

Appendix 4

Complaints process prior to 1995

Between 1992 and 1995, the Commission, then known as the Human Rights and Equal Opportunity Commission (HREOC), had statutory functions under the RDA, *Sex Discrimination Act 1984* (SDA) and *Disability Discrimination Act 1992* (DDA) with the following general functions:

- The Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner investigated and attempted to conciliate complaints of unlawful discrimination under the RDA, SDA and DDA.
- Where the relevant Commissioner determined that the investigation into the complaint would not continue because, for example, the alleged act the subject of the complaint was not unlawful, the complaint was out of time or lacking in substance, the complainant could request an internal review of the Commissioner's decision by the President.
- Where the complaint was not resolved by conciliation and the Commissioner was of the view that it should be referred for a hearing, the hearing was conducted by HREOC and the complaint either dismissed or substantiated.
- Where a complaint was substantiated, HREOC registered its determination with the Federal Court registry. Upon registration, the determination was to have effect as if it were an order of the Federal Court.¹

Process found unconstitutional - Brandy v HREOC

In *Brandy v Human Rights and Equal Opportunity Commission*, the High Court held that the provision for registration of the HREOC's decisions was unconstitutional as its effect was to vest judicial power in HREOC contrary to Chapter III of the Constitution.²

In response to the decision in *Brandy*, the parliament enacted the *Human Rights Legislation Amendment Act 1995*. This Act repealed the registration and enforcement provisions of the RDA, SDA and DDA. Complaints that were lodged under the new regime introduced by the Act were still the subject of hearings before HREOC. Where a complaint was successful, HREOC would make an (unenforceable) determination.³

1 Human Rights and Equal Opportunity Commission (HREOC), *Federal Discrimination Law* (2008), 8.

2 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

3 HREOC, *Federal Discrimination Law* (2008), 8.

Amendments to establish the current process

The *Human Rights Legislation Amendment Act (No. 1) 1999* amended the complaints process further:

- the complaint handling provisions were repealed and replaced with a uniform scheme in the [*Human Rights and Equal Opportunity Act 1986*];
- responsibility for the investigation and conciliation of complaints was removed from the Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner and vested in the President;
- the right to an internal review by the President of matters terminated by reason of, for example, being out of time or lacking in substance, was removed;
- HREOC's hearing function into complaints of unlawful discrimination under the RDA, SDA and DDA was repealed and provision made for complainants to commence proceedings in relation to their complaint before the Federal Court or [(the then) Federal Magistrates Court] in the event that it was not conciliated when before HREOC for investigation; and
- the Race Discrimination Commissioner, Sex Discrimination Commissioner, Disability Discrimination Commissioner Human Rights Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner were given an amicus curiae function in relation to proceedings arising out of a complaint before the Federal Court or [(the then) Federal Magistrates Court].⁴

4 HREOC, *Federal Discrimination Law* (2008), 9.