

The Role of National Human Rights Institutions in Implementing the Durban Declaration: an Australian Perspective

I would like to thank the Office of the High Commissioner of Human Rights for organising this event and inviting me to speak today.

The Durban Declaration and Programme of Action (DDPA) outline an important role for National Human Rights Institutions (NHRIs), particularly that of monitoring national compliance of laws, policies and programmes with universal human rights standards. The DDPA also encourages co-operation between NHRIs at a regional and international level and urges government to work with NHRIs to combat racism. In addition NHRIs have an important role to provide effective remedies where racism has occurred.

The Australian Human Rights Commission is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). The Commission operates in compliance with the *Principles for national institutions for the promotion and protection of human rights* (the 'Paris Principles') as approved by the United Nations General Assembly.¹

The HREOC Act provides for the Commission to consist of six members – a President and five Commissioners. The Commissioners are designated as follows: a Human Rights Commissioner, Race Discrimination Commissioner, Aboriginal and Torres Strait Islander Social Justice Commissioner, Sex Discrimination Commissioner and Disability Discrimination

¹ See the Commission's website for more information at: www.humanrights.gov.au

Commissioner. One Commissioner also has responsibility for age discrimination matters.

The five Commissioner positions are currently held by three people. Since 1999, the positions of Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner have been held by the one person, and in my case, since 2004.

The Commission has the following specific functions which implement or monitor Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and are mandated under our domestic legislation, the *Racial Discrimination Act 1975 (Cth) (RDA)*:

1. Conciliation of individual complaints: the Commission attempts to conciliate complaints of racial discrimination and racial vilification brought under the RDA. Complaints that cannot be resolved through conciliation are terminated and may then be taken to the courts for determination.
2. Race Discrimination Commissioner: The Race Discrimination Commissioner has specific roles to promote and monitor compliance with the RDA. This includes promoting research and educational programs that combat racism and fostering awareness of and compliance with federal race discrimination and racial vilification legislation and produce guidelines to comply with the RDA.
3. Aboriginal and Torres Strait Islander Social Justice Commissioner: The Commissioner has an independent

monitoring role on the impact of government activity on the exercise and enjoyment of human rights by Australia's Indigenous peoples. The Commissioner reports annually to the federal Parliament on the status of enjoyment of Indigenous human rights (the Social Justice Report) and the impact of native title legislation on the enjoyment of Indigenous human rights (the Native Title Report). The Commissioner also has functions to examine the impact of proposed or actual legislation on the enjoyment of Indigenous peoples' human rights and the conduct of activities to promote respect for the enjoyment of human rights by Indigenous peoples.

4. Education: The Commission has a role to promote understanding of human rights, as well as specific functions to promote understanding and awareness about racial discrimination.
5. Amicus curiae role: Where a complaint of unlawful discrimination has been lodged with the courts, Commissioners may seek the leave of the court to provide assistance on the interpretation of discrimination law as a friend of the court (*'amicus curiae'*). This includes advising on the interpretation of Australia's obligations under ICERD or its domestic implementation through the RDA.
6. Legal intervener role: In addition to the role of Commissioners as *amicus curiae*. The Commission may seek leave to intervene in matters before the courts that relate to its mandate. To date the Commission has

intervened in over 40 matters before the courts. These matters include some in which the provisions of ICERD and the RDA have been relevant, such as the interpretation of the race power in section 51(xxvi) of the Australian Constitution,² and the consideration and application of native title principles.³

Limitations to our role;

Having set out our structure and mandate I will now outline some of the constraints in implementing fully my mandate to address racism in Australia.

- As indicated, the position of the Race Discrimination Commissioner has not been filled for the past ten years. The failure of the government to appoint a separate race discrimination commissioner has constrained the Commission's ability to combat racism.
- Limited commitments to international and regional mechanisms for fighting racism:
 - There is no regional mechanism for monitoring race discrimination and sharing best practice. There is however an informal meeting of human rights institutions in Australia and New Zealand to exchange information and knowledge about racism in our region. This is the Australian/New Zealand Race Relations Roundtable.

² *Kartinyeri v Commonwealth* (1997) 152 ALR 540.

³ *Western Australia & Ors v Ward & Ors* [2002] HCA 28 (8 August 2002); *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002).

- Australia is not fully committed to ICERD having placed a reservation on article 4(a) which requires states to criminalise serious acts of racial vilification
- Limited legislative framework for carrying out our role:
 - The legislative framework makes it difficult for complainants to prove discrimination., eg burden of proof
 - There is no requirement that government have reference to human rights standards in their enactment of legislation or their development of policy. Australia is currently conducting consultations for a Human Rights Act.
 - The RDA can be overturned or suspended to enable the enactment of discriminatory legislation. Eg NT Intervention.
 - There is no positive duty on government institutions to promote equality
 - The Commission operates with limited resources, having suffered a cut of around 15% in the last financial year.

Best Practice on Addressing Racism:

The Commission conducts a number of projects that can be considered best practice in the elimination of racial discrimination.

These include:

- Education function; The following projects provide important education resources to assist in combating racism:
 - *Face the Facts*, provides facts, statistics and information on migrants, Indigenous peoples and refugees in Australia. The information facilitates discussion of race issues based on factual information and is provided to schools, training institutions and government bodies⁴.
 - Educational projects under the Muslim Communities Projects include human rights resources for young people (developed in collaboration with Community Languages Australia,) and community legal education training programmes.⁵
 - Recently we have developed tool kits to assist in consultations presently taking place with civil society on human rights protections in Australia.⁶
- Projects to Influence the development of government policy; The Commission's *Multicultural Position Paper* provided government with the human rights basis for renewing Australia's multiculturalism policy⁷. As Aboriginal and Torres Strait Islander Social Justice Commissioner I produce two reports annually that are tabled in Australia's national

⁴ http://www.hreoc.gov.au/racial_discrimination/face_facts/index.html

⁵ <http://www.hreoc.gov.au/partnerships/index.html>

⁶ <http://www.hreoc.gov.au/letstalkaboutrights/index.html>

⁷ http://www.hreoc.gov.au/racial_discrimination/multiculturalism/index.html

Parliament on the status of enjoyment and exercise of human rights by Indigenous Australians⁸.

- Community Engagement: Finally, many of our projects are directed to community capacity building and engagement. The Unlocking Doors project brought Muslim communities and police together in an exchange of information and views that would enable improved community relations⁹

⁸ http://www.hreoc.gov.au/social_justice/index.html

⁹ http://www.hreoc.gov.au/racial_discrimination/unlocking_doors/index.html