be commenced in the Federal Court to enforce decisions of the Commission. A Senate inquiry in November 1992 recommended that legislation be introduced to enable the registration of determinations with the Federal Court which would be enforceable subject to objection. The *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth) established the new procedures for enforcement.

The High Court agreed that the enforcement provisions were unconstitutional and made the declaration sought. As a consequence, the Government introduced the *Human Rights Legislation Amendment Act 1995* (Cth) which repealed the registration and enforcement provisions in the RDA, the SDA and the DDA and essentially reverted to the pre-1992 position. Thus, if a complainant wished to enforce a determination of HREOC, he or she would have to apply to the Federal Court for a fresh hearing of the complaint. Only if the Federal Court hearing the matter *de novo* found in favour of the complainant could this order be enforced against the respondent.

The extent to which the unenforceability of HREOC decisions has been problematic in practice is not easy to determine. It is difficult to track actual compliance rates but anecdotal evidence suggests that government and big business compliance rates are in fact relatively high.<sup>3</sup> That is, compliance is seen as a moral obligation if not a strictly legal one. In addition, only a very small percentage of complaints ever make it to the stage of hearing and determination.<sup>4</sup>

Nevertheless, the situation after *Brandy* was clearly undesirable. Complainants could proceed through the entire HREOC process and be left with a decision that could not be enforced. The ultimate unenforceability of determinations may well have had an effect on the willingness of complainants to lodge complaints with HREOC as it is obviously problematic for complainants to have no certainty about compliance. There may also have been ramifications for the conciliation process where failing to reach a resolution leads to a process that has no ultimately binding consequences.

In addition, in 1993 a review was carried out of HREOC's functions and management. As well as recommendations concerning the standardisation of procedures within HREOC and the role of Commissioners, the review recommended that unconciliated discrimination complaints be referred to the Federal Court. It was envisaged that a Human Rights Division would be established within the Court.<sup>5</sup>

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Although compliance with HREOC decisions does not necessarily connote agreement as evidenced by the increasing number of applications under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("ADJR Act") of HREOC decisions by Commonwealth agencies.

In 1998-1999 only 12% of complaints made to HREOC's central office were referred for hearing. The figure was 7% in 1997-1998, 9% in 1996-1997 and 10% in 1995-1996. Of the hearing matters finalised in 1998-1999, only 33% proceeded to hearing and formal decision. Overall, a significant proportion of complaints are finalised by conciliation: in 1998-1999, 27% of all complaints were finalised in this way with 20% of RDA matters, 41% of SDA matters and 26% of DDA matters being successfully conciliated. (All figures are from HREOC Annual Report, 1998-1999.)

### 3. Overview of the changes to the current scheme

Essentially, the effect of the Amendment Act has been to:

- vest the President with responsibility for managing the administrative affairs of HREOC;
- vest the President with responsibility for complaint handling under the human rights and discrimination legislation;

repeal complaint handling provisions from the discrimination Acts and place a uniform scheme in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (“HREOCA”);

- remove HREOC’s hearing function and provide complainants with access to the Federal Court or the Federal Magistrates Court;

remove the right for internal review by the President over matters terminated by reason of, for example, their being out of time or being lacking in substance, and provide complainants with access to the Federal Court or the Federal Magistrates Court;

- provide the Commissioners with an *amicus curiae* function in relation to proceedings in the Federal Court or the Federal Magistrates Court.

This presentation will consider two groups of changes in more detail:

- the changes to the *investigation and conciliation function* of HREOC (Division 1 of Part IIB); and
- the changes to the *hearing function* of HREOC (Division 2 of Part IIB) and the *roles* HREOC will assume in relation to hearings in human rights matters before the Federal Court or the Federal Magistrates Court.

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The history of this review is set out in Senate Legal and Constitutional Committee, Report on Human Rights Legislation Amendment Bill 1997, June 1997 at pp.6-7.

## 3.1 Changes to complaint handling

### 3.1.1 Centralisation of complaint handling in the President

Each of the discrimination Acts included a part that defined a complaint, outlined the inquiry, conciliation and decline processes and the manner in which HREOC would undertake public hearings. These provisions have been repealed and replaced with a new uniform scheme in HREOCA which deals with the definition of a complaint, the inquiry, conciliation and termination processes only. As the new uniform scheme has been inserted in HREOCA, all references below to legislative provisions are to HREOCA unless otherwise indicated. It is important to note that the definitions, grounds of complaint and areas of complaint have not changed and remain in the respective discrimination Acts.

The new complaint handling provisions are contained in Division 1 of new Part IIB which provides that if a complaint is made to HREOC under s.46P, HREOC must refer the complaint to the President (s.46PD) and the President must inquire into and attempt to conciliate a complaint referred pursuant to s.46PD (s.46PF). This means that the President will assume responsibility for complaint handling under the discrimination Acts and that these procedures are now uniform for all RDA, SDA and DDA matters.

The ability of the President to delegate these powers is limited by an amendment to s.19 of HREOCA. The amendment provides that the President cannot delegate complaint handling powers under the SDA, RDA or DDA to another member of HREOC (see s.55 of the Act).

In relation to HREOCA complaints, s.8(6) has been amended to indicate that the President shall undertake the complaint handling functions under that Act. Unlike the alleged unlawful discrimination complaints, however, the President may, but is not required to, delegate the HREOCA complaint handling powers to the Human Rights Commissioner (“HRC”). Note, however, that the *Human Rights Legislation Amendment Bill (No.2)* (“HRLAB No 2”) currently contains an amendment that would remove the delegation power to the HRC and create a uniform complaint handling regime for all Acts (draft item 28).<sup>6</sup>

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HRLAB 2 passed the House of Representatives on 13 October 1999. It reorganises HREOC, appoints Deputy Presidents rather than Commissioners and changes the name of HREOC amongst other things.

### 3.1.2 The complaint process

The Amendment Act provides (s.46P(2)) that a complaint may be lodged by:

a person who has been personally aggrieved by the alleged unlawful conduct on their own behalf or on their own behalf and on behalf of other aggrieved persons;

- two or more aggrieved persons on their own behalf or on behalf of themselves and other aggrieved persons;
- a person or a trade union on behalf of one or more aggrieved persons.

As was the case with complaints under the discrimination Acts, HREOC cannot exercise its function in relation to complaints under the Amendment Act unless the complaint is in writing (s.46P(1)). While HREOC's standard form for lodging complaints does not have to be used, the written complaint should contain the following information:

- the name, address and contact details of the complainant and, where relevant, their representative;
- identify and include contact details for the person, persons and/or organisation that is being complained against and their relationship to the complainant;
- contain a brief explanation of why the complaint is being made;
- describe the alleged unlawful conduct, where it happened and who was involved;
- explain how the situation has affected the complainant;
- include a list of any persons (and their contact details) who could assist in explaining what has occurred;

attach any letters, memos or documents that may be relevant (or at least note their existence);

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But note that only an "affected person" can commence proceedings in the Federal Court (s.46PO(1)).

if the complaint is being made on behalf of another person, include the name of the other person and the relationship that exists with them;

include an indication of what would be a fair settlement of the complaint; and

indicate if a complaint has been made to another federal or state agency.

Furthermore the Amendment Act provides the following changes to HREOC's complaint handling procedures:

HREOC must take reasonable steps to assist a person to formulate a complaint and reduce it to writing where it appears that a person requires assistance (s.46P(4)). Previously this was only an obligation under the DDA (s.69(2) of the DDA);

- the complainant has the express right to amend the complaint at any time with leave of the President (s.46PA(1));

### 3.1.3 Termination of complaints

As noted above, the discrimination Acts have been amended to limit HREOC's complaint handling role to the investigation and conciliation processes. Under the new scheme, if a matter is considered to be (for example) lacking in substance or out of time, it will be terminated (s.46PH) and the complainant may commence proceedings in the Federal Court or the Federal Magistrates Court. These are matters which under the old scheme would have been the subject of a decision by the Commissioner to decline to conduct further inquiries and would have been subject to internal review by the President. The Amendment Act removes the right of internal Presidential review that existed under the RDA, SDA and DDA and permits a complainant to commence proceedings in the Federal Court or the Federal Magistrates Court.

The grounds for termination of complaints reflect those that were previously "decline" grounds under the DDA (s.46PH). Additional grounds for termination is that the matter is non-conciliable or of such public importance that it should be considered by the Federal Court or the Federal Magistrates Court (s.46PH(1)(h) and (i)). The full list of grounds are:

the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;

- the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;

the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;

- in a case where some other remedy has been sought in relation to the subject matter of the complaint—the President is satisfied that the subject matter of the complaint has been adequately dealt with;
- the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;
- in a case where the subject matter of the complaint has already been dealt with by HREOC or by another statutory authority—the President is satisfied that the subject matter of the complaint has been adequately dealt with;
- the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;
- the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Magistrates Court;
- the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

Upon termination, complainants will be issued with a Notice of Termination (s.46PH(2)), a copy of their original complaint and a letter of termination explaining the reasons for termination in more detail. On issue of these documents the complainants have 28 days to lodge an application with the Federal Court or the Federal Magistrates Court for a hearing (s.46PO). Complainants must have a Notice of Termination issued by HREOC before they



can commence proceedings with the Court to hear their allegations of unlawful discrimination.

Section 46PH(4) of the Amendment Act allows the President to revoke a termination of a complaint up until an application is made to the Federal Court or the Federal Magistrates Court under s.46PO. The circumstances in which this revocation power can and will be utilised will be clarified as the new scheme develops but it should be noted that the section is not to be seen as permitting the President simply to review a decision to termination because the complainant is dissatisfied with the matter being terminated.

Despite these changes, the regime for complaint handling under the discrimination Acts remains essentially unaltered. It is important to bear this in mind given the high proportion of complaints which are finalised by conciliation.

### **3.2 Proceedings in the Federal Court or Federal Magistrates Court**

As previously stated, the **Notice of Termination** is an essential prerequisite to commencing Federal Court or Federal Magistrates Court proceedings which must be commenced within 28 days of receipt of the notice.

The provisions dealing with proceedings in the Federal Court and the Federal Magistrates Court are set out in HREOCA at sections 46PO – 46PV. These provisions include the making of an application in the Court, representation before the Court, application of the rules of evidence and formality of proceedings, financial assistance, interim injunctions and the *amicus curiae* role for the special purpose Commissioners.

### **3.3 Who does the new process effect?**

The process outlined above effect all complaints lodged with HREOC after 13 April 2000. The transitional provisions of the Amendment Act also provides that the new process affects complaints that were already with HREOC as at 13 April 2000. The effect of the transitional provisions on matters that were already before HREOC can be summarised as follows:

purported complaints which have been lodged but where HREOC has not decided if it is a complaint within the meaning of the SDA, DDA or RDA will be taken to have been lodged under the new scheme and treated as such;

complaints which are currently in the process of inquiry and conciliation will be taken to have been lodged under the amended scheme and will continue in the new scheme at the appropriate stage;

complaints that a Commissioner had declined to inquire or continue to inquire into and the complainant had either 21 days to request a Presidential review of that decision or had requested a Presidential review but the review was not completed by 13 April 2000, were terminated and a termination notice issued in relation to them<sup>8</sup>;

- complaints that had been referred for public inquiry by HREOC but that had not commenced their first day of public inquiry by 13 April 2000, were terminated and a termination notice issued in relation to them;<sup>9</sup> and
- complaints that had been referred for public inquiry and the public inquiry had commenced by 13 April 2000, remain with HREOC and the provisions of the Amendment Act do not apply to them.<sup>10</sup>

There are explicit provisions concerning remitter by the Federal Court in relation to review of decisions to decline (that is, they are taken to have been terminated on the date the order is made by the Federal Court) but not in relation to Commission hearings (this is left to the discretion of the Federal Court).

### **3.3 The role of HREOC in hearings under the new scheme**

HREOC has four main functions under the new scheme for hearings before the Federal Court or the Federal Magistrates Court.

#### **3.3.1 Providing assistance to applicants**

HREOC is given a discretion to help an applicant prepare the forms required for the person to make an application to the Federal Court or Federal Magistrates Court (s.46PT). The extent of the role that HREOC will play in practice in this regard has not yet been determined but it is envisaged that it would not go beyond explaining aspects of the relevant form to the applicant and what particular information is being sought from them. It would be inappropriate for

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Sections 9 and 10 of HREOCA: 68 matters were terminated under this provision.  
Section 12 of HREOCA: 145 matters were terminated under this transitional provision.

HREOC to provide any substantive or legal assistance as to what should be inserted in the form or the affidavit accompanying the form.

### 3.3.2 President's report

The President is given a discretion to provide the Federal Court or the Federal Magistrates Court with a written report in relation to a complaint that has been terminated (s.46PS). She may also provide this report to the applicant, the respondent and any relevant member of HREOC. There is no legislative guidance to the President as to what may or may not be in the report (other than the exclusion of matters relating to conciliation) and the circumstances in which a report should be issued.

The President has established guidelines as to when to provide a report and what format it should take. The President has decided to provide the report where:

- HREOC has been notified that proceedings have been commenced in the Federal Court or the Federal Magistrates Court in relation to the subject matter of the complaint that was terminated; and
- the matter was terminated on the grounds provided for in s.46PH (1)(h) and (i) of HREOCA<sup>11</sup>; and

the parties and/or the judge hearing the proceedings requests that the report be provided.

Given the resource implications of providing a report in circumstances outside those above, the President will consider any request to do so by a judge or the parties on a case by case basis.

The President has also decided that the format of the report shall be a paginated bundle of the relevant documents acquired or created during the investigation of the complaint. This would

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Section 13 of HREOCA: 41 matters fall within this category.

That is the President is satisfied that the subject matter of the complaint involved an issue of public importance that should be considered by the Federal Court or the President is satisfied that there was no reasonable prospect of the matter being settled by conciliation.

consist of the complaint, the response from the respondent and any other material provided by the parties as well as any relevant correspondence sent by HREOC to the parties in the course of the investigation. Attached to the bundle of documents would be a cover sheet as well as an index to the bundle of documents.

### 3.3.3 Commissioners' role as *amicus curiae*

Section 46PV provides that the Aboriginal and Torres Strait Islander Social Justice Commissioner, Disability Discrimination Commissioner, HRC, Race Discrimination Commissioner and Sex Discrimination Commissioner have the function of assisting the Federal Court or Federal Magistrates Court as *amicus curiae*. This may only be exercised by leave of the Court and is restricted to those situations where in the Commissioner's opinion:

the orders sought or are likely to be sought may affect to a significant extent the human rights of persons who are not parties to the proceedings; or

- the proceedings have significant implications for the administration of the relevant Act/s; or

the proceedings involve special circumstances that make it in the public interest for the Commissioner to assist the Court.

HREOC is in the process of drafting further guidelines as to when a Commissioner may seek to be *amicus* in relation to a matter.

### 3.3.4 Interim injunctions

The provisions in each of the discrimination Acts for HREOC or its delegate or the President grant to interim determinations (albeit enforceable only in the Federal Court) have been repealed by the Amendment Act. Section 46PP allows a complainant, a respondent, an "affected person" or HREOC to apply to the Federal Court or the Federal Magistrates Court for an interim injunction at any time after the lodgment of a complaint with HREOC. The Court may grant an interim injunction to maintain:

- the status quo, as it existed immediately before the complaint was lodged; or

the rights of any complainant, respondent or affected person.

As this function will involve HREOC balancing this role with the role of the President as an impartial complaint handler, it is developing guidelines to assist it to determine in what circumstances it may seek an interim injunction from the Court.

#### 4. Conclusion

It is too early to ascertain how the new scheme will actually operate, both in the Federal and the Federal Magistrates Court and within HREOC. No doubt many legal and practical issues will arise.

In HREOC, the changes will undoubtedly have some effect on the choices complainants make with respect to jurisdiction. The nature of these changes, however, is not clear. For example, the changes may mean that more complainants choose to use the state systems (where possible) out of concern regarding the ultimate prospect of Court proceedings or they may mean that more complainants now choose to lodge their complaints with HREOC, as enforceability is now no longer an issue.

It is very difficult to predict these matters as complaint numbers and the numbers of matters referred for hearing have changed over the years for reasons which are not easy to attribute to *Brandy* enforceability problems. In the year to June 1996 – ie after the *Brandy* decision - the total number of complaints referred for hearing rose from 120 to 231. The number rose again in the 1996-1997 year to 256, fell in the 1997-1998 year to 169 and rose in the 1998-1999 year to 182.<sup>12</sup> In relation to the total number of complaints lodged with HREOC, numbers rose in 1996-1997 then fell in 1997-1998 and rose again in 1998-1999.<sup>13</sup>

In practical terms this means we will have to wait and see the extent to which changes at one end of the complaints process affects the whole process. It is important to note, however, that complaint handling processes under the new scheme remain relatively unchanged. Those familiar with HREOC's investigatory and conciliation processes should not encounter any significant changes.

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<sup>12</sup> See HREOC Annual Reports for the relevant years. Complaints lodged in the Sydney Office, HREOC Annual Report, 1998-1999, p.36. The total complaints lodged nationally rose in 1998-1999 by 17%, see HREOC Annual Report, 1998-1999, p.37.