

HREOC:
Its structure, its functions and
its challenges

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- Acknowledgements to be advised on the day, ladies and gentlemen thank you for inviting me here today.
- I am delighted to have been given the opportunity to address the University of Hong Kong faculty of law.

STRUCTURE OF HREOC

- Today I would like to talk about the institution from which I come - Australia's national human rights institution, the Human Rights and Equal Opportunity Commission, which is commonly referred to as HREOC.
- HREOC was established by an Act of the Australian Federal Parliament in 1986, the *Human Rights and Equal Opportunity Commission Act 1986*.
- It is an independent federal statutory body, administered by the President as the Chief Executive officer. This position is currently held by Alice Erh-Soon Tay.

- The President is assisted in running HREOC by the Human Rights, Sex, Race, Disability and Aboriginal and Torres Strait Islander Commissioners.
- The President and Commissioners are statutory appointments for fixed terms of between three to five years.
- I am the Sex Discrimination Commissioner and was appointed to my position in 2001.
- Myself and my fellow Commissioners are responsible for the administration of the pieces of HREOC's legislation.
- Each of these pieces of legislation outlines specific functions for the Commissioners.
- I am generally delegated with administering the Sex Discrimination Act 1984.
- The other acts administered by Commissioners are the:
 - Racial Discrimination Act 1975
 - Disability Discrimination Act 1992
 - Human Rights and Equal Opportunity Commission Act 1986

- HREOC employs staff to work in policy areas, public affairs, the legal section and complaint handling sections.
- There are also administrative staff, who are responsible for the running of HREOC.
- All employees of HREOC are federal civil servants.

FUNCTIONS OF HREOC

HREOC's main functions are:

- Human rights education and promotion
- Investigating, mediating and adjudicating individual complaints made under federal (national) human rights and anti-discrimination legislation.
- Conducting public inquiries into breaches of human rights and of discriminatory practices.
- Policy development and monitoring the government's own respect for international human rights treaty obligations.

- Recommending and reviewing laws, policies, programs and activities to promote and protect human rights

- HREOC also undertakes other specific functions as required by the various pieces of legislation it administers.
- With such a wide range of functions, we need to be multi-skilled and strategic in the approaches we choose to deploy when addressing particular issues.
- We therefore continually need to be re-evaluating how we fulfil our role as Australia's national human rights institution and how we deliver our human rights message in the most effective or efficient way.
- Delivering this message can be done in a number of different ways, including through:
 - the administration of a complaints process,
 - engaging with the media,
 - implementing education and awareness campaigns,
 - policy work,
 - research,

- legal interventions and
 - national inquiries.
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- Time limitations today mean that we can only consider a few of these in more detail.
 - Please feel free however, to ask me questions about any of the strategies I do not address during question time.

NATIONAL INQUIRIES

- National Inquiries are a potentially powerful vehicle for facilitating change and delivering a human rights message.
- They can influence public debate and educate the general community on their subject matter – usually a human rights violation.
- The special value of a national inquiry is that it puts personal and individual experiences of discrimination or other rights violation on the public stage.

- This is because carrying out a national inquiry involves conducting public and private hearings with people relevant to the issue of the inquiry.
- Some of the hearings may be made public, as is the report published at the end of an inquiry.
- National inquiries therefore enable the public to hear and understand the detail of the issue and the personal stories of those concerned.
- The inquiry can name the harm as a *human rights* violation - making it more concrete and less like an abstract concept.
- National inquiries also make recommendations for remedies. In doing so, the 'story' is resolved with justice, and the public is informed as to how a human rights solution will work.
- HREOC has conducted national inquiries on a range of issues including mental illness, homelessness, rural and remote education, racist violence and pregnancy.
- Between 1995 and 1997, HREOC conducted a national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families.

- The report of the inquiry, published in 1997 was titled *Bringing them home*.
- This inquiry was established to examine the impact of laws and policies over the course of much of the twentieth century which saw Indigenous children, particularly those of mixed ancestry forcibly removed from their families and communities.
- The inquiry involved extensive public and private hearings taking place over the two year period.
- The published report was a lengthy and complex document.
- It included numerous recommendations, was accompanied by a community guide to the key findings of the report.
- Also accompanying the report were a video and website materials, which addressed frequently asked questions about the policies of removal, their impact and the report's recommendations for addressing the resultant harm.
- There was also significant contact with media and advocacy groups to bring the findings of the report to the attention of the general community.

- The media coverage of the inquiry's findings was at this time unprecedented.
- It can legitimately be claimed that the inquiry and report has led to a much greater understanding in the Australian community about the treatment of Indigenous Australians and the historical background to the situation currently faced by many Indigenous people in Australia today.
- Even five years after the publication of the report, the stolen generation remains a matter of national significance and discussion.
- HREOC is currently conducting another national inquiry.
- This time examining the treatment of children in immigration detention centres.
- Most of these children are asylum seekers.
- This inquiry also received extensive publicity as public hearings took place across the country and it is in report writing stages.

LEGAL INTERVENTIONS

- Another way HREOC fulfils its human rights obligations is through intervening in legal matters.
- We do this either in the role of *amicus curiae* or through acting as an intervener in court proceedings.
- The intervention function is more established. It has been around since HREOC's inception in 1986.
- The *amicus role*, which is given to each individual Commissioner, is far newer. It only came into effect in April 2000.
- The *amicus* and intervention roles are not only useful in their ability to affect legal decisions - they are also useful educational tools.
- By publishing our legal arguments on our website and making comments in the media as appropriate, our legal arguments and therefore human rights message are accessible to all.
- So what is it?
- An *amicus curiae* is a “friend of the court”.

- The role of an amicus has traditionally been to ensure that the court is properly informed of matters which it ought to take into account when reaching its decision.
- A person applying to act as amicus must establish “good cause” before they can have their amicus application heard by the court.
- The *amicus curiae* function can *only* be used in matters in which a complaint alleging unlawful race, sex, or disability discrimination has been terminated by HREOC and the Federal Court or Federal Magistrates Service is subsequently hearing the application.
- This situation arises as HREOC’s main role in handling the complaints it receives is a conciliatory one. Where conciliation between the parties involved is not possible the unresolved or terminated complaint can then be heard in a court.
- The first case I appeared in involved a professional female kick boxer, who held the triple world championship, South Pacific, Commonwealth & Australian titles.
- She was prevented from taking part in kickboxing bouts in the State of New South Wales by the Boxing Authority in this state.

- This authority relied on state legislation which outlaws women from taking part in all forms of boxing.
- The question in the case was raised as to whether this ban contravened the Sex Discrimination Act.
- The court accepted that the proceedings had significant implications for the administration of this Act and that it was in the public interest for me, in my role as Sex Discrimination Commissioner and administrator of the Act, to assist the court in this case.
- HREOC continues to monitor and look for cases where it may be appropriate for them to act in this role and there have been a few such cases since then under the Sex and Disability Discrimination Acts.
- The Intervention function has much broader application than the amicus function.
- HREOC with the permission of the Court can intervene in court proceeding involving:

- any human rights issues; human rights being defined as those meanings and freedoms recognised in six named International conventions; and
- in proceedings involving discrimination in employment or occupation; and in race, sex , martial status, pregnancy or disability discrimination matters.
- Under the SDA, RDA and DDA, also the Commission has the power to intervene in cases that raise issues of discrimination under our legislation.
- In proceedings where HREOC has intervened it has relied heavily on its specialist human rights knowledge and expertise.
- HREOC has also been careful to choose to intervene in proceedings which involve issues of public importance and may affect a significant number of persons, other than just those parties before the Court.
- To date, HREOC has sought and been granted leave as an intervener in over 26 cases.
- The range of matters covered in these cases include:

- Family law proceedings involving sterilisation of young women with disabilities, and the validation of the marriage of a female to a male transsexual person;
 - Proceedings involving child abduction cases ;
 - International law and the extent to which administrative decision makers are obliged to take account human rights instruments in making their decisions;
 - Native title issues;
 - Immigration cases including access by people in detention to legal representation; and the alleged arbitrary detention of persons aboard the *MV Tampa*.
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- In addition to performing an educative function, legal interventions provide an important avenue for the development of human rights and anti-discrimination law in Australia.
 - HREOC has a distinct educational role which I will discuss shortly.
 - The importance of coupling education with *any* method we use to deliver our human rights message and fulfil our role cannot be underestimated.

- And this is not limited to educating about a national inquiry and the surrounding issues, or about a legal case we have intervened in.
- What would be the value of anti-discrimination laws if no one knows about them?
- Without education, you can have in place a perfect *theoretical* framework for dealing with discrimination, yet a society rife with discrimination as no one knows what behaviour is unacceptable.

EDUCATION AND AWARENESS RAISING

- HREOC has a distinct educational role.
- It promotes awareness of human rights, and educates the community about these rights and the responsibilities that go with them.
- This can be done in a number of ways including through the media, the internet and educational institutions.
- HREOC produces curriculum materials and formal education programs for schools.

- It develops online human rights education programs for young students.
- The first online Human Rights Education program, the Commission developed is called Youth Challenge. It is for secondary school students. The Program was launched in December 2001. It links to curriculum subjects such as Civics and Citizenship, History and Legal Studies.
- Youth Challenge provides teaching strategies, activities worksheets, links to human rights resource materials, and case studies presented by way of two videos.
- There are three parts to the program which cover Human Rights in the classroom, origins of human rights, relationship between rights and responsibilities and application to the students own lives.
- Other issues include the importance of “identity” and difference as an element of human rights, and sex, race and disability discrimination.
- We promote the online materials widely through the use of advertisements in teacher journals, distribution of posters and postcards and direct contact with all secondary schools.

- The success of the promotion is evident from the online statistics which show large numbers of people accessing the Youth Challenge online materials.
- And as a result, we are currently working to produce a comprehensive online education program.
- Initially these programs targeted teachers (both primary and secondary) but students now also have access to use these materials.
- The modules provide a context for discussion on human rights and assist students to hone their decision making skills when presented with a range of conflicting ideas about human rights and responsibilities.
- It makes issues, often the subject of government policy making and debate accessible to young people.
- For example, in Australia we are currently in the midst of a national debate on whether to introduce a national scheme of paid maternity leave.
- I launched a paper in December last year outlining a proposal for such a scheme.

- HREOC devised an online education module – *Paid maternity leave: Activities on gender equality in the workforce*.
- It is designed to be used by teachers of secondary students.
- The module is intended to assist students in developing an understanding of the issue and its broader context, being gender and the workforce.

CHALLENGES TO HREOC IN PERFORMING ITS FUNCTIONS

- Like all national human rights institutions, HREOC faces a number of challenges in performing its functions. There are a few I would like to highlight today.

MAINTAINING INDEPENDENCE

- Maintaining independence is the number one challenge for national human rights institutions around the world.

- It is crucial if these institutions are to fulfil their role effectively and of particular importance when these institutions are monitoring their government's respect for international human rights treaty obligations.
- It is a challenge for HREOC to maintain this independence because as stated earlier, HREOC is a statutory body created by an Act of the Australian Parliament. It therefore finds itself reliant on funding from the very government it is often critiquing.
- This is a common predicament for national human rights institutions.
- And it should come as no surprise therefore that these institutions often face significant financial resource constraints and the further challenge of having to target scant resources to make the widest impact.
- It is also not difficult to see how this 'conflict of interest' could potentially render national human rights institutions ineffective, useless or 'toothless tigers'.

- To address this problem, a UN-sponsored meeting of representatives of national institutions was held in Paris in 1991.
- As a result, the Paris Principles were developed.

THE PARIS PRINCIPLES

- The Paris Principles are a detailed set of principles on the status of national institutions, such as HREOC.
- The principles, subsequently endorsed by the UN Commission on Human Rights¹ and the UN General Assembly² have become the foundation and reference point for the establishment and operation of national human rights institutions.
- In summary, the Paris Principles guarantee national institutions:
 - independence by statute or constitution
 - autonomy from government
 - pluralism, including in membership

¹ (Resolution 1992/54 of 3 March 1992)

² (Resolution 48/134 of 20 December 1993, annex)

- a broad mandate based on universal human rights standards
 - adequate powers of investigation
 - sufficient resources.
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- Increasingly, maintaining independence does not mean from government only.
 - In most countries today there is an overlap between the interests of government and business or industry.
 - The nature of politics and politicking means that maintaining independence may therefore involve maintaining independence from a range of stakeholders.
 - This presents new challenges.
 - It involves recognising this need for *total* independence at an international level. It means supporting this independence at a national level and fostering solidarity and mutual support amongst other independent institutions, for example through the National Asia Pacific Forum of human rights institutions.

- At present this forum has 12 members from those institutions around our region.³

LIMITED JURISDICTION

- Another challenge HREOC faces relates to Australia's system of Federal Government.
- HREOC's authority and the legislation which it administers only apply in the Federal jurisdiction.
- Frequently however the government whose human rights performance we need to criticise will be one of the States or even a local, municipal, government.
- These governments fall outside of our Federal system and therefore HREOC's jurisdiction.
- Alternatively, it may be that the issue of concern may fall outside the Federal system and therefore HREOC's jurisdiction.
- For example, each State and Territory in Australian has its own school education system.

³ The 12 member countries are Australia, Fiji, India, Indonesia, Malaysia, Mongolia, Nepal, New Zealand,

- There is no one national curriculum. Our federal system therefore presents a barrier when we try to influence school education.
- Monitoring all of these levels of governments and issues in a comprehensive fashion is therefore often beyond HREOC's capacity.
- The way we circumvent this problem in our education program is to develop broad human rights education materials – and help each State and Territory to identify where it might fit in their own curricula.
- The challenge still remains however of how do we address significant human rights concerns whenever they arise, without acting beyond our jurisdiction?
- Because unlike legislation, human rights abuses and discrimination do not have respect for jurisdictional boundaries.

INTERSECTIONALITY

- Another challenge facing HREOC, arising from our legal and administration structure and other human rights institutions world wide – are those presented by intersectionality.
- Intersectionality, refers to the connection between aspects of identity, in particular race and gender.
- The reality is that **all** people have a race and a gender, although race or gender may be obscured or ignored when, for example, the race is whiteness or the gender male.
- An intersectional approach asserts that these and other aspects of identity are indivisible and that speaking about race and gender in isolation from each other results in concrete disadvantage.
- The challenge is to acknowledge and incorporate this idea of intersectionality in any national system of anti-discrimination legislation.

- HREOC's legislation and its structure suggest that discrimination can be neatly dealt with by considering separately these aspects of identity.
- We have created race discrimination legislation, sex discrimination legislation etc.
- HREOC itself is structured into policy and complaints handling units along these same divisions.
- The effect of setting up legislation and human rights structures that deal with these aspects of identity separately is that they are often inadequate for dealing with situations of discrimination or disadvantage that have been brought about as a result of the intersection of different aspects of identity.
- In Australia for example, race and gender intersectionality mean that the experiences of women from non-English speaking backgrounds (NESB women) and Indigenous women are unique, however our human rights system often struggles to work with this overlap.

- This is not to criticise Australia's human rights or anti-discrimination system – we simply mirror the international human rights structure.
- The challenge is to recognise that different groups and persons will have very different experiences of racism, for example, because of other aspects of their identity, such as gender.
- Hong Kong is in the midst of proposing to introduce a Racial Discrimination Act.
- I urge you to take this intersectional approach when formulating your legislation. It is to your benefit as a strong, relevant, inclusive piece of legislation has greater chances for effectiveness and longevity.
- Hong Kong has its own national rights institution – the Equal Opportunity Commission.
- The work it undertakes in areas of sex discrimination is however very impressive and I am pleased to be sharing this platform

with the chair of Hong Kong's Equal Opportunity Commission,
Anna Wu.

- Your Equal Opportunity Commission and HREOC face many of the same challenges.

- We are committed to the same cause.

- There is much to be learnt from each other and together much work to be done to ensure that the worldwide, human rights are protected, enshrined and ensured.

Thank you.