

2 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (2002) ("PJC Report"); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Consideration of the Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2], Suppression of the Financing of Terrorism Bill 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, Border Security Legislation Amendment Bill 2002 (2002), Telecommunications Interception Legislation Amendment Bill 2002 (2002); Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Consideration of the Legislation Referred to the Committee: Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (2002).

3 Senate Legal and Constitutional References Committee, Parliament of Australia, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters (2002).

4 PJC Report, vii.

5 In particular, concessions were made regarding the age of children detainable under the legislation (this was raised from 14 to 16 years), the ability of detainees to access a lawyer of their own choice, and the

length of time a person could be questioned and detained.

6 See s 34C of the Act. Note however that the rules for children who are at least 16 but under 18 are different and require that they must be "suspects" in order to be detained, see s 34NA(4).

7 s 34B.

8 ss 34D(3)(c) and 34HC set the maximum length of the questioning period at 168 continuous hours from the time when the person is first brought before a prescribed authority; s 34HB sets the maximum length of each questioning session at 8 hours, extendable a maximum of two times after the initial 8 hour period. Section 34D(2b)(i) allows for a person to be detained for the questioning period, which is defined under s 34D(3)(a).

9 See s 34TA of the Act. Section 34U(3) limits the legal advisers' ability to advise the subject to "breaks in the questioning"; s 34U(4) prohibits the legal adviser from intervening in questioning of the subject or addressing the prescribed authority before whom a subject is being questioned, except to request clarification of an ambiguous question; s 34U(5) allows the prescribed authority to remove a legal adviser if they consider the legal adviser's conduct to be unduly disrupting the questioning. Further, s 34U(2) states "contact [between lawyer and detainee] must be made in a way that can be monitored by a person exercising authority under the warrant".

10 s 34TA.

11 See s 34VA.

12 s 34U(3).

13 s 34U(5).

14 s 34U(7).

15 s 34J and s 34NB.

16 See s 92 *Australian Security Intelligence Organisation Act 1979* (Cth)

17 Submissions were received from many groups including the Law Institute of Victoria, Law Council of Australia, Australian Lawyers for Human Rights, Amnesty International, Federation of Community Legal Centres, Liberty Victoria, Castan Centre for Human Rights, International Commission of Jurists, Victorian Bar, United Nations Association of Australia, Catholic Coalition for Justice and Development and Peace.

18 The final outcome of the Young Lawyers Section's campaign is that only children 16 years of age and older will be subject to the legislation, which still includes the ability of ASIO officers to strip search such children.

19 "High Court to Prevent Abuse of Terror Laws" *Courier Mail*, 17 June 2003.

The Human Rights & Equal Opportunity Commission:

Proposed changes



By Jennifer Holdstock, Russell Kennedy

The Human Rights and Equal Opportunity Commission ("HREOC") was established in 1986¹. HREOC works to protect human rights in Australia, particularly in the areas of discrimination on the basis of sex, race and disability. There is also a strong focus on the rights of indigenous Australians².

Amongst its initiatives, HREOC has a complaints-handling process and an education program, and holds inquiries into important national issues. It is also able to intervene and apply to become *amicus curiae* in cases affecting fundamental human rights principles³.

In a Bill currently before Federal Parliament, some of these fundamental functions may be put at risk. The Australian Human Rights Commission Legislation Bill 2003 (Cth) proposes the following structural amendments:

- The introduction of a requirement that the Attorney-General must approve the intervention of HREOC in court proceedings that raise important human rights or discrimination issues;
- The removal of special purpose commissioners, to be replaced with general commissioners;
- A limitation on HREOC's inquiry powers, and the removal of the power to recommend the awarding of compensation in discrimination matters;
- A shift in focus from compliance and individual complaint handling functions to an emphasis on education and the promotion of awareness; and
- The removal of the President's ability to delegate inquiry powers to the Human Rights Commissioner.

The proposed requirement that the Attorney-General must give approval for the intervention of HREOC into important cases raises some concerns. The most obvious problem is the potential conflict of interest when the Commonwealth is a party to the proceeding. Since HREOC was established, it has intervened in 35 cases⁴. In more than half those cases, the Commonwealth has been a party to the proceedings⁵. Currently, courts have the discretion to determine whether or not to grant HREOC leave to intervene in a case. The amendment provides an exception where the President of HREOC is a judge with federal jurisdiction, in which case the approval of the Attorney-General is not required⁶, but in all other cases such approval would be needed.

It can also be argued that the Attorney-General's approval would impact upon the independence of HREOC. As a member of the government, the Attorney-General will clearly have party-political views. The approval of the Attorney-General would blur the line between the executive and judicial arms of power and may offend the constitutional principle of separation of powers.

The removal of specialist commissioners, and their replacement with general commissioners, presents both positives and negatives. Clearly general commissioners will provide greater flexibility and access, as Commissioners won't be restricted to their specialities. However, removing areas of speciality may result in less areas of focus for HREOC⁷. Further, the specialist commissioners - the Disability, Race and Sex Discrimination Commissioners and the Aboriginal and Torres Strait Islander Social Justice Commissioner - will lose their expertise and the relationships they have formed with

their constituent groups, and similarly the disadvantaged groups will lose their right to specialist advocacy⁸.

Other concerns raised about the proposed changes include: the impact they may have upon the effectiveness of HREOC by removing the power to recommend compensation in discrimination matters, as well as the shift in HREOC's focus away from its compliance and complaint handling functions towards education and awareness. Further, the Attorney-General would be given power to appoint part-time 'complaints commissioners' to assist with inquiries received by HREOC. This has been criticised as trying to fix something that isn't broken. The current complaint-handling system works effectively and there is no backlog⁹.

The proposed amendments to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) have received a mixed response. Some changes appear to not achieve a great deal, whereas others appear to take away or limit some of the important functions of HREOC. As stated above, the Bill is still before Parliament, so it remains to be seen whether or not the changes will take place. ■

1 *Human Rights and Equal Opportunity Commission Act 1986* (Cth)

2 *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11

3 HREOC Submissions - p 1 at www.hreoc.gov.au/ahrc/summary.html

4 LIV Submissions - p 6 at www.liv.asn.au/news/pro_issues/livsubs/2003/20030523hreoc.pdf

5 HREOC submissions - p 2 at www.hreoc.gov.au/ahrc/summary.html

6 Explanatory Memorandum - p 10 at <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/Linked/16050301.pdf>

7 LIV submissions - p 8 at www.liv.asn.au/news/pro_issues/livsubs/2003/20030523hreoc.pdf

8 HREOC submissions - p 3 at www.hreoc.gov.au/ahrc/summary.html

9 HREOC submissions - pp 3-4 at www.hreoc.gov.au/ahrc/summary.html