The Australian Human Rights Commission—roles, responsibilities and challenges

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[*Professor Croucher spoke to this paper*]

Introduction

I begin my presentation by acknowledging the traditional custodians of this land, and pay my respect to the elders, past, present, and emerging.

Thank you Justice Pearce for your warm introduction.

It is a great honour to be here. Speaking to this group is a rare privilege—a very learned assemblage indeed.

I came into my present role after a long period in the academic world, and then a ten-year 'apprenticeship' in the world of statutory office-holding at the Australian Law Reform Commission. I had many questions about the role—both of the Australian Human Rights Commission and of the role of President. It has been an intriguing voyage of discovery. I have also come to understand that much of what the Commission does is not understood, or not properly understood, and I am making it my mission to open up and expand the understanding of the enormously significant role of the Commission as Australia's national human rights institution (or NHRI in international parlance).

For my focus today, I thought I would speak of the complaints handling jurisdiction of the Commission—well, actually, the three different such jurisdictions that the Commission has under its statutory mandate.[1] I will use this to weave in aspects of the challenges ahead for the Commission and how we will lead a national conversation in the coming year on how to achieve the best human rights protections for Australia.

[1] An article focused on the complaints handling aspects of the Commission has been accepted for publication in the *Australian Law Journal* this year.

As presently constituted, the Commission comprises myself, as President, and the 'magnificent seven'—seven other Commissioners as statutory office holders, in the areas of: Human Rights; Aboriginal and Torres Islander Social Justice; and Children; and the four Discrimination Commissioners in the areas of Race, Sex, Disability and Age. In December, the Government announced that it proposes to add to this list a Freedom of Religion Commissioner.[2]

The Commission's 'mantra' is that human rights concern 'everyone, everywhere, everyday'. Our website explains that our statutory responsibilities include:

- education and public awareness
- discrimination and human rights complaints
- human rights compliance
- policy and legislative development.

We are very busy on *all* these fronts.

Each chapter in the Commission's history (from 1975, 1981 or 1986, depending on how you count it) has had two distinct roles in common: the promotion and the protection of human rights. The promotion aspect is performed principally through education, advocacy and advice—to the Government (briefings of parliamentarians, government departments and agencies, cooperative projects); to Parliament (submissions and evidence to Parliamentary committees; the tabling of reports); and to the broader community (educational resources, community advisory groups, consultations, events and awards). The protection of human rights is focused largely on the world of individuals, expressed through the complaint handling functions of the Commission.[3]

The complaint handling role attracts some attention in the media—but not always for constructive reasons. So I thought I would take the opportunity today to tell you the real story. It is one that is a worthy one—and we've been doing it since 1975.

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[2] The Hon Scott Morrison MP, Prime Minister, 'Government Response to Religious Freedom Review' (Media Release, 13 December 2018) <https://Www.Pm.Gov.Au/Media/Government-Response-Religious-Freedom-Review>.

[3] In addition to handling human rights complaints, the Commission may conduct inquiries on human rights matters more generally on its own motion. This power is relied upon to support the Commission's national inquiries into human rights issues. The provisions have remained the same from the original *HREOC Act* to its present form: *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f), 20(1)(c).

Complaints usually start with just a phone call or email—some form of contact—by, on average, 15,000 people a year, individuals who consider that they have been badly done by in one way or another, and businesses just trying to understand their obligations. They are assisted or referred. About 2,000 people pursue the Commission's formal complaints process—one that is based on conciliation. Only a tiny number of these ever end up in court; and most participants, both those who complain and those who are complained against, are very satisfied with the professionalism of the process and its outcomes.

Part of the lesser known story is that there are three distinct streams of complaints, a fact that reflects the history of the Commission itself. As is the story in most legal histories of the development of legislation, it is not a linear narrative. Contemporary criticism or questioning also needs to be placed in the context of that history. An understanding of the role played by the Commission since its foundation also provides essential background for a consideration of improving human rights protections in Australia—which is the topic that I would like to conclude on this morning.

By way of preliminary observation, I thought I would address a common misunderstanding by noting that the Commissioners today, despite the titles of four of them, have *no* role in relation to complaint handling. They did originally but, since 2000, all the complaints have been managed by way of direct delegation from the office of the President. I will come to this.

Chapter One: 1975

Human rights in the international sense are codified in agreements or treaties between governments, as conventions or covenants, providing an agreed set of human rights standards and establishing mechanisms to monitor the way that a treaty is implemented. By ratifying a treaty, a country voluntarily accepts legal obligations under international law. But then it is up to signatory states to implement treaty commitments into domestic law.

The International Convention on the Elimination of All Forms of Racial Discrimination was one of the first human rights treaties to be adopted by the United Nations, in 1966. Australia ratified the Convention in September 1975 under the Government of the Hon E Gough Whitlam MP; and it was given domestic implementation in the *Racial Discrimination Act* (RDA), which came into

force in October 1975.[4] It made race discrimination unlawful in public life, and made provision for the Office of the Commissioner for Community Relations, whose principal tasks were to conciliate disputes, and to promote the purposes of the Act within Australia.[5] The Hon AJ Grassby was appointed the first Commissioner.

The adoption of an approach based on conciliation has proved to be the hallmark of the Commission's complaint handling since then.[6] It was 'an administrative means of dealing with racial discrimination, rather than leaving the matter to courts'.[7]

Why the emphasis on conciliation?

Anne Twomey said that it was 'aimed at solving the problems which *underlie* racial discrimination, rather than exacerbating them with adversarial proceedings'.[8] Attorney-General Murphy had stressed the importance of resolving complaints by conciliation, as 'a more satisfactory way of tackling individual instances of racial discrimination and the tensions that are associated with individual disputes'.[9]

The emphasis was on the resolution of issues *for individuals*. Court proceedings were available, but they were kept separate from the conciliation process. If a settlement could not be reached through conciliation, a person aggrieved could institute civil proceedings and seek a range of enforceable remedies, including damages.[10] It was only through court proceedings that interpretation of the legislation was set by precedent. For the most part, matters were resolved administratively through conciliation.

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[4] *Racial Discrimination Act 1975* (Cth) s 9(1).
[5] Human Rights Commission, *Annual Report, 1981–82,* vol 1, 7.
[6] *Racial Discrimination Act 1975* (Cth) s 20(a). The provisions of the Act referred to are as in the original form of the Act.
[7] Anne Twomey, 'Trimming the Tribunals: Brandy v Human Rights and Equal Opportunity Commission' (Library Publications CJ820, 30 March 1995) 3.
[8] Anne Twomey, 'Trimming the Tribunals: Brandy v Human Rights and Equal Opportunity Commission' (Library Publications CJ820, 30 March 1995). Emphasis added.
[9] Commonwealth, *Parliamentary Debates*, Senate, 31 October 1974, 2192 (Lionel Murphy, Attorney-General). Senator Murphy was appointed to the High Court in February 1975, so it was Kep Enderby MP as Attorney-General who saw the passage of the Bill to completion. When speaking to the Bill, Enderby used the same words as Murphy: Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 286 (Kep Enderby, Attorney-General).
[10] *Racial Discrimination Act 1975* (Cth) ss 24, 25.

Chapter Two: 1981

Australia's ratification of the International Covenant on Civil and Political Rights (*ICCPR*) on 13 August 1980 provided the catalyst to the establishment of the first iteration of the present Commission, in 1981—as the 'Human Rights Commission'—under the government of the Hon Malcolm Fraser MP.[11] The Prime Minister said the establishment of the Commission represented 'a unique approach to issues of human rights', with the capacity 'to make an innovative contribution to the advancement of rights in Australia'. Its functions and powers, he said, were 'based four square upon the fundamental realities of the acceptance and development of human rights in civilised communities'.[12] Its chair was the Hon Dame Roma Mitchell DBE.

In addition to dealing with complaints under the RDA, which were wrapped in, a new aspect was introduced, as the Commission could now inquire into 'any act or practice that may be inconsistent with or contrary to any human right'.[13] Hence the name of the new Commission as the 'Human Rights Commission'.

What did this mean? The RDA covered *some* aspects of now established 'human rights'. This new limb added a generic description of matters that could be brought to the Commission.

'Act or practice' was defined, principally, as an act or practice by or on behalf of the Commonwealth.[14] 'Human rights' were defined as meaning the rights and freedoms recognised in the *ICCPR*; declared by three listed Declarations—the *Declaration on the Rights of the Child* (1959); the *Declaration on the Rights of*

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[11] *Human Rights Commission Act 1981* (Cth). The first Annual Report of the Commission: 'The process commenced in 1977 when a Bill was introduced which lapsed with the dissolution of Parliament in that year. A further Bill was introduced in 1979, but it became the subject of considerable controversy and conflict between the Senate and the House. It was different from the 1977 Bill principally in that provision was made for processes of conciliation to be undertaken in association with the investigation of complaints. The 1981 Bill, which finally emerged as the *Human Rights Commission Act 1981* (Cth), was in most respects the same as the 1979 Bill. However, three further international instruments with significant implications for important groups in the community were annexed as schedules in addition to the *ICCPR*.' See Human Rights Commission, above n 5, 4.

[12] Human Rights Commission, above n 5, vol 1, 4–5.

[13] *Human Rights Commission Act 1981* (Cth) s 9(1)(b).

[14] *Human Rights Commission Act 1981* (Cth) s 3(1).

Mentally Retarded Persons (1971); and the *Declaration on the Rights of Disabled Persons* (1975)—or 'declared by any relevant international instrument'.[15]

Continuing the central role of conciliation, the Commission was to endeavour to effect a settlement of the matters that gave rise to the complaint. But the next step was different. If a conciliation was not successful, and the Commission considered the act or practice *was* in breach of a human right by reference to the relevant international instruments, the Commission was obliged to report to the Minister (the Attorney-General) 'the results of its inquiry and of any endeavours it has made to effect a settlement'.[16] Once a report was made to the Minister, the Minister was then obliged to table it within 15 sitting days of receiving it.[17]

In contrast to racial discrimination complaints, the 1981 Act did not create offences of infringement of human rights—a breach was not *unlawful*, as such.[18] A complaint stopped at the Human Rights Commission and the report to the Attorney-General. There was no recourse to the courts.

The Attorney-General Senator Durack, described the Commission's settlement function of these matters as a 'creative and developing process', to assist the parties to reach an agreed outcome consistent with *ICCPR* rights. He said that the Commission would not need enforcement powers 'of the kind vested in courts'.[19] Rather, the process itself would *promote* increased recognition and observance of human rights; as would the attendant publicity and government awareness that would result from the *reporting* to the Minister. The Attorney concluded that the Commission's reports would 'ensure that governments and parliaments are *aware* of situations in which there needs to be a redefinition of the rights of different individuals and will *stimulate* them to take appropriate action'.[20]

As the Commission observed, the effect of the reports was

> to bring a matter to public notice, through its tabling in Parliament, and, perhaps, discussion there. This publicity itself may result in changes in the

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[15] *Human Rights Commission Act 1981* (Cth) s 3(1), definition of 'human rights' and 'declarations'. 'International instrument' was defined as including a declaration 'made by an international organization': *Human Rights Commission Act 1981* (Cth) s 3(1), definition of 'international instrument'.
[16] *Human Rights Commission Act 1981* (Cth) ss 9(1)(b), 10(7), 16(2).
[17] *Human Rights Commission Act 1981* (Cth) s 30.
[18] Human Rights Commission, *Annual Report, 1983–84,* 19.
[19] Commonwealth, *Parliamentary Debates*, Senate, 25 September 1979 (Peter Durack, Attorney-General) speaking to the Human Rights Commission Bill 1979.
[20] Commonwealth, *Parliamentary Debates*, Senate, 25 September 1979 (Peter Durack, Attorney-General).

> attitudes, not only of the parties concerned, but also of the community at large.[21]

Though not enforceable, the reports were therefore seen as performing a broader educative function. 'Aware' and 'stimulated' (according to Senator Durack, but without enforceable rights)—changes in attitudes and perhaps law reform—but dependent on a complaint being brought.

The first Annual Report of the Commission, 1981−82, spoke of the direct concern of the Commission with 'people and their problems' and that it dealt with 'a constant flow of complaints that an act or practice of the Commonwealth is inconsistent with or contrary to one of the general human rights found in the international instruments it administers'. In the first seven months of the Commission, 97 complaints were received under this head.[22] In the period 1983−1984, 348 human rights complaints were received and a further 614 concerning racial discrimination. In the period 1985−1986, there were 405 human rights complaints: immigration complaints increased from 51 to 121; employment-related complaints rose from 52 to 66.[23]

An example of an immigration matter is Report No 10, *The Human Rights of Australian-Born Children: A Report of the Complaint of Mr and Mrs RC Au Yeung*, January 1985.[24] The Au Yeungs came to Australia on tourist visas to visit Mrs Au Yeung's mother. They overstayed. After 15 months Mrs Au Yeung gave birth to Alvin, who became an Australian citizen by virtue of his birth in Australia at that time. At the expiration of their visas the family was deported, despite attempts of the Commission to achieve a conciliated settlement. The human rights complaint was based on the position of Alvin, who was not liable to deportation. The 'one substantial human rights issue' raised in the complaint was 'whether the deportation of a husband and wife who are prohibited immigrants should be restrained on the grounds that their deportation would infringe the human rights of their Australian born child'.[25] The focus of the report was on the human rights of the child.

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[21] Human Rights Commission, above n 5, vol 1, 10–11.
[22] Human Rights Commission, above n 5, vol 1, 19.
[23] Human Rights Commission, *Annual Report, 1985–86,* 2. The reports are found at https://www.humanrights.gov.au/1981-86-human-rights-commission-reports.
[24] Human Rights Commission, *The Human Rights of Australian-Born Children: A Report of the Complaint of Mr and Mrs RC Au Yeung* (Report No 10, January 1985).
[25] Human Rights Commission, *The Human Rights of Australian-Born Children: A Report of the Complaint of Mr and Mrs RC Au Yeung* (Report No 10, January 1985) 3.

The recommendations were that the Au Yeungs be permitted to return to Australia as permanent residents and, in other cases like this, that recognition should be given to the paramountcy of the human rights of these children in the making of immigration decisions concerning their parents. Other recommendations were that consideration be given to the question whether Australia's international obligations in the field of human rights required it automatically to grant citizenship; and more effective supervision of temporary entrants.[26]

Chapter Three: 1984

Australia's ratification of the *Convention on the Elimination of All Forms of Discrimination Against Women* led to an expansion of the Commission's roles, with the passage of the *Sex Discrimination Act* in 1984.[27] Like the RDA approach, the Sex Discrimination Commissioner's functions included inquiring into alleged infringements and attempting by conciliation to effect a settlement.[28] The grounds of complaint could be made against individuals and companies, for example in areas of discrimination in work, education, the provision of goods and services and accommodation.

A further change from the procedures so far established, if the Sex Discrimination Commissioner was of the opinion that a matter could not be settled by conciliation, the matter could be referred to the Human Rights Commission, which meant all the Commissioners.[29] The Commission would then hold a new inquiry and make determinations and recommendations, including by way of compensation.[30] However, any such determination was not binding or conclusive between any of the parties,[31] and either the Commission or the

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[26] Human Rights Commission, *The Human Rights of Australian-Born Children: A Report of the Complaint of Mr and Mrs RC Au Yeung* (Report No 10, January 1985) 10. Currently, children born in Australia become citizens only if at least one parent is an Australian citizen or if the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person was born. This is specified in the *Australian Citizenship Act 2007* (Cth) s 12.

[27] The references to provisions of the 1984 Act are to the Act as made, unless otherwise indicated.

[28] *Sex Discrimination Act 1984* (Cth) ss 48(1)(a), 49(1).

[29] A quorum of the Commission was constituted by three members, at least one of whom was legally qualified: *Sex Discrimination Act 1984* (Cth) s 60(1).

[30] *Sex Discrimination Act 1984* (Cth) ss 57, 59.

[31] *Sex Discrimination Act 1984* (Cth) s 81(2).

complainant could institute subsequent proceedings in the Federal Court, which could lead to binding determinations.[32]

Chapter Four: 1986

The second formal iteration of the Commission reflected a decision about permanency as well as the fact of more ratifications in the international domain. It was as the 'Human Rights and Equal Opportunity Commission', or 'HREOC', established as a permanent body on 10 December 1986,[33] consisting of a President, a Human Rights Commissioner, a Race Discrimination Commissioner (to replace the position of the Commissioner for Community Relations) and the Sex Discrimination Commissioner—to bring in the functions of the Sex Discrimination Act[34]—and between one and three other Commissioners. At this time, each Commissioner was still responsible for handling complaints on behalf of HREOC within their respective spheres.

But not all of the architectural design of HREOC was implemented. The proposal was that the functions in relation to the *ICCPR* would now be exercised under an *Australian Bill of Rights Act*, rather than directly referable to the international instrument.[35] The Australian Bill of Rights Bill 1985 (Cth) replicated the human rights functions of the Commission since the 1981 Act, but now by reference to the human rights set out in the Bill of Rights Act, to give effect to the assumptions under the *ICCPR* through direct and comprehensive domestic implementation.

But when the Bill failed to survive the Senate, this did not mean that the human rights functions fell away, but rather that HREOC would *continue* to exercise the functions relevant to the *ICCPR* for Australia, as the previous Commission had, although without a formal enactment of the covenant as a 'Bill of Rights Act'. This remains the case for the current Commission, renamed as the 'Australian Human Rights Commission' in 2008.

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[32] *Sex Discrimination Act 1984* (Cth) s 82.
[33] *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
[34] *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986* (Cth).
[35] A summary of the history of the Australian Bill of Rights Bill 1985 is found in George Williams, 'The Federal Parliament and the Protection of Human Rights' (Research Paper No 20, Parliamentary Library, Commonwealth, 11 May 1999) 10–11.

In addition, HREOC, as explained by Attorney-General Bowen, was to be 'the vehicle under which Australia's obligations under the Discrimination (Employment and Occupation) Convention 1958—that is, International Labour Organisation Convention No 111—will be implemented'.[36] This added another specific limb of human rights protections—and complaints mechanisms—the third in the suite.

The ILO functions enabled the Commission to inquire into any act or practice that may constitute 'discrimination', involving any distinction, exclusion or preference that had the effect of 'nullifying or impairing equality of opportunity or treatment in employment or occupation'.[37] The focus was on equal opportunity in employment—hence the name of the new Commission as the Human Rights *and Equal Opportunity* Commission.

This meant that the *HREOC Act* now distinguished between '**unlawful discrimination**', to refer to discrimination under the *Racial Discrimination Act* and *Sex Discrimination Act*; and '**discrimination**' simpliciter, to refer to ILO 111 discrimination. While there is overlap between the concepts,[38] the range of grounds to which ILO 111 discrimination applies is broader than the range of grounds covered by unlawful discrimination, but is limited in its application to 'employment or occupation'. Unlawful discrimination, under the Discrimination Acts, operates in a wide range of areas of 'public life' (in employment, education, accommodation, the provision of goods and services etc).[39]

In 1989, the definition of 'discrimination' in s 3(1) of the *HREOC Act* was amended by regulation to spell out the kinds of matters that ILO 111 discrimination might include, specifically: any distinction, exclusion or preference made on the ground of, principally: age; medical record; criminal record; impairment; marital status;

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[36] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 1985, 1711 (Lionel Bowen, Attorney-General). See *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3(1), definition of 'Convention'. This referred to the Discrimination (Employment and Occupation) Convention, 1958 adopted by the General Conference of the International Labour Organization on 25 June 1958. A copy was set out in Schedule 1 of the *HREOC Act*.

[37] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3(1), definition of 'discrimination'. There were also express exceptions in relation to discrimination on the basis of the 'inherent requirements of the job' and in connection with employment in an institution conducted in accordance with 'the doctrines, tenets, beliefs or teachings of a particular religion or creed'.

[38] Australian Human Rights Commission, *Federal Discrimination Law* (2016) 4.

[39] Australian Human Rights Commission, above n 38, 4.

mental, intellectual or psychiatric disability; nationality; physical disability; sexual preference; trade union activity.[40]

By way of example, the first report concerning ILO 111 discrimination was in 1997.[41] It concerned the compulsory retirement age of 60 for Qantas airline pilots.[42] As it was based on ILO 111 discrimination, the complaints could only be completed by way of report to the Attorney-General. Chris Sidoti had been appointed as Human Rights Commissioner in 1995, a time when Commissioners were responsible for complaints, and he sought to clear up the books of unresolved human rights and ILO 111 complaints.

> I do not consider prolonged handling of complaints to be in the interests of either respondents or complainants. When it becomes clear that there is no reasonable prospect of conciliation, the conciliation process should cease. If there is no substance to the complaint, it should be dismissed. If there is substance, that is, if there is an act or practice that is either discriminatory or a breach of human rights within the terms of the Act, the inquiry process should be finalised and a report should be made to the Attorney-General and tabled in parliament.[43]

This report deals with the first four of these complaints—some of many complaints received by the Commission about compulsory retirement practices. While compulsory retirement had been abolished in a number of the states and territories, the practice continued in federal public sector employment and many complaints of compulsory retirement had been lodged against federal public sector agencies. The *Public Service Act 1922* and many other federal laws required retirement at age 65.

While acknowledging that discrimination on the basis of age was not unlawful, it did come within the type of conduct within ILO 111. Sidoti recommended:

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[40] *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth).

[41] Sidoti was appointed on 14 August 1995. He then commenced a review of current complaints lodged under the Act and the conciliation attempts that had been made: Human Rights and Equal Opportunity Commission, *Report of Inquiry into Complaints of Discrimination in Employment and Occupation* (HREOC Report No 1, August 1996) 1–2. There were many complaints that had been active for some years. The respondents were unwilling to resolve them through conciliation and the complainants were committed to pursuing them.

[42] The pilots had worked with Australian Airlines, which became part of Qantas Airlines Limited: Human Rights and Equal Opportunity Commission, *Report of Inquiry into Complaints of Discrimination in Employment and Occupation* (HREOC Report No 1, August 1996) 7.

[43] Human Rights and Equal Opportunity Commission, *Report of Inquiry into Complaints of Discrimination in Employment and Occupation* (HREOC Report No 1, August 1996) 2.

> —that, to the extent that it has not already done so, it should discontinue the practice of compulsorily retiring its pilots and other employees on the basis solely that they have attained the age of 60 years or any other particular age;
> —that the respondent should pay to Mr Bone, Mr Craig, Mr Ivanoff and Mr Love compensation for loss of earnings suffered by reason of the discriminatory conduct of the respondent

With respect to Mr Ivanoff, the one pilot who sought reinstatement, Sidoti also recommended:

> —that the respondent should make the necessary arrangements for Mr Ivanoff to undertake the Qantas 'over 60' medical tests and, if these and other requirements of the Civil Aviation Authority are satisfied, re-employ Mr Ivanoff and where necessary retrain him as a pilot to fly equivalent aircraft or aircraft as near to equivalent as possible to those he was flying prior to his compulsory retirement.[44]

Qantas declined the recommendations regarding compensation and reemployment. It also said that it did not compulsorily retire pilots just because of age.

Sidoti recommended abolishing the compulsory retirement age in the Public Service Act and other federal legislation as well as the introduction of comprehensive national prohibition of age discrimination. These recommendations for law reform did happen—but it took some time.[45]

Conciliation was also the starting point for endeavouring to resolve complaints of ILO 111 discrimination.[46] If settlement could not be effected, and the Commission considered that the act or practice constituted discrimination, the Commission

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[44] Human Rights and Equal Opportunity Commission, *Report of Inquiry into Complaints of Discrimination in Employment and Occupation* (HREOC Report No 1, August 1996) 6.
[45] Provisions for compulsory retirement were removed from the Commonwealth when the *Public Service Act 1999* commenced operation, for Commonwealth public servants employed under that Act; and more generally in the federal public sector with the passage of the *Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001*. The prohibition of age discrimination was achieved in the passage of the *Age Discrimination Act 2004* (Cth), seven years later, making it unlawful to discriminate on the ground of age in various areas of public life including: employment; provision of goods and services; education and the administration of Commonwealth laws and programs. See Rachael Patterson, 'The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A Cause for Celebration and Concern' (2004) 3 *Elder Law Review* 1.
[46] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ss 31(b), 32(1)(b).

was required to report to the Minister.[47] In neither case was there provision for a matter to be taken to the Federal Court.

The two different pathways of complaint handling were therefore clear by this time, although both started with conciliation and an endeavour to effect a settlement: the pathway that applied to the *Racial Discrimination Act* and *Sex Discrimination Act*; and the pathway that applied to human rights complaints and complaints of ILO 111 discrimination, leading only to a report to the Minister.[48] The major differences between them include that discrimination under the Discrimination Acts is made unlawful and there is potentially access to the courts; but for the other streams the relevant actions are not made unlawful, nor is there access to the courts in relation to complaints of ILO 111 discrimination and human rights complaints.[49] Another difference is that where conciliation was conducted confidentially, a report, being tabled, was public. The names of people (unless an order for suppression was made), and the circumstances of the matter were squarely in the public domain.

Chapter Four: 2000 and 'unlawful discrimination'

On 13 April 2000, amendments to the Commission's legislation in 1999 came into effect,[50] to deal with an issue that had arisen concerning the relationship between the Commission's determinations and the role of the Court when a complainant in relation to Discrimination Act matters sought the have a matter considered judicially. What did it mean for the Court to 'enforce' a determination of HREOC?

In *Aldridge v Booth* [1988] FCA 27, Spender J considered this question in a matter concerning a sexual harassment complaint. The Commission had made a determination under the *Sex Discrimination Act* on 5 November 1986, in a matter of sexual harassment, that the respondents pay the applicant, Ms Aldridge, $7,000 damages. When the respondent did not pay this sum, Ms Aldridge applied to the Federal Court to enforce the determination. The problem this case revealed was that matters involving complaints under the *Sex Discrimination Act* or RDA had, in effect, to be heard 'all over again' if they went to the Court; and in

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[47] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 31(b).
[48] Two other discrimination acts added to the 'unlawful discrimination' pathway: the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*.
[49] Australian Human Rights Commission, above n 38, 4.
[50] Human Rights Legislation Amendment Bill 1996 (Cth).

some cases, the Court would make a different finding from the Commission, 'because different evidence was presented before the Court, and different rules of evidence applied', 'which often required a complainant to endure three full investigations'.[51] However, after having heard the evidence in this case, Spender J ordered the same amount of compensation as had been determined by the Commission.[52]

This multiplication of processes that the case revealed led to criticism that the system was 'inefficient and prone to exacerbate, rather than ameliorate, the distress of the complainant',[53] and also to an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs. Following the Committee's report in 1992, a process of *registration* of determinations of the Commission was introduced in the Federal Court. Upon registration of a determination of the Commission, a determination had 'effect as if it were an order made by the Federal Court'.[54]

However, in 1995 this scheme was challenged, in *Brandy v HREOC*, involving a complaint under the RDA.[55] In proceedings that reached the High Court, the issue was the validity of the process of registering the Commission's determinations. It was claimed that the sections of the *HREOC Act* that provided for the registration a determination were invalid by reason of Chapter III of the Commonwealth Constitution. The High Court agreed that the amendments purported to vest judicial power in the Commission, contrary to Chapter III, and were therefore invalid.[56]

In consequence of the post-*Brandy* amendments, a uniform scheme for complaint handling for unlawful discrimination under the set of Discrimination Acts was introduced. If the relevant complaint was 'terminated' at the

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[51] Anne Twomey, 'Trimming the Tribunals: Brandy v Human Rights and Equal Opportunity Commission' (Library Publications CJ820, 30 March 1995) 2. A case that led to a different result was *Maynard v Neilson* [1988] FCA 237, a complaint made under the *Racial Discrimination Act*.
[52] *Aldridge v Booth* [1988] FCA 279, [80]–[81].
[53] Krysti Guest, *Human Rights Legislation Amendment Bill 1996* (Bills Digest No 75 of 1996–97, Department of the Parliamentary Library, Information and Research Services) 3. Guest referred to academic and judicial comments noted in: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Review of the Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner* (1992) 8–12.
[54] Eg, *Racial Discrimination Act 1975* (Cth) s 25ZAB. The Bill came into force on 13 January 1993.
[55] *Brandy v HREOC* (1995) 183 CLR 245.
[56] *Brandy v HREOC* (1995) 183 CLR 245, [20].

Commission, an affected person could bring an unlawful discrimination case.[57] This provision remains the contemporary basis for the bringing of an action for unlawful discrimination in the Federal Courts.

The 1999 amendments also marked the shift of the complaint handling jurisdiction of the individual Commissioners to the President. The process of internal review was also removed, which at least eliminated one of the steps from the 'tripartite' structure. The Discrimination Commissioners and the Aboriginal and Torres Strait Islander Social Justice Commissioner were also now given an amicus curiae function in certain proceedings before the Federal Court.[58] This scheme continues to the present day.[59]

What of the other sets of complaints?

With respect to complaints alleging that an act or practice is contrary to a human right,[60] or of ILO 111 discrimination, the principal focus is still on endeavouring to effect a settlement by conciliation, even though the conduct the subject of the complaint is not 'unlawful'. The findings may include recommendations 'for preventing the repetition of the act or a continuation of the practice'[61] and, since 1986, they may also include recommendations for the payment of compensation and the taking of other action to remedy or reduce loss or damage suffered by the person as a result of the act or practice.[62] The same kinds of recommendations may be made in relation to ILO discrimination complaints,[63] as was exemplified in Sidoti's first report, which included recommendations for compensation for lost earnings.[64]

In neither case are the recommendations enforceable; and in neither case is there further recourse to the courts. This has been the position since such complaints processes were first introduced in the 1981 Act, and continued in the 1986 Act until the present day.

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[57] *Australian Human Rights Commission Act 1986* (Cth) s 46().
[58] *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) introducing s 46PV. See summary in Australian Human Rights Commission, above n 38, [1.4.3].
[59] *Australian Human Rights Commission Act 1986* (Cth) s 3(1).
[60] As defined in *Australian Human Rights Commission Act 1986* (Cth) s 3(1). See above.
[61] *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
[62] *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
[63] *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(b), (c).
[64] Human Rights and Equal Opportunity Commission, *Report of Inquiry into Complaints of Discrimination in Employment and Occupation* (HREOC Report No 1, August 1996) 6.

The reactions to this set of complaints have been mixed. It is also helpful to unpack the set of ILO 111 matters from the general group of 'human rights' complaints that are not otherwise covered in the other pathways.

The ILO set is much closer to 'unlawful discrimination' complaints and, over time, some of the matters listed as discrimination under ILO 111 have been incorporated into the enforceable protections of other federal Discrimination Acts, including the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth), and some had already been covered in the RDA and SDA. Additionally, the *Sex Discrimination Act* was amended in 2013 to make discrimination on the ground of 'sexual preference' unlawful.[65] It is only in the areas that are not covered by 'unlawful discrimination' that complaints would be brought as ILO 111 discrimination. The remaining field for ILO 111 discrimination is, as I have described it, 'relic' jurisdiction.[66]

An example of the relic grounds is discrimination on the basis of criminal record. In its 1987 report, *Spent Convictions*, the Australian Law Reform Commission (ALRC) recommended that ILO discrimination on the basis of irrelevant criminal record should be placed on the same basis as that available under the Discrimination Acts—with an avenue for judicial consideration, and enforceable orders.[67]

The Government implemented part of the ALRC's recommendation in relation to criminal records: by expressly including 'criminal record' in the definition of 'discrimination' in the *Human Rights and Equal Opportunity Commission Regulations 1989*, but it did not provide an enforceable remedy. The complaints pathway was left untouched, to be dealt with under the approach to ILO discrimination and not like the regimes under the Discrimination Acts. In an article in the *Law Society Journal*, published in September 2018, I argued that the recommendation of the ALRC should be implemented.[68] The same argument can be made in relation to any other remaining grounds of discrimination in employment, covered by ILO 111 and not otherwise covered by the Discrimination Acts. In the meantime, and notwithstanding the recommendations against employers are not

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[65] *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).
[66] Rosalind Croucher, 'Righting the Relic—towards Effective Protections for Criminal Record Discrimination' (2018) 48 *Law Society Journal* 73.
[67] Australian Law Reform Commission, *Spent Convictions*, (Report No 37, 1987).
[68] Croucher, above n 66.

enforceable, there has been a solid take-up of systemic recommendations (about policies and training, for example) and, in some cases, an acceptance of a recommendation about compensation—at least where it has not involved the Commonwealth.[69]

The other set of complaints, the human rights complaints, concern acts or practices of the Commonwealth, so any recommendations are directed to the Commonwealth—often meaning the big government departments, such as the Department of Home Affairs, on matters that may involve questions central to government policy, such as immigration.[70] Moreover the acts or practices concerned, either with respect to the remaining ILO 111 grounds or human rights breaches, do not give rise to unlawfulness under domestic law—a point that was clear in the Qantas pilot case. There is a clash therefore between commitments and expectations under the international treaties and the question of lawfulness under Australian law. With respect to complaints concerning arbitrary detention, arising pursuant to immigration policies for example, the dilemma is that, while the detention may be *lawful* under domestic law, the detention may become *arbitrary* under the *ICCPR*.[71] In such cases the Commission endeavours to conciliate, but most matters end in a report with unenforceable recommendations as the conciliation has not resolved the matters. While some recommendations of a procedural or administrative nature may be implemented, recommendations for compensation, when involving Government departments, have not been accepted.

The lack of enforceability has prompted Governments to question the necessity for including a compensation power in the Commission at all, given that the 'acts or practices' that may breach human rights, or amount to ILO discrimination, are not made expressly unlawful under the Act. Indeed, there were several attempts

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[69] Aspects of this are explored in the article, 'Seeking equal dignity without discrimination'—The Australian Human Rights Commission and the handling of complaints', forthcoming in the *Australian Law Journal*.

[70] The Reports can be found at https://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports.

[71] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9; Australian Human Rights Commission, Submission to the Joint Standing Committee on Migration, *Review Processes Associated with Visa Cancellations Made on Criminal Grounds* (27 April 2018).

from 1997 to 2003—each contested by the Commission and others—and unsuccessful—to remove the power.[72]

Given the clash between policy and international commitments, the reports required for ILO and human rights complaints have generated attention on occasion, and not always complimentary of the Commission. The human rights complaints have also touched a raw nerve at times that is a familiar one in the world of interaction with the United Nations, of resenting challenges to 'domestic sovereignty' and the like.

This is not a new theme. But the Commission's responsibility is clear. Dame Roma Mitchell touched on this in the report I referred to earlier, from 1985, in the context of a deportation decision of a family. Recalling that the 'Parliament of the Commonwealth' had itself given a clear indication of the legislative policy that the Commission's Act embodied, she said that this envisaged that 'decisions such as those relating to deportation must conform with human rights'.[73]

> Although the Parliament, at this stage, has not made the human rights embodied in the instruments administered by the Commission directly enforceable in domestic law, it clearly requires the Commission to report how domestic laws and policies should be modified in order that human rights violations do not occur. The Parliament has made clear its intention of requiring conforming with human rights as defined in the relevant international instruments. It has not said that human rights considerations must give way to policy considerations or other matters. Indeed, the Commission has been set in place precisely to receive complaints that a policy or practice is not in conformity with human rights.[74]

This was thirty-four years ago. The Commission was established in part to be a 'Devil's Advocate'. In the first formal speech I gave in my role as President, I said that having a 'Devil's Advocate' for human rights is a healthy, indeed necessary, thing in the context of the promotion and protection of those rights. Even if it means we should expect criticism—for calling out Government against the commitments made to the international community in signing up to the international treaties that set the benchmark for human rights. Even if it means

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[72] A discussion of the 1997–1998 Bills in Senate Standing Committee on Legal and Constitutional Affairs, Legislation Committee, Parliament of Australia, *Provisions of the Human Rights Legislation Amendment Bill (No 2) 1998* (February 1999). The background to the 1998 Bill is discussed in ch 1 of the Committee's Report.

[73] Human Rights Commission, *The Human Rights of Australian-Born Children: A Report of the Complaint of Mr and Mrs RC Au Yeung* (Report No 10, January 1985) 6.

[74] Human Rights Commission, *The Human Rights of Australian-Born Children: A Report of the Complaint of Mr and Mrs RC Au Yeung* (Report No 10, January 1985) 6.

that Governments see us more of the 'Devil's Blowtorch' than the Devil's Advocate.

While Dame Roma did not use this metaphor, the analysis in the Commission's report reflects the same conclusions.

The next chapter

This exposition of the complaints pathways leads me to some conclusions and a number of key questions.

For a start, conciliation works—especially in matters invoking the unlawful discrimination pathway of the Discrimination Acts. In a review of the RDA in 1995, it was stated that 'the conciliation framework has many advantages':

> it allows for a complaint handling process that is accessible, private, inexpensive and flexible. The complainant also has a significant degree of control over the process. … [M]any complaints have been satisfactorily resolved for the complainant by an apology and an assurance that the action which is the subject of the complaint will not be repeated. In other instances, significant settlements have been agreed upon, including financial compensation, reinstatement to a job, agreement to stop a particular procedure or practice and the introduction of training programs, grievance procedures or policies to prevent future discrimination.[75]

Conciliation is the centrepiece of the Commission's processes of complaint handling—in all three types of complaints. In *Aldridge v Booth* in 1988, Spender J drew attention to the fact that, notwithstanding that the legislation had been in force since 1981, this had been the first time that the issue of enforcement had come to the Court and that, in this time, the Commission had made determinations in 'many thousands of matters'. This indicated that the Commission was successful in its 'primary purposes',[76] and that the resolution of complaints, without court proceedings, was 'obviously a socially desirable result and conducive to achieving the objects of the Act'.[77] In introducing the 1999 amendments, Attorney-General Daryl Williams reiterated the value of

[75] Race Discrimination Commissioner, *The Racial Discrimination Act: A Review* (December 1995) 33.
[76] *Aldridge v Booth* [1988] FCA 279, [15].
[77] *Aldridge v Booth* [1988] FCA 279, [14].

conciliation in the Commission's processes, 'as this step in the process has proved most effective'.[78] This message is reinforced in the intervening years.

So much of this work of conciliation continues unnoticed and observed over the years. The reports, required in a few instances, and only in cases of human rights complaints or ILO 111 discrimination, may attract attention—at times—because they do become public of necessity, even though the names may be protected through pseudonyms. Publicity may also happen if the individuals involved in any of the otherwise confidential processes decide not to keep them confidential.

But the Commission's record over the years speaks for itself. For example, if we look at the number of complaints the Commission has received and conciliated over the past 20 years, the numbers represent successful alternative dispute resolution through conciliation for more than 30,000 people and organisations.[79] And these are not *just* numbers: for every matter there is an individual who has taken the initiative, sometimes the courageous decision, of coming to the Commission.

But what about the missing piece, or pieces—framing human rights protections in Australia?

For a start, domestic legislation is *not* comprehensive in its protection of the human rights commitments we have made in ratifying international treaties. Recent discussions about freedom of religion, freedom of speech and protection of privacy are singular cases in point. Existing legislation, and the common law, go some way down these roads. But the common law has limits.

Protection of serious invasions of privacy, for example, has got stuck. The common law needs a great leap forward, as it achieved in *Donoghue v Stevenson* in relation to negligence,[80] but we have not got there yet. Perhaps the 'age of drones', is the contemporary equivalent of the 'age of railroads' to provide the necessary catalyst for the common law.[81]

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[78] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1998, 1276 (Daryl Williams, Attorney-General).
[79] Looking at reports from July 1998 to July 2018.
[80] *Donoghue v Stevenson* [1932] AC 562.
[81] See, eg, Percy Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 *Law Quarterly Review* 184, 195.

Another issue is that our discrimination laws are framed in the negative space—what you *can't* do—and rely on a dispute before offering a solution. This is not to say that our discrimination laws are not important. They directly reflect international commitments and can achieve many positive systemic outcomes. Similarly in relation to the generic set of human rights complaints: they may achieve the kinds of things that Attorney-General Durack said in 1979, in terms of promoting Government awareness and stimulating action, but they are still framed around complaints by individuals—and this is not always the best way to achieve law reform.

The complexity of the system is also seen in the exposition of the three different pathways of complaints handling; and the 'human rights' pathway is not easily seen, being referenced to obligations that are not evident in Australian laws. How would the person in the street understand this—that they can make a complaint referable to the ICCPR directly to the Commission? Shouldn't we all know what our human rights are?

The central fact, moreover, is that our human rights architecture is incomplete. The legal history of the Commission is like that of a house that has had several rooms added over a 30 year period without any thought, or recollection, as to the overall design or architecture of the place. The hole in the middle is the framing of rights in a positive way—such as may be offered by some form of positive expression of rights and freedoms, as imagined in a federal statute like the initiative adopted in the *Human Rights Act in 2004* (ACT) (the ACT *Human Rights Act*) and *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Victorian Charter*). Development of a charter modelled on the Victorian Act is also currently underway in Queensland.[82] There are also the older examples of the UK and New Zealand.[83]

The focus of these models is primarily aimed at ensuring that decisions are made with human rights obligations in mind. It is frontloaded, rather than reliant on ex post facto action through complaints. In any future consideration of improving human rights protections in Australia, and especially at the Federal level, such models will be instructive.

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[82] Human Rights Bill 2018 (Qld).
[83] *Human Rights Act 1998* (UK); *Human Rights Act 1993* (NZ).

There are many questions to consider. Some of these became especially clear to me in the consultations concerning religious freedom last summer. Stakeholders from many perspectives were advocating a federal charter of rights as part of the solution. But for me the question was not, 'whether or not', but 'what then'? What is the relationship between a federal charter, which must be enacted through the possibilities, and limitations, of the external affairs power of the Constitution, and the existing and any future state or territory charters? What kind of complaints mechanisms are contemplated? What is the role of the courts?

The bottom line is that we need to open up the conversation. Not make it about this bit or that; this section or not; a charter or not. These *are* important questions, but can be distracting; and they are readily politicised—and divisive. Rather, we need to *reimagine* our system of protections of human rights and freedoms—so that we can provide everyone with the opportunity to be the best that they can be. In today's world. Respectful of our federation. Respectful of our commitments to the international community. Respectful of the part that *each* of us, with the separation of powers, can play. *You*, as judges, have an enormously important role, as the final arbiters of the law in Australia, and the custodians of the rule of law drawn from a rich heritage of the common law.

And then to the Commission.

As Australia's national human rights institution, we have an *obligation* to hold Parliament and Governments to account in their commitments, entered into in good faith in the international domain. It should not be political, nor 'left-wing' or 'right-wing', but the discharge of our statutory mandate of Devil's Advocate, in the way I have described it.

I want us to aim high. I come to leading this conversation honed in the intellectual world of legal history and with the discipline of ten years in law reform. My objective in this conversation, as President of the National Human Rights Institution, is—

- to recommend an agenda for federal law reform to protect human rights and freedoms fully
- to recommend priorities for reforming federal discrimination law to make it more effective and less complex
- to articulate key actions that all governments must take to adequately protect the human rights and freedoms of all Australians, and
- to identify how we can build community understanding and partnerships to realise human rights and freedoms.

I want to see human rights and freedoms embedded in our national psyche—and not as an afterthought.

I look forward to your engagement in this national conversation. Because human rights are best protected and promoted when they are everyone's responsibility; and here *everyone* has a role to play.