DISCUSSION PAPER 30 (1993) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

Terms of Reference, Participants, Submissions and Glossary

TERMS OF REFERENCE

In a letter dated 17 December 1991, the Commission received the following reference from the Attorney General, the Hon P E J Collins, QC.

> To inquire into and report on the current scope and operation of the *Anti-Discrimination Act* 1977 (NSW) and any related issues.
>
> In conducting the review the Commission was asked to have regard to:
>
> existing Commonwealth laws relating to anti-discrimination;
>
> Australia's international human rights obligations as they relate to anti-discrimination; and
>
> any related issues.

PARTICIPANTS

The Commission

The Law Reform Commission is constituted by the the *Law Reform Commission Act* 1967 (NSW). For the purpose of the Anti-Discrimination Reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

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The Commission invites submissions on the issues raised in this Paper. Submissions and comments should reach the Commission by **31 May 1993.** Details on how to make a submission are set out on page 7 - 9 of this Paper.

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GLOSSARY

The Commission has been conscious of the need to use plain English and to avoid technical legal terminology in order to make this Paper accessible to any person interested in discrimination issues. However, the use of some legal words and phrases cannot be avoided. Such words an phrases that may not be familiar to persons with a non-legal background are explained below:

Act: An Act of Parliament or the law made by Parliament; also called "statute law". A "Bill" becomes an Act of Parliament, when it is passed by both Houses of Parliament and is approved or "assented to" by the Govenor General. See "Bill" below.

Affidavit: A written statement, sworn or affirmed, which may be used as a substitute for oral evidence in court.

Bill: Usually refers to the draft form of a proposed statute (Act) as presented to Parliament. Not all Bills ultimately become Acts of Parliament; only those that are passed by both Houses of Parliament and assented to by the Govenor General.

Common law: The law developed by the courts through the accumulation of judicial decisions, as distinct from law laid down in Acts of Parliament. The common law is used to supplement and interpret Acts of Parliament.

Commonwealth Government: The central government of Australia based in Canberra. Also referred to a federal legislation.

Complainant: The person who makes a complaint [of discrimination].

Conciliation: A non-judicial system for resolving disputes between two or more parties by a process involving negotiation and agreement in the presence of an appointed third party.

Constitution: The law which contains the fundamental principles and rules according to which a nation or state is governed. In Australia, the Commonwealth and each of the states has a written Constitution. The Commonwealth Constitution lists the powers of the Commonwealth government. Some, but not all of these powers, are exclusive to the Commonwealth and are denied to the states. Other powers are shared between Commonwealth and state governments.

Entrenched: Rights or entitlements which cannot be removed or amended except by a special procedure. In Australia, the Constitution which is entrenched can only be changed by a referendum, that is a reference of the proposal to the electorate for acceptance or rejection.

Federal Government: May refer to the Commonwealth Government, see above. However, it may also refer to a system of government where there is a division of legislation, executive and judicial power between two main levels of governments. Such a system exists in Australia, as well as in the United States of America, Canada, Germany and Nigeria. The division of power is between the Commonwealth, which is the central government and has responsibility for the nation as a whole, and the state governments which have responsibility for particular geographic areas. This division of power results in a citizen having to obey two sets of laws, elect two governments, and use two court systems (federal and state). It is because Australia has a federal system of government that we have both federal and state anti-discrimination laws.

Industrial Awards: Made pursuant to federal and state industrial relations legislation, setting out terms and conditions of employment for a defined period of time. The purpose of an industrial award is to regulate (wholly or partly) the conditions of employment of persons in a particular trade or industry.

Jurisdiction: May refer to:

- the power of a state to pass and enforce it's laws; or

- the extent or range of power of a court, tribunal or other regulatory authority to hear and determine a matter; or

- the geographical area over which such power is exercised.

Legislation: The body of laws made by Parliament. These laws consist of:

- Acts of Parliament; and

- Regulations, Ordinances, Rules which are also called "subordinate" or "delegated" legislation. See "Regulation" below.

Litigation: The taking of a dispute before the court.

Preamble: An introduction to an Act or Bill setting out its purpose.

Ratification: The process whereby a state may express its consent to be bound by a treaty, involving formal confirmation by the state of its initial signature to the treaty. Ratification is normally required before a treaty becomes binding.

Regulation: A form of subordinate or delegated legislation, essentially of a subsidiary or procedural nature generally relating to the administration of the Act under which it is made. Regulations and other forms of delegated legislation are not made by Parliament, but are made under the delegated authority of the Parliament, usually by a Minister or senior public official.

Respondent: The person against whom a complaint is made, for example, the employer in a complaint of employment discrimination.

Sunset Clause: A clause in a statute providing that the Act or part of it will cease to have effect at some future time.

1. Introduction

THE COMMISSION'S REFERENCE

The terms of reference

1.1 In a letter dated 17 December 1991, the Commission received the following reference from the former Attorney General, the Hon P E J Collins QC .

> To inquire into and report on the current scope and operation of the *Anti-Discrimination Act* 1977 (NSW) and any related issues.
>
> In conducting the review the Commission was asked to have regard to:
>
> existing Commonwealth laws relating to anti-discrimination;
>
> Australia's international human rights obligations as they relate to anti-discrimination; and
>
> any related issues.

Background

1.2 The *Anti-Discrimination Act* 1977 (NSW) ("the Act") commenced on 1 June 1977 making New South Wales the second Australian State to pass legislation prohibiting discrimination. The Act has now been in operation for fifteen years and many States have since followed suit by enacting similar legislation. In the federal jurisdiction, discrimination on the grounds of race and sex is covered by the *Racial Discrimination Act* 1975 (Cth) and the *Sex Discrimination Act* 1984 (Cth) respectively. Discrimination on the ground of disability is now covered by the *Disability Discrimination Act* 1992 (Cth) which was passed on 15 October 1992 and commenced in part on 26 November 1992. (The operative provisions are scheduled to commence on 1 March 1993.)

1.3 The rationale behind the enactment of the *Anti-Discrimination Act* was recognition of the need for, and importance of, the protection of fundamental rights and freedoms and the provision of equal opportunity for all people. Introducing the Bill in Parliament, the then Premier, the Hon Neville Wran QC, said in his second reading speech that "all human beings are born equal, have a right to be treated with equal dignity, and a right to expect equal treatment in society" and that "the [Anti-Discrimination] Bill is an attempt, as far as legislation can, to end intolerance, prejudice and discrimination in our community".

1.4 The *Anti-Discrimination Act* 1977 (NSW) is described in its Preamble (the introductory part of the Act) as "an Act to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons". Since coming into force, the New South Wales Parliament has responded to the need for widening the scope of the Act, prompted by decisions of the Supreme Court and the Equal Opportunity Tribunal and recommendations of the Anti-Discrimination Board. Accordingly, the Act has been amended on numerous occasions. The amending legislation has:

introduced new grounds of discrimination (eg physical impairment was added in 1981, intellectual impairment and homosexuality in 1982);

established new administrative and regulatory bodies (eg the Office of the Director of Equal Opportunity in Public Employment was created in 1980, the Equal Opportunity Tribunal in 1981); and

widened the overall scope and operation of the Act (eg indirect discrimination was made unlawful in 1981, pregnancy was included as discrimination on the ground of sex in 1981, appointment of part-time judicial members to the Equal Opportunity Tribunal was allowed in 1982, the Tribunal was allowed to conduct hearings in private in 1984, racial vilification was made unlawful in 1989, compulsory retirement of most NSW public service employees was made unlawful in 1991, with the introduction of similar provisions for local government in 1992 and the private sector in 1993).

1.5 Although the Act has been amended many times to deal with specific matters, it has never been the subject of a comprehensive review in its fifteen years of operation and suffers from the effects of piecemeal amendment. It is therefore timely that the Law Reform Commission conduct a comprehensive, overall review of the Act. The Commission's review is not limited to the Act's current operation. It will also consider the purpose and effect of anti-discrimination law. Such a review is necessary, given the length of time that has lapsed as well as the changing and constantly evolving social, political and legal conditions since the Act was first introduced in 1977.

1.6 There have been a number of inquiries in recent years at both the federal and state level on various aspects of discrimination law. The Commission will consider the reports of these inquiries in the course of its review.

The scope of the reference

1.7 The scope of this reference is extremely broad. It involves an analysis of the *Anti-Discrimination Act* 1977 (NSW), which covers six grounds of discrimination, namely race, sex, marital status, physical impairment, intellectual impairment and homosexuality. The Act also makes racial vilification unlawful and prohibits compulsory retirement from public sector employment on the ground of age. Each ground has various areas of operation, such as work, education, the provision of goods and services, and is subject to special and general exceptions. The Act also sets in place procedural mechanisms for its operation and enforcement by the establishment of the Anti-Discrimination Board, the Equal Opportunity Tribunal and the Office of the Director of Equal Opportunity in Public Employment. The Commission will carry out a detailed analysis of the Act which is intended to establish whether there are significant gaps and anomalies in the legislation and whether the enforcement mechanisms are effective.

1.8 The Commission is committed to conducting a comprehensive review of the Act and its purpose and effect, including a consideration of the philosophical issues underlying discrimination and other approaches to anti-discrimination law and practice. Existing federal discrimination and other associated legislation gives rise to constitutional issues that will be addressed in the review. The relationship between the principles of anti-discrimination as embodied in the Act and the international human rights conventions to which Australia is a signatory will also be examined. The Commission will also consider the relationship between anti-discrimination law and other related areas, especially employment and industrial relations, and the continuing effectiveness of anti-discrimination law in the context of developments and changes in those related areas.

THE COMMISSION'S APPROACH

Essential aspects of the process of law reform

1.9 The Commission's approach to all its references involves extensive *research* and *consultation*. The purpose of research is to ascertain what the existing law is, what its defects are, what has been done to correct those defects in other jurisdictions, how effective those solutions have been and what solutions would work best in New South Wales. The purpose of consultation is to involve the community in the law reform process in order to facilitate a workable and practical solution to the matter under review. As Justice Hartt, the first Chairman of the Law Reform Commission of Canada once said "[l]aw touches the lives of everyone; it is therefore the business of everyone".

The conduct of the reference to date

1.10 Given the breadth of the reference and the number of interest groups and people it would wish to consult, the Commission decided that it should seek a preliminary response to the terms of reference. Accordingly, the terms of reference were distributed to people and organisations in New South Wales and elsewhere in Australia, including a number of overseas law reform agencies. Approximately 700 individuals and organisations have been contacted. Comments made and issues raised in preliminary meetings, interviews, written submissions and telephone calls have been incorporated in Chapters 2 to 7 of this Discussion Paper and will be dealt with in more detail in the next Discussion Papers.

The purpose of this Discussion Paper

1.11 The purpose of this Discussion Paper is to outline the approach the Commission proposes to adopt in conducting this review and to identify issues of concern. It is meant to promote discussion of, and to invite submissions on, those issues and the conceptual framework within which the Commission proposes to deal with the issues raised by the reference. *This Paper does not provide discussion on the scope and operation of the Act in great detail nor does it make specific recommendations for reform.*

The next step

1.12 The volume and complexity of the issues to be addressed in the course of the review will require the Commission to publish a further Discussion Paper (possibly two) which will focus on the major issues of concern and make draft recommendations for change. The contents of these further Paper(s) will be influenced by the response to the issues raised in this preliminary Discussion Paper. The draft recommendations made in those Papers will be subject to extensive community consultation, after which the Commission will prepare its final Report to the Attorney General.

The structure of this Discussion Paper

1.13 This Paper consists of seven chapters.

Chapter 1 outlines the approach that the Commission proposes to adopt in conducting the review.

Chapters 2 to *7* identify specific issues that have arisen for consideration out of the Commission's preliminary research and comments made at meetings and interviews, as well as in written submissions and telephone calls. The Commission emphasises that the issues identified are not meant to be an exhaustive list of all the relevant issues. They are a tool to stimulate further discussion. To facilitate consideration of the issues in context, the issues for consideration are preceded by a general comment. Although each chapter deals with different subject areas, some issues for consideration overlap between chapters. Such issues have been cross referenced within the Paper and should not be considered in isolation. Each chapter is followed by a list of suggested background reading material. Those lists include articles, books and cases used in the preparation of the respective chapters, as well as some additional references that may be useful to gain a better understanding of the issues raised.

1.14 The contents of chapters 2 - 7 are as follows:

Chapter 2 - The wider issues: impact of the Constitution, international human rights obligations and industrial relations on discrimination law

This chapter identifies issues relating to:

constitutional inconsistencies between federal and state discrimination legislation;

Australia's international human rights obligations and discrimination legislation; and

the nexus between industrial relations and discrimination legislation.

Chapter 3 - Discrimination law in Australia

This chapter identifies issues relating to:

the historical background to discrimination law in Australia;

overview of discrimination legislation in other jurisdictions; and

the legislative framework of the *Anti-Discrimination Act* 1977 (NSW) and the main features of discrimination under the Act.

Chapter 4 - The scope of the Anti-Discrimination Act

This chapter identifies issues relating to:

grounds of discrimination;

areas of operation; and

special and general exceptions.

Chapter 5 - General observations on the scope of the Act

This chapter identifies issues relating to:

the case for and against extending the grounds of discrimination;

other grounds and areas of discrimination; and

the distinction between public and private spheres of activity.

Chapter 6 - The Act's enforcement mechanisms

This chapter identifies issues relating to:

the Anti-Discrimination Board;

the Equal Opportunity Tribunal; and

the Office of the Director of Equal Opportunity in Public Employment.

Chapter 7 - Legislation vs education

This chapter identifies issues relating to:

the roles of legislation and education in preventing and dealing with discriminatory conduct; and

the question of resources.

HOW TO MAKE A SUBMISSION OR COMMENT

Who can make a submission?

1.15 Anyone may make a submission or comment, including people to whom the legislation applies or who think it should apply, relatives or service providers, members of the legal profession or members of the public. If you have been affected by the Act in any way or have a particular interest in the area of anti-discrimination law, the Commission would like to hear from you. The Commission is interested to hear any comments, from any source, about any of the matters raised in this Discussion Paper. You can do so in any of the following ways:

Make a written submission by writing to:

Mr Peter Hennessy

Executive Director

NSW Law Reform Commission

GPO Box 5199

SYDNEY NSW 2001

[DX 1227 SYDNEY]

Telephone the Commission on **(02) 9228 8230** and ask to speak to a Legal Officer to make your comments by telephone.

Telephone or write to the Commission to arrange to make a submission in person.

You can also contact the Commission by fax on **(02) 9228 8225**

If you need an interpreter or have some other difficulty of communication or transport, please arrange for someone to telephone the Commission and we will attempt to make some suitable arrangements.

What should a submission contain?

1.16 There is no special form for or restriction on what can be said in a submission. Your submission can simply describe your experience. The Commission welcomes examples of instances where the provisions of the Act or the mechanisms established by the Act have been inadequate or ineffective in solving a discrimination problem. Comments about the effectiveness of the Act in achieving its objectives and ideas or suggestions on how the Act can be made more effective will also be welcome. You can, but need not, make comments about reform of the law and whether or not you would like to see the law changed in any way. It may be useful to address the areas of concern on which the Commission would like more information and the issues raised in Chapters 2 to 7 of this Paper. However, it is not necessary to respond to all the issues raised in those chapters. You can choose to comment on any one, or all of the issues raised. You may also wish to discuss other related issues that have not been raised, but should be considered by the Commission. The Commission also welcomes copies of submissions made to other agencies inquiring into discrimination related matters, whether at the federal or state level. The Commission emphasises that comments on *any* aspects of the legislation and its impact will be welcome and will be given careful consideration.

Closing date for submissions

1.17 The closing date for submissions on this Paper is **31 May 1993**. There will, however, be other opportunities to contribute to the Commission's work on this reference. A further Discussion Paper is to be published and community consultations will be conducted by the Commission before the final Report is prepared.

Use of submissions and confidentiality

1.18 Submissions made to the Commission may be used in two ways:

> Since the Commission's process of law reform is essentially public, copies of submissions made to the Commission will normally be made available on request to any person or organisation. However, if you would like all, or part, of your submission or comment to be treated as confidential, please indicate this in your submission or comments. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act* 1989 (NSW).

In preparing the next Discussion Paper(s) and the final Report, the Commission may also find it useful to refer to and make mention of comments submitted in response to this Discussion Paper. However, if a request for confidentiality is made, it will be respected by the Commission in relation to the publication of such submissions in a Discussion Paper or Report.

2. The Wider Issues: Impact of the Constitution, International Human Rights Obligations and Industrial Relations on Discrimination Law

INTRODUCTION

2.1 Discrimination law, like any other law, does not operate in a vacuum. It is influenced and affected by changing community needs. It is also affected by other areas of the law. Two areas of the law that have a significant impact on discrimination law and practice are *constitutional law* and *industrial relations law*. Australia's international human rights obligations also exert considerable influence on discrimination law. This chapter considers the impact of these other areas on discrimination law, with particular emphasis on their impact on the *Anti-Discrimination Act* 1977 (NSW) ("the Act").

THE CONSTITUTION AND DISCRIMINATION LEGISLATION

Federal and state discrimination legislation

2.2 The Australian Constitution (*The Constitution of the Commonwealth of Australia Act* 1901), creates two levels of government, federal and state, both having powers to make laws. Federal and state governments have both enacted discrimination legislation. The federal discrimination statutes presently in force are the following:

Racial Discrimination Act 1975 (Cth);

Sex Discrimination Act 1984 (Cth);

Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth); and

Human Rights and Equal Opportunity Commission Act 1986 (Cth).

The *Disability Discrimination Act* 1992 (Cth) has also recently been enacted and certain provisions commenced operation on 26 November 1992; the operative provisions of the Act will commence on 1 March 1993.

All states and territories, except Tasmania, have discrimination legislation; the Northern Territory will be the most recent entrant into the field when its discrimination legislation, which was passed by Parliament on 17 November 1992, is assented to in 1993.

From where does the Commonwealth derive its legislative power?

2.3 The main source of power that enables the Commonwealth to legislate in the field of equal opportunity and anti-discrimination emanates from s 51(xxix) of the Australian Constitution. That provision enables federal legislation to be enacted with respect to "external affairs" and permits the Commonwealth Government to ensure that international obligations assumed by Australia are given effect throughout the country. It is this power that provides the most common basis for the discrimination statutes enacted by the Commonwealth.

2.4 Federal discrimination legislation also derives validity from other heads of legislative power in the Constitution. For instance, s 5 of the *Racial Discrimination Act* 1975 (Cth) draws on the power in s 51 (xxvii) of the Constitution with respect to immigration and emigration; similarly s 9 of the *Sex Discrimination Act* 1984 (Cth) draws on a variety of heads of power, such as the trade and commerce power and the corporations power. The courts have also held that, where an international obligation deals with a subject matter within Commonwealth power, even if the matter is not within a direct head of Commonwealth power, the Commonwealth may legislate to give effect to the obligation.

2.5 Although the Commonwealth has enacted various statutes affording protection against different kinds of discrimination, the Constitution says little about human rights and nothing about equal opportunity or discrimination against individuals in *express* terms. However, in the recent landmark decision of *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 108 ALR 577, the High Court ruled that the Constitution provides an *implied* right to free political speech. This decision has prompted speculation as to whether other human rights and a wider range of protections are implied in the Constitution.

AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND DISCRIMINATION LEGISLATION

How are international obligations assumed?

2.6 International obligations arise when the Commonwealth Government signs and ratifies an international convention or treaty. Thus, when the Commonwealth Government decides that Australia should become a party to an international convention, it also takes on responsibility for the implementation of the convention. The Commonwealth can then enact the provisions of such conventions (to which it is a party) into domestic legislation. The legislation must conform with the conventions, though not necessarily in precise terms.

What is an international convention?

2.7 An international convention is an agreement between different countries to regulate or make rules about matters of common interest. By ratifying a convention, a country undertakes to comply with the terms of the convention. In the Australian context, this can only be done by the Commonwealth Government since it is the only entity that possesses full international personality.

International Conventions applicable to federal discrimination legislation

2.8 The *Racial Discrimination Act* 1975 (Cth) gives domestic effect to Australia's ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination,* which is attached as a schedule to the Act. One of the stated goals of the *Sex Discrimination Act* 1984 (Cth) is to give effect to Australia's ratification of the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women,* which is similarly attached as a schedule to that Act. The *Disability Discrimination Act* 1992 (Cth) provides that certain provisions of the Act have effect in relation to discrimination against people with disabilities, to the extent that the provisions implement Australian responsibilities under certain international instruments. Most notably, these are the United Nations *International Covenant on Civil and Political Rights* and the *International Labour Organisation Convention concerning Discrimination in respect of Employment and Occupation.* The *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) established the Human Rights and Equal Opportunity Commission to administer the federal discrimination legislation. It promotes human rights as defined by the international instruments which are annexed as schedules to the Act:

> *International Labour Organisation Convention concerning Discrimination in respect of Employment and Occupation;*
>
> *International Covenant on Civil and Political Rights;*
>
> *Declaration of the Rights of the Child;*
>
> *Declaration on the Rights of Mentally Retarded Persons;* and
>
> *Declaration on the Rights of Disabled Persons.*

Importance of International Conventions

2.9 Since international conventions represent the collective aspirations and experiences of the world community on matters of common interest, they are a valuable source of legal principles. It must be noted, however, that Australia's international obligations are not limited to the conventions named above. For instance, in December 1990, Australia ratified the United Nations *Convention on the Rights of the Child.* There is no specific enabling legislation as yet, but the terms of the Convention will still influence Australia's domestic laws and policies. However, although legislation is not always necessary to comply with a convention, a convention does not become part of Australian law or create any enforceable rights and duties in the absence of specific implementing legislation.

2.10 In the context of Australian discrimination law and practice, the importance of international conventions is three-fold, in that:

> the objectives of the conventions are furthered in discrimination legislation;
>
> avenues of international supervision are provided; and
>
> the development of the common law is influenced.

These effects are discussed in more detail below.

Furtherance of objects of conventions in discrimination legislation

2.11 The impact of international conventions on *federal* discrimination legislation arises because the federal legislation is, to a large extent, based on the terms of these international conventions. The obligations contained in the conventions are therefore important to ensure a good understanding of the scope and correct interpretation of the federal legislation. Although most states and territories have passed legislation in relation to equal opportunity and anti-discrimination, they are not constitutionally bound to do so. States and territories that have no discrimination legislation of their own are governed by the federal discrimination legislation. International conventions consequently have an impact on the Commonwealth and on those states and territories without their own discrimination legislation.

2.12 In those states and the Australian Capital Territory which have their own discrimination legislation, soon to be joined by the Northern Territory, there is no restriction on the use of federal discrimination legislation, provided a complaint has not also been made under state legislation. Thus, the conventions upon which federal legislation is based can have an impact even on states and territories which have their own discrimination legislation, to the extent that federal legislation is relied on by a complainant in that jurisdiction.

2.13 With regard to the impact of international conventions on *state* discrimination legislation, s 6A(1) of the *Racial Discrimination Act* 1975 (Cth) and s 11(3) of the *Sex Discrimination Act* 1984 (Cth) provide that the respective Acts are "not intended to exclude or limit the operation of a law of a state or territory that *furthers the objects of the Convention* [upon which the federal Act is based] and capable of operating concurrently" [emphasis added]. Thus, to the extent that states enact discrimination legislation on a subject dealt with by the federal legislation based on a convention, the state legislation on the same subject must further the objects of the convention, to avoid inconsistency with the federal legislation. As Dr Gavan Griffith QC, the Commonwealth Solicitor-General, commented:

> State law which is inconsistent with Australia's treaty obligations will also, *ex hypothesi,* be inconsistent with any Commonwealth legislation implementing those obligations and the State law will be overridden through the operation of section 109 of the Constitution. Conversely, to the extent that Commonwealth legislation fails to implement treaty obligations, State law can be inconsistent with the unimplemented international obligation without being inconsistent with the Commonwealth law. ("Dancing Through the Minefield - Can Co-operative Federalism Work?", paper presented at the Conference *Human Rights - the Australian Debate,* University of New South Wales, 10 December 1985).

2.14 The impact of international conventions on state discrimination law is therefore limited to the extent that the federal legislation deals with the same subject matter, in fulfilment of an obligation imposed by convention. Thus, as Dawson J said in the case of *Gerhardy v Brown* (1985) 57 ALR 472 at 541:

> ... except to the extent that the Commonwealth has exercised its legislative power with respect to that subject matter, the exercise by the States of their legislative powers with respect to the same subject matter has no relevant limits and is not subject to any of the requirements of the Convention [the *International Convention on the Elimination of All Forms of Racial Discrimination*].

2.15 The issue of co-operative implementation of treaty obligations by federal and state laws has also been given some judicial support, adding weight to the impact of conventions on both federal and state discrimination law. In this respect, Dr Griffith, in the paper referred to at para 2.13, also noted that:

> [t]he external affairs power should support a Commonwealth law which demonstrably ensures that Australian law as a whole fulfils treaty obligations ... there is some judicial support for the view that a Commonwealth law under the external affairs power should ensure that laws giving effect to treaty obligations are uniform in their operation within the States.

Avenues of international supervision

2.16 The signing by Australia of the First Optional Protocol to the *International Covenant on Civil and Political Rights* has given Australian citizens and residents the right to complain to the United Nations Human Rights Committee about the violation of rights set out in the Covenant. The Committee only considers complaints between individuals and the government. Complaints concerning actions between private individuals are outside the scope of the Committee. It is also a pre-requisite that all domestic remedies must be exhausted before a case can be taken to the Human Rights Committee. Despite these and other limitations, the availability of this remedy is considered to be an avenue whereby Australian courts and Parliaments will be influenced by international human rights law.

Development of common law

2.17 An emerging trend that reveals the influence of international conventions (to which Australia is a party) concerns the use of such conventions in domestic law. This may arise in the courts through the development of the common law, when judges interpret statutes that are ambiguous and where there is a gap in the common law. It may also arise through Parliament, where laws are drafted with an awareness of international human rights standards.

2.18 The recent High Court decision of *Mabo v The State of Queensland* (1992) 66 ALJR 408, seems to point to the future development of Australian common law in keeping with international conventions and the extent to which they can influence Australian domestic law. Writing with the concurrence of Chief Justice Mason and Justice McHugh, Justice Brennan said, at 422:

> [t]he common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

2.19 The more recent High Court decision of *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2),* referred to above in para 2.5, further reveals that the courts are becoming increasingly aware of, and responsive to, human rights standards and values. A majority of the Court found that the political system established by the Constitution carried an implied guarantee of freedom of discussion of political affairs, leaving open the possibility that the Constitution may also contain other human rights guarantees. For further discussion on the impact of international conventions on the development of the common law, see the articles by Justice Kirby listed in the “Background Reading” section at the end of this chapter.

Issues for consideration

Impact of international conventions on discrimination law

Question 1

(a) Are there instances of inconsistency between the *Anti-Discrimination Act* 1977 (NSW) ("the Act") and the terms of the Conventions upon which the parallel federal Acts are based?

(b) If so, how should such inconsistencies be addressed?

Question 2

(a) Should the focus of the Act be widened by implementing principles contained in other international instruments to which Australia is a signatory?

(b) If so, which particular international instruments should the Act recognise and implement?

Question 3

(a) As stated in one submission, should human rights standards contained in international conventions continue to influence the interpretation of domestic law?

(b) If so, should this be done within the parameters of the common law, as is presently the case, or should it be done by statutory enactment, perhaps by an amendment to the *Interpretation Act* 1987 (NSW), or both?

FEDERAL AND STATE LAWS - A PROBLEM?

The problem of inconsistency

2.20 As stated above, since the Constitution has created federal and state governments, the Commonwealth and the states are both able to legislate on a whole range of issues. Such legislation may sometimes be inconsistent. The inconsistency may be between federal and state legislation on the same subject matter (such as a provision in the *Racial Discrimination Act* 1975 (Cth) and a provision relating to race in the *Anti-Discrimination Act* 1977 (NSW)), or between federal and state legislation on different subject matters (such as a provision in a federal Act other than discrimination legislation which offends a prohibition of discrimination contained in the *Anti-Discrimination Act* 1977 (NSW)).

2.21 Section 109 of the Constitution provides that, in the event of inconsistency between a law of the Commonwealth and a law of a state, the former shall prevail. Despite s 109, the High Court has had to consider the issue of inconsistency on many occasions.

Inconsistency between federal and state discrimination laws

2.22 As stated earlier, most states, the Australian Capital Territory and the Northern Territory have enacted discrimination legislation in addition to the federal discrimination legislation. This gives rise to the problem of inconsistency between federal and state discrimination laws.

2.23 In *Viskauskas v Niland* (1983) 153 CLR 280, the High Court considered the issue of inconsistency between federal and state laws and held that the racial discrimination provisions of the *Anti-Discrimination Act* 1977 (NSW) were inconsistent with the *Racial Discrimination Act* 1975 (Cth). That decision resulted in an amendment to the *Racial Discrimination Act.* The amendment made it clear that a state or territory law, which furthers the objectives of the *International Convention on the Elimination of All Forms of Racial Discrimination* (which was ratified by the Commonwealth) and is capable of operating concurrently with federal law, can stand alongside the federal law. Similar provisions were included in the *Sex Discrimination Act* 1984 (Cth) when it was enacted and more recently in the *Disability Discrimination Act* 1992 (Cth).

2.24 Despite legislative efforts to solve the problem of inconsistency, it still exists. In the first instance, the provision for concurrent operation does not avoid the difficulties of direct inconsistencies. There is also a more important limitation arising out of the external affairs power. The courts have held that the validity of an Act depends largely on the implementation of a convention, whose terms require equal operation throughout Australia. However, achieving equal operation of anti-discrimination laws Australia-wide is a problem. Currently all states (except Tasmania), the Australian Capital Territory and the Northern Territory have discrimination legislation. Consequently, the Commonwealth's intention to preserve state legislation results in uneven operation of discrimination laws. This is because the law in the states which have preserved anti-discrimination laws will differ from the law in the states which have no anti-discrimination law to be preserved. The problem of uneven operation could also extend to states which do have anti-discrimination legislation, if the provisions in the various state laws are not identical with one another.

An illustration of the problem:

This problem can be illustrated by an exception to discrimination in the area of employment on the ground of sex as follows:

Section 30 of the *Sex Discrimination Act* 1984 (Cth) permits what would otherwise be unlawful discrimination on the ground of sex where a person's sex is a genuine occupational qualification for the job. Section 30(2) expands on the exception to include the following circumstances:

the occupant of the position is required to live on the premises;

there are no separate sleeping/sanitary facilities;

persons of one sex already occupy the premises;

it is not reasonable to expect separate facilities to be provided by the employer.

The *Equal Opportunity Act* 1984 (WA), the *Anti-Discrimination Act* 1991 (Qld) and the *Discrimination Act* 1991 (ACT) contain almost identical provisions.

The *Equal Opportunity Act* 1984 (SA) has a defence of genuine occupational qualification but does not go as far as the Commonwealth, Western Australia, Queensland and the ACT and will therefore be subject to judicial interpretation.

The *Anti-Discrimination Act* 1977 (NSW) contains the defence but omits the requirement that persons of the relevant sex already occupy the premises.

The *Equal Opportunity Act* 1984 (Vic) has no equivalent provision.

Would the above state legislation be able to operate concurrently with the Commonwealth *Sex Discrimination Act* 1984?

If the respective provisions apply in the various states, the resultant position will be the operation of uneven exemptions Australia-wide and direct inconsistency between the Victorian *Equal Opportunity Act* (and to a lesser extent the New South Wales *Anti-Discrimination Act*) and the Commonwealth *Sex Discrimination Act.*

The *Sex Discrimination Act* 1984 (Cth) provides that state laws dealing with sex discrimination will be valid unless there is direct inconsistency with the federal Act. In other words, identical provisions will be valid and therefore preserved by the federal Act.

If only the identical provisions are valid and therefore preserved, there would still be uneven operation since the other states will not have such identical provisions capable of being preserved.

If only the identical provisions are preserved, and if the federal law operates in the states with unpreserved or no legislation, what purpose is served by the presence of separate state *and* federal laws in the area of anti-discrimination?

Issues for consideration

Inconsistency between federal and state discrimination laws

Question 4

How best can the constitutional inconsistencies described above be avoided?

Question 5

In a federal system such as ours, where should the responsibility lie for ensuring the proper protection of rights and freedoms? Is it something for which the Commonwealth Government should be solely responsible for by enacting legislation across the nation, should it be a state matter or should the responsibility be shared between the Commonwealth and states? In other words, should there be federal and/or state legislation on anti-discrimination?

Question 6

(a) Should New South Wales repeal its legislation to the extent that it deals with matters covered by federal discrimination legislation (ie the provisions in the *Anti-Discrimination Act* 1977 (NSW) concerning race, sex and disability)?

(b) Conversely, should the *Anti-Discrimination Act* 1977 (NSW) mirror the federal discrimination law in all aspects, except where it is superior?

Other sources of inconsistency

Federal legislation (other than discrimination legislation) and state discrimination legislation

2.25 Another area in which the problem of inconsistency arises is between federal legislation (other than discrimination legislation), and state discrimination legislation. Such inconsistency can result in circumstances that could undermine the effectiveness of state discrimination legislation. This is because the same principles of constitutional law apply - that is, that federal Acts prevail over the state Acts, even if it results in a discriminatory situation.

An illustration of the problem:

The problem of conflict between federal legislation (not dealing with discrimination) and state anti-discrimination legislation is well illustrated by reference to the case of *Dao v Australian Postal Commission* (1987) 162 CLR 317. In that case the Australian Postal Commission determined (among other things) standards for minimum body weight of prospective employees of the Commission, pursuant to the requirements prescribed by the *Postal Services Act* 1975 (Cth). Two Vietnamese women were denied employment since they failed to meet the minimum body weight requirement and alleged discrimination on the grounds of race and sex under the *Anti-Discrimination Act* 1977 (NSW). Both the Supreme Court of New South Wales and the High Court held that the *Anti-Discrimination Act* had no application in this case due to its inconsistency with the federal Act, which prevails.

Federal awards and state discrimination legislation

2.26 Federal legislation includes federal awards because they are made under a federal Act. Thus, a federal award may override state anti-discrimination legislation if it appears that the award was intended to exhaustively cover the employment relationship. (For further discussion and issues for consideration on industrial relations issues, see paras 2.38 - 2.75.)

State discrimination legislation and other state legislation

2.27 In New South Wales, another source of inconsistency is other New South Wales legislation. Section 54 of the *Anti-Discrimination Act* 1977 (NSW) provides that acts done under statutory authority are excepted from the operation of the Act. Thus, discriminatory conduct, if authorised by statutory authority, will override the provisions of the *Anti-Discrimination Act* by virtue of the exception provided by s 54 of the Act. (See also discussion on General Exceptions in Chapter 4 of this Paper.)

Issues for consideration

Inconsistency between the *Anti-Discrimination Act* 1977 (NSW) and other New South Wales legislation

Question 7

Section 26 of the *Sex Discrimination Act* 1984 (Cth) renders unlawful the exercise of power under a Commonwealth law or program (conducted on behalf of the Commonwealth Government) if it results in discrimination on the grounds prohibited by that Act.

(a) Should a similar compliance requirement be included in the *Anti-Discrimination Act* 1977 (NSW) whereby other New South Wales legislation, awards and programs, will be required to comply with the Act, rather than be excepted and allowed to override it?

(b) Should such a compliance requirement be subject to exceptions?

(c) Would such a proposal have other ramifications that need to be considered?

(d) Is there a better way of resolving the problem of inconsistency?

Which law applies - federal or state?

2.28 Apart from the problem of inconsistency, another issue which arises out of the federal system is the choice of jurisdiction. With federal and state discrimination laws dealing with much the same subject matter, at least in the case of race, sex, and now disability, the complainant is often confronted with having to choose between federal and state legislation.

2.29 Various factors can influence this choice, including the range of grounds, the exceptions to those grounds, the areas of operation, the range of remedies available and the processing time. Making the right choice is important, particularly because the federal discrimination Acts (Race, Sex and Disability) prohibit an action being brought under their provisions where action has already been taken under state legislation regarding the same matter. State legislation does not have this restriction. It is therefore possible to initiate action under state legislation if action under federal legislation is unsuccessful.

2.30 In most states where there is a choice, a form of "co-operative federalism" exists, whereby the Commonwealth and states enter into agreements for mutual benefit. In Queensland, for instance, the functions of the Anti-Discrimination Commission established under the *Anti-Discrimination Act* 1991 (Qld) are undertaken by the Queensland office of the federal Human Rights and Equal Opportunity Commission ("the Commission"). In New South Wales, the agency arrangement (no longer in force) between the Commission and the New South Wales Anti-Discrimination Board ("the Board") was also a typical example. This arrangement gave the Board the right to investigate complaints covered by federal laws or New South Wales law. It was cost effective and provided a single point of access for complainants. This was the case in New South Wales until 30 June 1991 when the Board ceased to be the "agent" of the Commission.

2.31 The present position in New South Wales is that the Commission has assumed responsibility for complaints lodged under the federal discrimination legislation. Consequently, complainants who lodge complaints with the Board are arguably precluded from transferring that complaint to the Commission and proceeding under the federal legislation. The issue of inconsistency of application in terms of the differences in the provisions of the federal and New South Wales anti-discrimination legislation is therefore of much more significance than it was while the Board was the agent of the Commission. For example, the *Racial Discrimination Act* 1975 (Cth) prohibits discrimination on the ground of race of a person's relative or associate. The *Anti-Discrimination Act* 1977 (NSW) does not include comparable provisions. Similarly the federal provisions permit the Race Discrimination and Sex Discrimination Commissioners to require the production of information or documents, whereas there is no equivalent provision in New South Wales. These factors will no doubt have some bearing on the choice to be made by the complainant.

Issues for consideration

Federal or state law?

Question 8

(a) If federal and state anti-discrimination laws are to continue to operate concurrently, should some form of co-operative federalism be achieved?

(b) Is the Queensland arrangement a suitable model?

Question 9

Are there other appropriate legislative and administrative arrangements by which the responsibility of protecting human rights can be efficiently shared, thereby overcoming the problems caused by the need to choose between federal and state legislation?

THE FORM OF DISCRIMINATION LEGISLATION

2.32 Establishing which level of Government (federal or state) should enact human rights or discrimination legislation raises the related issue of the *form* that legislation should take: constitutionally entrenched equality rights; a general Bill of Rights; specific subject legislation; or a combination of the three?

Constitutionally entrenched equality rights

2.33 At present, equality rights are not enshrined in the federal or state Constitutions. However, following the recent landmark decision of the High Court in *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)*, referred to in paras 2.5 and 2.19 of this Paper, Justice Toohey, one of the judges who decided the case, said at a constitutional conference in Darwin on 5 October 1992, that it may be possible to construct an implied bill of rights in the Constitution. According to Justice Toohey, the existence of such an implied bill would enable the court to strike down legislation it perceived as an invasion of "fundamental common law liberties". The Government does not agree that the High Court established a general right to freedom of expression, still less that it can construct an implied bill of rights.

2.34 The Constitutional Commission in its Final Report (Vol 1, 1988) recommended that the Constitution be altered to provide the right to freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status or political, religious or ethical belief. This recommendation was intended to be "confined to the relationship between the individual and the arms of government" unlike the relevant federal and state discrimination laws which are concerned with governmental and other actions between individuals in relation to each other (as defined by the respective Acts). Giving its reasons for this recommendation the Commission stated, at para 489 of its Report:

> [t]he purpose of the proposed provision is to ensure consistency in the relationship between the individuals and the arms of government with respect to equality rights throughout Australia ... Whether or not the Federal and State Governments choose to legislate with respect to discrimination, and however the federal and state anti-discrimination laws vary between themselves, there should be a uniform, consistent and entrenched right to equality of the nature we propose.

Bill of Rights

2.35 Simply stated, a Bill of Rights is a means of securing fundamental human freedoms by listing, in general terms, those rights which are to be recognised and declared and providing some mechanism for their enforcement. Its value and worth will depend on the nature of the rights that are identified, the way in which those rights are defined, whether the Bill is to be entrenched in the Constitution (or merely embodied in an ordinary statute) and the mechanisms available for enforcement. The need for a Bill of Rights in Australia at the federal level has been debated for many years, most recently at the Human Rights Conference held in Canberra in July 1992.

A Bill of Rights for New South Wales?

2.36 An emerging issue is the question of State Bills of Rights. Although a federal Bill, establishing national standards, is clearly preferable because it will be capable of being entrenched in the Constitution, it has been suggested that the potential of State Bills of Rights should not be discounted. Addressing the twenty-second Australian Legal Convention in Brisbane, in 1983, Senator Gareth Evans said:

> [t]here is indeed a strong case for the enactment (as is the case in most States of the USA) of State Bills of Rights as well. The primary role of any such Bill of Rights would be to set general standards against which legislative enactments and executive behaviour could be tested, and if found wanting, modified or overturned: such Bills should also, if drafted in succinct and accessible terms, play a significant educative role in alerting the community to the nature and importance of those civil and political rights which have been traditionally regarded as crucial in civilised societies.

This issue was also addressed at the Human Rights Conference held in Canberra by Federal Human Rights Commissioner, Mr Brian Burdekin, who said that "the question of a Bill of Rights is not necessarily solely a question for consideration at the federal level in Australia". Some consideration has been given to this question in Victoria. In Queensland, the Electoral and Administrative Review Commission released an Issues Paper entitled "Review of the Preservation and Enhancement of Individual's Rights and Freedoms" in mid June 1992. This Paper deals with the question of a possible Bill of Rights for Queensland. However, no definitive results have been achieved in either jurisdiction. At the international level, there are precedents for sub-national Bills of Rights in the USA and Canada, where most, if not all, states or provinces have their own Bill of Rights to complement the federal one.

Specific subject legislation

2.37 An example of specific subject legislation is the form that discrimination legislation presently takes, that is, separate Acts dealing with discrimination only. In the federal arena, discrimination legislation is even more subject specific in that the federal Acts deal with specific types of discrimination (race, sex and disability). In the states and the Australian Capital Territory discrimination legislation deals with all types of discrimination.

Issues for consideration

Constitutionally entrenched equality rights

Question 10

In view of the multi-cultural nature of Australian society, there are problems of inconsistency between generally accepted equality rights and certain customary practices and traditions of other religions and cultures, for example in relation to the treatment of women. It has been suggested that such inconsistencies may be best addressed by entrenched equality rights.

(a) Should equality rights be entrenched in the federal Constitution?

(b) If so, should it be in the form of a constitutional amendment or an entrenched Bill of Rights?

Bill of Rights

Question 11

(a) Does New South Wales need its own Bill of Rights, irrespective of whether the Commonwealth enacts a Bill of Rights?

(b) If so, should there be a general Bill of Rights or specific discrimination legislation (as in the *Anti-Discrimination Act*) or both?

Question 12

Could a Bill of Rights, if agreed upon, be a schedule to the *Anti-Discrimination Act* with a preamble outlining the principles guaranteeing certain freedoms and rights and including a context in which these freedoms should operate? (For example, explaining that the right to freedom of expression is not absolute and must be limited by the prohibition of racial vilification provisions.)

Question 13

Should a New South Wales Bill of Rights override any New South Wales statute that appears to legislate against its listed freedoms/rights?

INDUSTRIAL RELATIONS AND DISCRIMINATION LEGISLATION

Background

Sources of standards for equal opportunity in employment

2.38 Australia's policy of equal opportunity and treatment in employment is based, at both the federal and the state level, on international instruments adopted in the field of human rights. The main sources of standards are the conventions of the International Labour Organisation ("ILO") and of the United Nations ("UN"). The ILO conventions dealing with discrimination in employment, ratified by Australia include:

Equal Remuneration Convention 1951 (No 100) ratified in 1974;

Discrimination (Employment and Occupation) Convention 1958 (No 111) ratified in 1973; and

Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities Convention 1981 (No 156) ratified in 1990.

2.39 The UN conventions dealing with discrimination in employment, ratified by Australia include:

Convention on the Elimination of All Forms of Racial Discrimination 1965 ratified in 1975;

International Covenant on Economic, Social and Cultural Rights 1966 ratified in 1976;

International Covenant on Civil and Political Rights 1966 ratified in 1980; and

Convention on the Elimination of All Forms of Discrimination Against Women 1981 ratified in 1983.

Implementation of conventions

2.40 Being a signatory to ILO and UN conventions obliges Australia to prevent discrimination in employment. This obligation is fulfilled by implementing *some* (but not all) of the conventions in legislation relating to anti-discrimination, affirmative action and industrial relations issues.

2.41 Discrimination legislation dealing with discrimination in employment exists nationally and statewide. For instance, the *Convention on the Elimination of All Forms of Racial Discrimination,* which is annexed to the *Racial Discrimination Act* 1977 (Cth), provides that measures to promote equality are not to be regarded as discrimination. Accordingly, that provision is included in s 8(1) of the *Racial Discrimination Act.* The *Sex Discrimination Act* 1984 (Cth) specifically states that one of its objects is to give effect to the *Convention on the Elimination of All Forms of Discrimination Against Women* and partly implements the provisions of that Convention relating to employment (the other part is implemented through industrial relations legislation). Complaints under ILO Convention 111 (*Discrimination (Employment and Occupation) Convention)* and the *International Covenant on Civil and Political Rights* are dealt with by the Human Rights and Equal Opportunity Commission in pursuance of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), although there is no specific legislation to implement the conventions. Similarly, there is no specific legislation to implement the ILO Convention 156 (*Workers with Family Responsibilities)* or the *International Covenant on Economic, Social and Cultural Rights*.

2.42 Equality provisions in the field of employment are also found in industrial relations legislation, labour codes and affirmative action legislation. For instance, part of the *Convention on the Elimination of All Forms of Discrimination Against Women* dealing with employment is implemented in the *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth) and the *Equal Employment Opportunity (Commonwealth Authorities) Act* 1987 (Cth). The *Industrial Relations Act* 1988 (Cth) also requires the Industrial Relations

Commission to have regard to the *Sex Discrimination Act* 1984 (Cth). The *Equal Remuneration Convention* (ILO 100) is dealt with by a combination of industrial legislation, awards, determinations and agreements, government policy and administrative arrangements.

2.43 It has been suggested that the impact of international standards in the employment area is diminished in Australia because not all conventions that have been ratified are incorporated into law. Additionally, even when incorporated, they are not implemented fully. Despite these difficulties, the international standards on equality in employment contained in the conventions referred to above, have contributed immensely to the development of Australian discrimination and industrial relations law.

2.44 The importance of international conventions relating to employment has been re-emphasised most recently by the Federal Government's plan to invoke its external affairs powers to give effect to several such conventions to offer federal protection to workers affected by the new Victorian industrial system. There is some scepticism about the constitutional validity of the proposed legislation. It is nevertheless a further confirmation of the potential impact that international conventions can have in the employment area.

The relationship between industrial relations and discrimination legislation

2.45 The fact that the international conventions relating to employment are implemented in discrimination legislation as well as in industrial relations legislation, shows that the two areas of law have a complementary effect on the employment relationship.

2.46 The *aim of discrimination legislation*, as far as it relates to employment, is to encourage and ensure equal employment opportunity and non-discriminatory attitudes among all people, so that employment decisions are based on merit and the capacity to perform the job, rather than characteristics that are irrelevant to the job. In seeking to ensure that employment decisions do not lead to unlawful discrimination, the *Anti-Discrimination Act* 1977 (NSW) ("the Act") prohibits employment discrimination on certain specified grounds and establishes a complaint system based on dispute resolution by conciliation. The Act also deals with equal opportunity in public employment, makes provision for the exercise of a research and policy function and for community education to promote and eliminate discrimination. (For further discussion see Chapters 3-7 of this Paper.)

2.47 The *aim of the industrial relations system* is to promote industrial harmony and balance the competing interests of employers and workers. The tools used to realise this balance are the awards and agreements made pursuant to the federal and state industrial relations legislation, which set out the terms and conditions of employment for a defined period of time. In New South Wales, the Industrial Relations Commission ("Industrial Commission") determines matters relating to an industrial dispute referred to it by unions or employers.

2.48 The main feature common to industrial relations and discrimination legislation (federal and state) is that they both affect the employment relationship. Although discrimination in employment is only one of the areas in which discrimination is prohibited under the *Anti-Discrimination Act* 1977 (NSW), it is, and has consistently been, the main area in which complaints are made. The Annual Report of the Anti-Discrimination Board for 1991/92 confirms that employment-related discrimination outnumbered all other areas of complaint during that period (673 complaints or 54%).

2.49 Issues relating to anti-discrimination and industrial relations were considered in the Niland Green Paper "Transforming Industrial Relations in New South Wales" in January 1990. As stated in the Green Paper:

> [w]hile industrial relations has long dealt with the idea of unfair or unequal treatment, not infrequently this results in members of some groups being treated more equitably than others. The past decade, however, has witnessed a considerable widening in the notion of unfair treatment at work: in this sense, community standards are probably changing more rapidly than the precepts and values in the mainstream of industrial relations. A sign of the times is that over half the case load of the Equal Opportunity Tribunal in New South Wales concerns grievances arising from problems at work. ... The principles of equal opportunity and anti-discrimination have become industrial relations issues in the 1980's in ways that were unthought of a generation ago. The area is likely to become even more critical to industrial relations into the 1990's.

2.50 The Green Paper led to a range of responses and efforts to deal with the problems identified, not least of which was the enactment of the new *Industrial Relations Act* 1991 (NSW).

Overlap between industrial relations and discrimination legislation

2.51 Since both industrial relations legislation and discrimination legislation deal with the employment relationship, there is in practice, an inevitable overlap between the two areas of law. As stated in the Niland Green Paper:

> [m]ost matters arising out of employment relationships dealt with by the Anti-Discrimination Board and the Equal Opportunity Tribunal could, technically, also be dealt with by the Industrial Commission or the Conciliation Commissioners provided the issue qualifies as an "industrial matter" ...

2.52 Under the new *Industrial Relations Act* 1991 (NSW), employees working under state awards (apart from those employed in businesses of less than 20 people) can bring complaints of discrimination before the Industrial Commission, if the complainant has gone through an internal grievance handling procedure. The new legislation also allows any person employed under a state award who is dismissed or threatened with dismissal to apply to the Industrial Commission for their claim of unfair dismissal to be dealt with. Thus, a woman dismissed on the ground of pregnancy will be able to pursue an action either in the industrial system or under the *Anti-Discrimination Act* 1977 (NSW).

2.53 There is also scope for dual litigation. Sections 235-244 of the *Industrial Relations Act* 1991 (NSW) relate to workers' compensation for injured employees and allow an employee to commence an action for reinstatement. The employee can also bring a separate action for discrimination on the grounds of physical impairment under the *Anti-Discrimination Act* 1977 (NSW). There is nothing in either Act to prevent employees bringing actions under both Acts.

2.54 Sections 245-254 of the *Industrial Relations Act* 1991 (NSW) deal with unfair dismissal. In this context, s 254 provides that the Industrial Commission should reject an application if a person has redress under another

Act (such as the *Anti-Discrimination Act*) and has commenced proceedings under that other Act or has not lodged an undertaking not to proceed under that other Act. However there is nothing in the *Anti-Discrimination Act* to prevent a person from gaining compensation in the industrial jurisdiction and then commencing proceedings under the *Anti-Discrimination Act*.

2.55 Given the overlap between the two jurisdictions, one of the most contentious issues about the determination of employment discrimination grievances is the selection of jurisdiction. Some argue that it belongs in the industrial jurisdiction, while others believe it belongs in the discrimination jurisdiction. Still others favour two different but parallel jurisdictions, so that complainants can select the most appropriate, depending on the circumstances of the case. This matter was dealt with in some detail in the Green Paper which considered the issue of choice in the light of the differences and similarities between the two jurisdictions. Some of the notable points of comparison were:

access - the anti-discrimination jurisdiction gives an individual, but not a trade union, standing to complain; the industrial jurisdiction gives only a trade union standing to act on an individual member's complaint, thereby responding to collective rather than individual problems;

process for resolving conflict - both jurisdictions promote conciliation but conciliation officers in the discrimination jurisdiction can only facilitate agreement, whereas in the industrial jurisdiction the Conciliation Commissioner can give determinations;

evidence - neither jurisdiction is bound by rules of evidence, but the need to determine complex questions of law in the discrimination jurisdiction have sometimes resulted in proceedings in the Equal Opportunity Tribunal being perceived as unduly legalistic;

outcomes - conciliation and arbitration in the industrial jurisdiction must comply with industrial principles, which often contain provisions that can have a discriminatory effect; determinations in the discrimination jurisdiction must comply with principles of equality which cannot have a discriminatory effect and may sometimes be contrary to accepted industrial principles. Also, although damages can be awarded in both jurisdictions, industrial law generally uses principles of contract law and is therefore restricted to past losses of an economic nature; discrimination law uses principles of tort law which includes past and future losses, and economic and social damages, but with a maximum limit of $40,000.

2.56 Despite the above, the Green Paper noted the effectiveness of maintaining the contribution of both jurisdictions to the eradication of unfair practices in the employment relationship. It stated that in view of the "complex and socially sensitive nature of direct and systematic discrimination" and the "new and path breaking work of the Equal Opportunity Tribunal in bringing forth new and appropriate standards of fairness in the world of work", the "preferred arrangement is to continue dual jurisdictional coverage". However, the Green Paper recommended that "particular initiatives to enhance the effectiveness of the work of the Industrial Relations Commission in the area of anti-discrimination, and the provision of better co-ordination arrangements between tribunals in the two jurisdictions" should be considered.

Issues for consideration

Overlap between industrial relations and discrimination legislation

Question 14

What are the issues facing the complainant in deciding whether to seek redress through the industrial or discrimination jurisdiction?

Question 15

Should joint conciliation be considered with a formal mechanism for referral of conciliation from one jurisdiction to the other?

Question 16

(a) Should there be closer co-ordination and contact between the Anti-Discrimination Board, the Equal Opportunity Tribunal and the Industrial Relations Commission to consider issues of mutual concern, including overlapping jurisdiction?

(b) If so, how can such co-ordination be facilitated?

Question 17

Are there areas in which discrimination in employment is not covered effectively by either jurisdiction?

Dual actions

Question 18

It has been submitted that it is unfair and arguably an abuse of process and not in the public interest for an employer to have to defend two actions arising out of the same set of facts.

(a) Should both the *Industrial Relations Act* and the *Anti-Discrimination Act* specifically prevent dual proceedings where the claims, issues and remedies are similar, by requiring that an aggrieved party must elect to proceed under one law and waive their rights under the other law?

(b) Alternatively, is there merit in allowing an aggrieved party to bring actions in both jurisdictions?

Recent trends in industrial relations that impact on discrimination issues

2.57 Major changes have recently occurred in industrial relations, in both federal and state spheres of government. As stated above, the operation of industrial provisions affects equity in employment and has an impact on discrimination issues. Thus, changes that provide safeguards for disadvantaged workers can be understood as complementary to the more individualistic focus of traditional anti-discrimination legislation.

Conversely, new industrial relations policies and legislation can fail to embody the principles of anti-discrimination. Some of the more important changes that may have an impact on discrimination issues are noted below.

National Wage decision and enterprise bargaining

2.58 In Australia, centralised wage-fixing systems enable equal pay provisions, without the need for legislation. It has been argued that such centralised systems have permitted incomes policies to address the interests of the low-paid and have consequently benefited many disadvantaged groups.

2.59 New trends in industrial relations have been reflected in the National Wage decisions in recent years. The Australian Industrial Relations Commission, in the National Wage Decision of October 1991, adopted the principle of enterprise bargaining within a regulated framework. Enterprise bargaining refers to the decentralised process through which management and employees (and their organisations, including unions) negotiate and reach agreement about the pay and working conditions to suit the needs of people within the enterprise. According to the Discussion Paper on enterprise bargaining by the Department of Industrial Relations, Employment, Training and Further Education published in 1992, enterprise bargaining focuses the attention of management and employees on recognition of their common interests in the performance of their organisations. Through negotiation, they can agree on how staff may be better organised to achieve the organisation's objectives, and on industrial conditions which are tailored to those working arrangements.

2.60 The *Industrial Relations Act* 1991 (NSW) requires that National Wage decisions are to be considered in relation to the conditions of employment. The *Industrial Relations Act* also supports the introduction of enterprise bargaining. It provides for agreements to be struck through enterprise bargaining and places emphasis on parties accepting greater responsibility for industrial arrangements at the enterprise level.

Impact of enterprise bargaining on disadvantaged groups

2.61 Although enterprise bargaining is now generally accepted as a way for Australian industry to become more productive and competitive, there has been concern that some disadvantaged groups, such as women, would be at a further disadvantage and discriminated against in an enterprise bargaining regime. The National Women's Consultative Council convened a forum in May 1992 to consider the issues which enterprise bargaining and other methods of wage fixing present for women. In its Interim Outcomes Report (July 1992), the Council has listed some concerns for women workers and strategies to address those concerns. In essence, the concerns arose from the structure of the labour market which places men and women in different circumstances from which bargaining commences. Disadvantages anticipated for part-time workers (which was found to be dis-proportionately female) were liable to have a much greater impact on the female workforce. Similar concerns may be shared by other disadvantaged groups and possibly exacerbated for women from non-English speaking backgrounds, Aboriginal and Torres Strait Islander women and who have a disability.

Awareness of principles of equal opportunity

2.62 A relatively recent trend, both in federal and New South Wales industrial relations law and policy is the requirement to be aware of and implement principles of equal opportunity. Section 93 of the *Industrial Relations Act* 1988 (Cth) places a specific onus on the Australian Industrial Relations Commission to take account of the principles embodied in the federal discrimination legislation. Section 3 of the *Industrial Relations Act* 1991 (NSW) includes non-discrimination in its objects as follows:

> to promote the conduct of industrial relations in a non-discriminatory manner and to provide for equality of opportunity in employment matters.

2.63 The *Industrial Relations Act* 1988 (Cth) was also more recently amended by the *Industrial Relations Legislation Act* 1992 (Cth). One of the aims of the amendment was to facilitate workplace bargaining agreements, to encourage their use in the prevention and settlement of disputes, and to specify the safeguards against proposed agreements that would potentially disadvantage employees. The amendment requires the Australian Industrial Relations Commission to be satisfied that workers covered by an agreement are not disadvantaged, using a 'test' of disadvantage, before it certifies such an agreement. The 'test' relates to the terms and conditions of employment which are not to be lowered if the certification of the proposed agreement would result in reduction of any entitlements or protection, or if the reduction is contrary to the public interest. This amendment applicable to industrial agreements is consistent with the extension of the *Sex Discrimination Act* 1984 (Cth) by recent amending legislation (*Sex Discrimination and Other Legislation Amendment Bill* 1992 (Cth) passed by Parliament on 8 December 1992), to cover federal awards and variations to industrial awards. This amendment will guard against the introduction of discriminatory provisions in new awards.

2.64 Amendments to the *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth), also passed by Parliament on 8 December 1992, are intended to introduce the concept of contract compliance, whereby Federal Government contracts for goods and services and specified industry assistance will only be available to employers who comply with the requirements of the Act.

Other co-operative ventures

2.65 The legislative changes referred to above illustrate the trend towards a co-operative approach between industrial relations and anti-discrimination law, and the importance of both jurisdictions acting in concert to address the complexity of the dynamic area of employment. The value attached to this co-operative approach is further evidenced by the current Inquiry into Pregnancy Discrimination and Maternity Leave which is being jointly conducted by the Anti-Discrimination Board, the Department of Industrial Relations, Training and Further Education and the Women's Co-ordination Unit in New South Wales.

2.66 In recognition of the high proportion of complaints made to the Anti-Discrimination Board which are employment related, the Board has recently produced *Guidelines for Employers.* This is a document setting out the principles and law of anti-discrimination and equal employment. The Board has also established a specialist Employers' Advisory Service and continues to conduct training sessions for managers, make presentations at employers' conferences and produce a range of employer-related resources.

Issues for consideration

Implications of recent trends in industrial relations for discrimination law

Question 19

How effective are the new directions in industrial relations from an anti-discrimination perspective?

Question 20

Is the reference to equal opportunity in the objects of the *Industrial Relations Act* 1991 (NSW) sufficient to oblige the Industrial Relations Commission and the courts to take account of and apply the principles of equal employment opportunity enunciated in the *Anti-Discrimination Act* 1977 (NSW)?

Impact of awards on discrimination legislation

What is an award?

2.67 Industrial awards are made pursuant to federal and state industrial relations legislation and set out terms and conditions of employment for a defined period of time. Thus, an award will govern and control the employment relationship as to the matters with which it deals, and will expose parties in breach of its clauses to penalties under the relevant industrial relations statute.

Status of awards in relation to the Anti-Discrimination Act

2.68 Awards made under federal legislation have the same force and effect as a federal law. Section 152 of the *Industrial Relations Act* 1988 (Cth) provides that where a state law is inconsistent with, or deals with a matter dealt with in a federal award, the federal award is to prevail. Thus, if there is an inconsistency between a federal award and the *Anti-Discrimination Act* 1977 (NSW*),* the former will generally prevail*.* In practice, however, it appears that whether a federal award will override state legislation will depend on whether the award intends to exhaustively regulate the relationship between employer and employee. Section 54 of the *Anti-Discrimination Act* 1977 (NSW) also specifically exempts federal and state industrial awards and agreements (in the case of compulsory retirement, federal awards only) from the operation of the Act.

Inconsistency arising from the operation of awards

2.69 Many industrial awards, federal and state, contain discriminatory provisions. For instance, when the *Anti-Discrimination Act* came into force, many sex-differentiating provisions were contained in industrial legislation and incorporated into awards. Such provisions included the specification of different basic wage rates for male and female employees, weight limits, amenities, shiftwork and work in lead processing industries. The subordination of the *Anti-Discrimination Act* to industrial awards in the event of inconsistency raises the possibility of the continuation of such discriminatory provisions entrenched in industrial awards. (For further discussion on s 54,

see Chapter 4 of this Paper.) In the federal sphere, the recent extension of the *Sex Discrimination Act* 1984 (Cth), to cover federal industrial awards, will guard against the introduction of discrimination in new awards.

Issues for consideration

Inconsistency between industrial awards and discrimination legislation

Question 21

(a) Given that federal and state awards prevail over state discrimination legislation, how can such awards be framed to avoid the problem of inconsistency?

(b) Should consideration be given to the removal of the current exemption for awards and agreements in the *Anti-Discrimination Act* 1977 (NSW), in keeping with the recent amendments to the *Sex Discrimination Act* 1984 (Cth)?

(See also the discussion relating to General Exceptions in Chapter 4.)

Impact of occupational health and safety legislation on discrimination legislation

Protective measures

2.70 Protective measures for workers are contained in various ILO conventions. Matters dealt with in the conventions include underground work for women, night work for women employed in industry and maximum permissible weight to be lifted. The ILO Convention 111 expressly permits these protective measures to be continued. The *Convention on the Elimination of All Forms of Discrimination Against Women* provides for:

> the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

Thus, many traditional sex-specific provisions were contained in industrial legislation, such as the now repealed *Factories Shops and Industries Act* 1926 (NSW), and industrial awards when the *Anti-Discrimination Act* was first introduced in 1977. By virtue of the s 54 general exception in the *Anti-Discrimination Act,* referred to above, the principles of anti-discrimination were frustrated in the face of such provisions which were justified on the basis of protecting women from hazardous work. They had profound effects on pay equity, the segregation of occupations, the workforce and on the educational system. Thus, protective measures can often operate in a discriminatory manner and have a corollary effect of restricting women's employment opportunities.

2.71 The ILO view on protective measures expressed at the Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment in Geneva (1989) is that it is up to each country

to determine what to do about protective provisions. Addressing the Equal Opportunity and Anti-Discrimination in Employment Conference in September 1991, Justice Elizabeth Evatt said:

> [t]here is a case for saying that, apart from the protection of pregnancy, the same standards and the same protective provisions should apply to men and women equally, so far as possible.

The new approach

2.72 The older protective and restrictive provisions were contained in a number of statutes and regulations, which were highly prescriptive and also restricted women's access to employment. The modern approach to occupational health and safety legislation is directed at covering *all* workers and people entering workplaces. Indeed one of the aims of the *Occupational Health and Safety Act* 1983 (NSW) is the provision of a system of work that is safe and without risk to health for all employees. Occupational health and safety legislation should not therefore be irreconcilable or inconsistent with equal employment opportunity.

2.73 Efforts have been made in Australia to reconcile occupational health standards with equal opportunity requirements. For instance, the *Occupational Health and Safety (Committees in Workplaces) Regulation* 1984 (NSW) requires that occupational health and safety workplace committees must take into account the composition of the workplace they are to represent. Although the prescribed factors to be taken into account in determining the composition of the committees do not explicitly refer to grounds of discrimination, their breadth allows for the goal of equal opportunity to be achieved. The *Miscellaneous Acts (Sex Discrimination) Amendment Act* 1987 (NSW) removed restrictive provisions relating to women working in mining, some provisions in the *Factories Shops and Industries Act* 1926 (NSW) and some provisions in the *Industrial Arbitration Act.* On 1 September 1991, the *Occupational Health and Safety (Manual Handling) Regulation* 1991 adopted the National Standard for Manual Handling and repealed the weight limit provisions in the *Factories Shops and Industries Act.* The new regulation adopted risk identification, assessment and control rather than gender-based criteria in setting national standards. At the time of writing, the only known restrictions remaining are the regulations concerning women working with lead, and separate amenities in workplaces above a certain number of employees. Despite these and other similar ventures, some anomalies have arisen through occupational health and safety policies that are based on the older theory of protection. (See also the discussion relating to General Exceptions (acts done under statutory authority) in Chapter 4.)

2.74 The links between federal and state legislation and practice, and the consequent inconsistencies and overlaps are evident in occupational health and safety legislation as in discrimination and other legislation. A decision was made at the Special Premier's Conference in 1991 to work toward national uniformity in occupational, health and safety standards. The issue of national uniformity in this area is also being addressed by the National Uniformity Taskforce.

Issues for consideration

Occupational health and safety and discrimination legislation

Question 22

(a) Are there difficulties in accommodating principles of anti-discrimination in occupational, health and safety practices and policies?

(b) If so, how can these difficulties be overcome?

(See also Issues for consideration about General Exceptions (acts done under statutory authority) in Chapter 4.)

Industrial policies and discrimination

2.75 Industrial policies, like other government policies, are not always translated into legislation and awards. Nevertheless, they are the driving force behind many administrative arrangements and practices. It has been submitted that industrial policies, whether or not translated into legislation and awards, must be scrutinised to eliminate any discriminatory effects. There is some doubt and confusion amongst employers as to whether certain employment practices and policies conflict with the principles of discrimination legislation. Indeed, the prospect of a policy being overturned for its discriminatory content could raise substantial economic and political implications. It could also lead to a greater interest in compliance with the principles of anti-discrimination.

Issues for consideration

Industrial policies and practices

Question 23

(a) What employment practices and policies are particularly problematic in the discrimination context?

(b) How should these problems be resolved?

BACKGROUND READING

The Constitution and discrimination legislation

Articles and Books

AUSTRALIAN AND NEW ZEALAND EQUAL OPPORTUNITY LAW AND PRACTICE, Vol 1 (CCH Australia Ltd)

AUSTRALIA. CONSTITUTIONAL COMMISSION [Chairman: Sir Maurice Byers] *Final Report of the Constitutional Commission,* Vol 1 (AGPS, Canberra, 1988)

BRENNAN, G "The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response", paper presented at the Conference *Australia and Human Rights: Where to From Here?* (Canberra, 15-17 July 1992)

BURDEKIN, B "The Impact of a Bill of Rights on Those Who Need it Most", speech presented at the Conference *Australia and Human Rights: Where to From Here?* (Canberra, 15-17 July 1992)

McCARRY, G "Landmines Among The Landmarks: Constitutional Aspects of Anti-Discrimination Laws" (1989) 63 *Australian Law Journal* 327

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD AND EQUAL OPPORTUNITY TRIBUNAL *Annual Report 1991 - 1992*

NILAND, C "Federal Co-operative Arrangements on Equal Opportunity and Human Rights: Australian Idealism or Administrative Pragmatism?" in M Wood, C Williamson and C Sharman (eds) *Governing Federations: Constitution, Politics, Resources* (Hale & Ironmonger, Sydney, 1989)

QUEENSLAND. ELECTORAL AND ADMINISTRATIVE REVIEW COMMISSION *Review of the Preservation and Enhancement of Individual's Rights and Freedoms* (Issues Paper, June 1992)

WILCOX, M "The North American Experience: A Personal Reaction", paper presented at the Conference *Australia and Human Rights: Where to From Here?* (Canberra, 15-17 July 1992)

Cases

Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2) (1992) 108 ALR 577

Commonwealth v Tasmania (1983) 158 CLR 1 ("Tasmanian Dams Case")

Gerhardy v Brown (1985) 159 CLR 70

Koowarta v Bjelke-Petersen (1982) 39 ALR 417

Metwally v University of Wollongong (1985) 60 ALR 68

Viskauskas v Niland (1983) 153 CLR 280

Australia's international human rights obligations and discrimination legislation

Articles and Books

ANDERSON, C and ROWE, G C "Human Rights in Australia: National and International Legal Perspectives" in H Schlochauer, I von Munch, O Kimminich and W Rudolf (eds) *Archiv Des Volkerrechts* (JCBMohr, 1986)

BIRD, G "International Law and the Australian Legal System" 17 (4) *Alternative Law Journal* 187

COMMONWEALTH SECRETARIAT (LONDON), HUMAN RIGHTS UNIT "Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms" (Judicial Colloquium at Bangalore, 24-26 February 1988)

DOYLE, J J and WELLS, B C “How Far Can the Common Law Go Towards Protecting Human Rights?” to be published in *International Human Rights Law in Comparative Perspectives* (Oxford University Press)

EASTMAN, K “Human Rights Remedies: A Guide” 17 (4) *Alternative Law Journal* 169

EDITORIAL “Human Rights in Australia” 7 (5) *Criminal Law Journal* 241

EVANS, G “Discrimination and Human Rights”, paper presented at the *22nd Australian Convention of the Law Council of Australia* (Brisbane, 1983)

GRAY, A “A Victorian Bill of Rights: Judicial Review and Other Issues” (1991) 63 (1) *Australian Quarterly* 74

GRIFFITH, G “Dancing Through the Minefield - Can Co-operative Federalism Work?”, paper presented at the Conference *Human Rights - the Australian Debate* (University of New South Wales, 10 December 1985)

KIRBY, M “Human Rights - Emerging International Minimum Standards”, paper presented at the 14th Annual National Conference, *The Australian Society of Labor Lawyers* (Melbourne, 23 May 1992)

KIRBY, M “Implications for Australia of the Continuing Internationalisation of Human Rights” to be published in *International Human Rights Law in Comparative Perspectives* (Oxford University Press)

LUCAS, D “What Are Our Human Rights?” (1992) 26 (10) *Australian Law News* 30

RADFORD, G “International Treaty Obligations and their impact on Anti-Discrimination in Australia”, paper presented at the IIR Conference *Practical Anti-Discrimination and the Law* (Sydney, 19 March 1991)

Cases

Mabo v The State of Queensland (1992) 66 ALJR 408

See also cases listed above in relation to “The Constitution and discrimination legislation”.

Industrial relations and discrimination legislation

Articles and Books

AUSTRALIA. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION *Discrimination against Women in the Lead Industry* (Occasional Paper 5, 1990)

BERTIN, J E “Reproductive hazards in the workplace” in N Taub and S Cohen (eds), *Reproductive laws for the 1990s: A briefing handbook* (Humana Press, 1989)

BRAITHWAITE, J and GRABOSKY, P *Occupational health and safety enforcement in Australia* (Report to the National Occupational Health and Safety Commission, 1985)

BURTON, C *The Promise and the Price: the Struggle for Equal Opportunity in Women’s Employment* (Allen & Unwin, Sydney, 1991)

CALLUS, R, MOREHEAD, A, CULY, M and BUCHANAN, J *Industrial Relations at Work: the Australian Workplace Industrial Relations Survey* (AGPS, Canberra, 1991)

EVATT, E “Impact of International Instruments and Bodies on Australian Domestic Law”, paper presented at the Conference *Equal Opportunity and Anti-Discrimination in Employment* (Sydney, 27 September 1991)

GUNNINGHAM, N “Equal Employment Opportunity and Protective Legislation: Directions For Reform” (1986) 16 *Federal Law Review* 240

GUNNINGHAM, N and WINDER, C “Protective Legislation and Discrimination in Employment in the Australian Lead Processing Industries: Implications for Future Non Discriminatory Legislation” (1988) 4 (2) *Journal of Occupational Health and Safety* 175

MACKEN, J J, McCARRY, G and SAPPIDEEN, C *The Law of Employment* (3rd ed, Law Book Co, 1990)

McCALLUM, R C “Civil Liberties and Industrial Relations; Hein v Jaques Ltd” (1987) 13 (4) *Australian Bulletin of Labour* 225

NEW SOUTH WALES. DEPARTMENT OF INDUSTRIAL RELATIONS, EMPLOYMENT, TRAINING AND FURTHER EDUCATION *Enterprise Bargaining in the New South Wales Public Sector* (Discussion Paper, August 1992)

NEW SOUTH WALES. DEPARTMENT OF INDUSTRIAL RELATIONS, EMPLOYMENT, TRAINING AND FURTHER EDUCATION [prepared by J Niland] *Transforming Industrial Relations in New South Wales* (Sydney, January 1990)

THORNTON, M “Job Segregation, Industrialisation and the Non-Discrimination Principle” (1983) 25 *Journal of Industrial Relations* 38

THORNTON, M “Discrimination law/industrial law: are they compatible?” (1987) 59 (2) *Australian Quarterly* 162

TOWNSEND-SMITH, R *Sex Discrimination in Employment: Law, Practice and Policy* (Sweet & Maxwell, London, 1989)

WALLACE, M “The Legal Approach to Discrimination and Harassment” (1985) 57 *Australian Quarterly* 57

Cases

Australian Iron and Steel Pty Ltd v Banovic & Anor (1990) 89 ALR 1

Dao v Australian Postal Commission (1987) 162 CLR 317

Najdovska v Australian Iron and Steel Pty Ltd (1988) 12 NSWLR 587

See also cases cited in the employment section of *(1989-1990) Equal Opportunity Cases* (CCH Australia Ltd, 1991) and *(1991) Equal Opportunity Cases* (CCH Australia Ltd, 1992)

3. Discrimination Law in Australia

INTRODUCTION

3.1 As stated in Chapter 1 of this Paper, New South Wales was one of the pioneering states in Australia to enact legislation in relation to discrimination by way of the *Anti-Discrimination Act* 1977 ("the Act"). While this Discussion Paper is primarily concerned with a review of that Act in terms of its scope and effect, it is important to first place the Act in the historical context from which it originated. This chapter considers the origin and background of the world-wide trend to secure rights for disadvantaged groups and of the current discrimination legislation in Australia, with special emphasis on the legislative framework of the New South Wales legislation and its general approach to discrimination issues.

ORIGINS OF DISCRIMINATION LEGISLATION

What is discrimination legislation about?

3.2 Discrimination legislation is an important public issue relevant to any analysis of human rights. Simply stated, discrimination is a problem which arises in relation to equality. Its importance springs from its very nature and pervasiveness, basically because all human beings are not equal in every respect. It is often this inequality that gives rise to discrimination, which, in certain defined circumstances, anti-discrimination legislation seeks to prohibit.

Historical background

3.3 There is a tendency to regard anti-discrimination legislation as a creature of the late twentieth century and attribute it to the civil rights movements that have evolved over the last 30 years. Although this may be true to an extent, the origins of discrimination law can be traced back much further to Aristotelian philosophy. Aristotle, in the *Nicomachean Ethics*, wrote of justice that it is the fairness in the distribution of the good things of life and said that the "ratio between the shares shall be the same as that between the persons". While difference was not meant to be a ground of differential treatment, unless the difference was a relevant one, even Aristotle acknowledged that the question of what differences are relevant posed a problem. He wrote:

> [e]veryone agrees that in distributions the just share must be given on the basis of what one deserves, though not everyone would name the same criterion of deserving: democrats say that it is free birth, oligarches that it is wealth or noble birth, and aristocrats that it is excellence.

Although in today's context, the criteria would be different, the principle is still the same: it is not acceptable to treat one person differently from another, unless such difference or discrimination is based on good reason allowed by legislation.

The beginnings of modern discrimination law

3.4 Contemporary anti-discrimination law developed after the second world war. The first countries to introduce anti-discrimination legislation were the United States of America, Canada and the United Kingdom.

3.5 Gross discrimination against black Americans became institutionalised in American law after the enfranchisement of the slaves in the mid-nineteenth century. There were sustained efforts during the 1920s and 1930s to use legal means to counter this. However, it was not until after the second world war and the upsurge in the civil rights movement in the 1950s that American anti-discrimination law developed in any meaningful manner.

3.6 From the 1960s onwards, the concept of anti-discrimination became one of the more successful ideological exports of the United States. It was the direct source of the British legislation and has influenced the Australian legislation considerably. Thus, anti-discrimination law developed significantly in other countries, often influenced by developments in American law.

Social history and background of Australian discrimination law

3.7 Australian discrimination law has been influenced not only by discrimination legislation in other parts of the world, primarily the United States, but also by many other factors. As stated in Chapter 2 of this Paper, Australia's international human rights obligations have had an important part to play in this regard. Australia ratified the International Labour Organisation Agreement No 111, 1958, in June 1973 which defines "discrimination" as including:

> any distinction, exclusion or preference made on the basis of race, colour, sex, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation.

3.8 The late 1960s and the 1970s also saw the resurgence of the feminist movement. In 1967, the United Nations passed a declaration on the Elimination of All Forms of Discrimination Against Women. The Commonwealth Government ratified this agreement in 1973. 1975 was designated International Women's Year. Social movements and pressure groups of other disadvantaged people also emerged about the same time. This, together with the recognition of the ill effects of Australia's race and sex segregated work force sparked off a series of legislative measures in the area of anti-discrimination in Australia. The resultant legislation was in response to

lobbying for equal rights and improved conditions and was a significant step towards affording those rights and remedies to all disadvantaged groups.

Legislative developments in Australia

3.9 The first anti-discrimination legislation in Australia was the South Australian *Prohibition of Discrimination Act* of 1966. This Act was subsequently repealed and replaced.

3.10 The first successful legislative initiative in the federal sphere was the enactment of the *Racial Discrimination Act* 1975 (Cth).

3.11 New South Wales entered the arena in 1976, when the Government introduced the *Anti-Discrimination Bill*, which was finally passed in 1977. The *Anti-Discrimination Act* 1977 (NSW), when originally enacted, prohibited discrimination on the grounds of race, sex or marital status in the areas of employment, the provision of goods and services and accommodation, and on the ground of race in education. It established two agencies: the Counsellor for Equal Opportunity to receive, investigate, and conciliate complaints; and the Anti-Discrimination Board to hold an inquiry into a complaint referred to it by the Counsellor or Minister and to review the laws and policies of New South Wales. The scope of the Act has been significantly widened over the years, and the original enforcement mechanisms have been replaced by the establishment of an Anti-Discrimination Board to administer the Act and receive and conciliate complaints, and the Equal Opportunity Tribunal to hold inquiries into each complaint or matter referred to it under the Act.

3.12 There has been much legislative activity in Australia, both federally and statewide, in the area of discrimination since the early 1970s. At present, the Commonwealth and all states and territories in Australia, either have, or have attempted to introduce, some form of discrimination legislation. Additionally, the Commonwealth and the various states conduct regular reviews of various aspects of existing legislation, often resulting in amending legislation to improve the overall impact of discrimination law in Australia. For instance, in the federal sphere, the recent amendments to the *Sex Discrimination Act* 1984 (Cth) arose from the "Half Way to Equal" Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs and the Human Rights and Equal Opportunity Commission's Report "A Review of Permanent Exemptions under the Sex Discrimination Act 1984". The following anti-discrimination legislation is currently in force:

Federal

Racial Discrimination Act 1975

Sex Discrimination Act 1984

Affirmative Action (Equal Employment Opportunity for Women) Act 1986

Human Rights and Equal Opportunity Commission Act 1986

Disability Discrimination Act 1992

New South Wales

Anti-Discrimination Act 1977

Victoria

Equal Opportunity Act 1984

Queensland

Anti-Discrimination Act 1991

South Australia

Equal Opportunity Act 1984

Western Australia

Equal Opportunity Act 1984

Australian Capital Territory

Discrimination Act 1991

Northern Territory

The Northern Territory has passed its *Anti-Discrimination Bill* 1992, which is due to be assented to early in 1993.

Tasmania

Tasmania does not presently have anti-discrimination legislation. An attempt to introduce such legislation was frustrated when the proposed Bill lapsed on the prorogation of Parliament in early 1992.

Overview of discrimination legislation in other jurisdictions

3.13 Although all discrimination legislation, whether federal or state, has a common aim, in that they all seek to prohibit certain kinds of discrimination, there are some differences in the *scope* of and *general statutory approach* adopted by the various jurisdictions.

Differences in scope

3.14 The prohibited grounds of discrimination, the areas in which those grounds are prohibited and the exceptions they are subject to determine the general scope of discrimination legislation in Australia. In addition to prohibited grounds, there are also unlawful acts which are prohibited generally, rather than by reference to specific areas of operation. The Table in Appendix 1 provides a comparative view of unlawful acts and grounds of discrimination in relation to areas of operation in the various jurisdictions that have or have attempted to have discrimination legislation in Australia. The Table does not set out the range of exceptions, which can limit the scope of the legislation in any given situation.

Differences in general statutory approach

3.15 The most obvious difference in approach between federal and state discrimination legislation is that the federal legislation deals with discrimination by subject matter, resulting in separate Acts prohibiting different types of discrimination. Thus, the *Racial Discrimination Act* 1975 deals with race discrimination, the *Sex Discrimination Act* 1984 with sex discrimination and the *Disability Discrimination Act* 1992 with disability discrimination. The *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 deals with equal employment opportunity for women and the *Human Rights and Equal Opportunity Commission Act* 1986 establishes the Human Rights and Equal Opportunity Commission which administers the federal discrimination legislation and deals with the wider human rights issues. Discrimination legislation in the states and territories deal with all prohibited grounds, such as race, sex and disability, and other matters relating to unlawful discrimination, in single Acts.

3.16 Apart from this general distinguishing feature between federal and state discrimination legislation, there are other features peculiar to certain Acts. The following are examples (not a detailed analysis) of some of those peculiar features.

3.17 Unlike all other discrimination legislation in Australia, the ***Racial Discrimination Act* 1975 (Cth)** gives persons of any race, colour, ethnic or national origin, a *right of equality* before the law (s 10). Also, the Act does not distinguish between the concepts of direct and indirect discrimination. Rather, the emphasis is on the distinction having an *adverse effect* on a particular racial or ethnic group (s 9(1A)).

3.18 Recent amendments to the ***Sex Discrimination Act* 1984 (Cth)** contained in the *Sex Discrimination and Other Legislation Amendment Act* 1992 (Cth) and the *Human Rights and Equal Opportunity Legislation Amendment Act* 1992 (Cth) (pursuant to recommendations made by the House of Representatives Standing Committee on Legal and Constitutional Affairs in the Report "Inquiry into Equal Opportunity and Equal Status for Women in Australia" and the Sex Discrimination Commissioner in the Report "A Review of Exemptions") have improved its operation and widened its scope considerably. Most notably, “sexual harassment” has been redefined, removing the requirement which previously existed that the complainant suffer, or reasonably fear that he or she will suffer detriment or disadvantage if he or she objects to the harassment. The operation of the sexual harassment provisions have also been extended to cover a range of situations where discrimination is unlawful under the *Sex Discrimination Act*. The new definition is modelled on the definitions of “sexual harassment” contained in the *Equal Opportunity Act* 1984 (SA), the *Discrimination Act* 1991 (ACT) and the *Anti-Discrimination Act* 1991 (Qld). The *Sex Discrimination Act* has also been amended to allow individuals to complain about allegedly discriminatory clauses in federal industrial awards, variations to awards and certified agreements made after the commencement of the provisions. (Previously, discriminatory acts done as a result of compliance with an industrial award were exempted from the operation of the *Sex Discrimination Act*.) Also of importance is that family responsibilities will not constitute a valid reason for termination of employment.

3.19 The ***Disability Discrimination Act* 1992 (Cth)** which commenced in part on 26 November 1992 (the operative provisions to commence on 1 March 1993) is very similar to both the *Racial Discrimination Act* 1975 (Cth) and the *Sex Discrimination Act* 1984 (Cth) in its structure. The definition of “disability” is very wide and includes physical disability, intellectual disability and mental illness. It also covers imputed, past, present and future disability.

3.20 Recent amendments contained in the *Sex Discrimination and Other Legislation Amendment* Act 1992 (Cth) have also brought the *Racial Discrimination Act,* the *Sex Discrimination Act* and the *Human Rights and Equal Opportunity Commission Act* in line with the *Disability Discrimination Act* and other state anti-discrimination legislation which allow complaints of victimisation to be considered through a process of conciliation. The existing provisions which allow complaints of victimisation to be prosecuted in court will remain. The amendments have also put in place a new mechanism for enforcing determinations by the Human Rights and Equal Opportunity Commission (“the Commission”) under the *Racial Discrimination Act*, the *Sex Discrimination Act* and the *Disability Discrimination Act*. It will no longer be necessary for a complainant who wishes to enforce a determination of the Commission to bring proceedings in the Federal Court, which in practice required that the matter be heard afresh. Under the new mechanism, once a determination is made by the Commission, it must register the determination in the Registry of the Federal Court which will give it the effect of an order of the Court, unless the respondent applies to the Court for a review of the determination. Of importance also, is that the representative complaints provisions of the *Racial Discrimination Act*, the *Sex Discrimination Act* and the *Disability Discrimination Act* have been replaced by new provisions adapted where appropriate from the representative proceedings provisions of Part IVA of the *Federal Court Act* 1976 (Cth) which came into force in 1992.

3.21 The ***Equal Opportunity Act* 1977 (Vic)** approaches discrimination (or equal opportunity as it is referred to in Victoria) differently to the rest of Australia. Though based on a comparison of treatment to establish discrimination, it contains two key concepts: discrimination on the ground of "status" and discrimination by reason of "private life". "Status" refers to a person’s sex, marital status, race, impairment or the conditions of being

childless, or a de facto spouse. "Private life" refers to the holding (or not) of any religious or political belief or view by a person, or engaging in or refusing to engage in any lawful religious or political activities.

3.22 Unlike all other anti-discrimination legislation in Australia, the Preamble to the ***Anti-Discrimination Act* 1991 (Qld)** specifically expresses support for the Commonwealth's ratification of various international conventions. A feature peculiar to this Act is the use of examples to illustrate the provisions of the Act. Another important feature is that the functions of the Anti-Discrimination Commission are undertaken by the Queensland office of the federal Human Rights and Equal Opportunity Commission under the co-operative arrangement provided for in the Act.

3.23 The criteria for establishing discrimination on the various grounds under the ***Equal Opportunity Act* 1984 (SA)** are based on "unfavourable treatment" rather than on the comparative basis of "less favourable treatment" as is the case in most jurisdictions, except the ACT. South Australia is also the only jurisdiction that has formal rules governing the procedures to be followed in the Tribunal (*Equal Opportunity Tribunal Rules* 1988).

3.24 As stated above, Tasmania does not currently have discrimination legislation of its own. The approach adopted in the lapsed ***Anti-Discrimination Bill* 1992 (Tas)** was structurally different to other existing legislation. It listed the grounds and all areas of operation, then proceeded on the basis of special and general exceptions. The Bill also classified the failure to accommodate a special need as prohibited conduct, thereby going beyond the prohibitions common to anti-discrimination legislation in requiring a person to reasonably accommodate another person's needs. Unlike other discrimination legislation, the Bill also made provision for complaint-based and non-complaint based investigation of discriminatory conduct.

3.25 Like South Australia, the ***Discrimination Act* 1991 (ACT)** defines discrimination with the focus on "unfavourable treatment". The definition of indirect discrimination is also different to that in other jurisdictions. The definition has taken the focus away from the aggrieved person's inability to comply with the requirement or condition, to the actual effect the requirement or condition has on the aggrieved person. Also of significance is that the Act prohibits discrimination based on presumed and past attributes.

3.26 The recently passed ***Anti-Discrimination Act* 1992 (NT)** defines discrimination in terms of its "effect of nullifying or impairing equality of opportunity". Harassment is included on the basis of any of the attributes of the grounds of discrimination.

THE LEGISLATIVE FRAMEWORK OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

Aims of the Act in relation to the legislative framework

3.27 The aims of the Act, as set out in its Preamble, are "to render unlawful [certain] types of discrimination in certain circumstances and to promote equality of opportunity between all persons". Accordingly, the legislative framework of the Act focuses on:

prohibition of discriminatory conduct; and

promotion of equal opportunity.

3.28 The Act deals with *prohibition of discriminatory conduct* by:

setting the parameters for such conduct and identifying grounds, areas of operation and exceptions; and

establishing enforcement bodies for dealing with such conduct.

3.29 The Act deals with *promotion of equal opportunity* by:

establishing an affirmative action agency; and

implementing education programs through the agencies established by the Act.

Prohibition of discriminatory conduct

Grounds and areas of operation

3.30 The Act defines certain grounds of discrimination and the areas in which the defined discrimination is prohibited. The grounds and areas are set out in the table below. Discrimination is only unlawful if it falls within the grounds *and* the areas specified in the Act. There is no general prohibition on discriminatory behaviour. Other types of discrimination, however unfair they may appear to be, are not prohibited by the Act. However, they may be illegal, depending on whether they infringe people's rights under other laws (for instance, a rude remark made in public about a person's family background might be defamatory though not discriminatory). Chapter 4 of this Paper deals with the grounds and areas of operation and raises issues for consideration concerning them.

Table of grounds and areas of prohibited discrimination under the *Anti-Discrimination Act* 1977 (NSW)

The Following types (or grounds) of discrimination are prohibited by the Act:	**But, they are only prohibited if they happen in one of the following areas:**
* race	- employment
* sex	- State (but not private) education
* marital status	- obtaining goods and services
* homosexuality/lesbianism	- accomodation
* intellectual impairment	- registered clubs
* physical impairment	- access to places and vechicles (for race only)
* compulsory retirement on the ground of age [is prohibited]	- access to places where liquor is sold (for sex only)
* racial vilification [is unlawful]	

And they must not be subject to special or general excep under the Act.

[Link to text only version of table]

Exceptions

3.31 Even if an act is discriminatory because it is a defined ground in a prohibited context, it may not be an offence if it is subject to an exception under the Act. There are two types of exceptions: general and special. General exceptions are those that apply to the Act as a whole, that is to all the grounds. Special exceptions are those that are peculiar to particular grounds, and differ from ground to ground. Special exceptions can be sub-

divided into two categories: those that apply to particular areas of operation within specific grounds and those that apply to all areas of operation within specific grounds.

3.32 Although each ground has different special exceptions, the legislative pattern of the exceptions in relation to the various grounds and their respective areas of operation is similar. The following diagram, which sets out the exceptions to what would otherwise be discrimination on the ground of race, is therefore representative of the legislative pattern of the exceptions under the Act and how they work. Chapter 4 of this Paper deals with special and general exceptions and raises issues for consideration concerning them.

Exceptions to discrimination on the ground of race

Exceptions to discrimination on the ground of race	**General Exceptions** (under s54-59 applicable to race and all other grounds)	
	Special Exceptions (applicable to specific grounds in this case, race)	to race discrimination only in **some** areas of operation: **- work -** exceptions for genuine occupational qualifications, provision of training skills outside NSW, employment in a ship. **- education -** exception for prescribed educational authority **- accommodation -** exception if provider resides in accommodation, or accommodation for mot more than six persons **- registered clubs -** exception if principal object to provide benefits to particular race to race discrimination only in **all** areas of operation: - provision of special needs - selection in sport

Enforcement bodies

3.33 Having identified the prohibited discriminatory conduct, the Act then establishes enforcement bodies for dealing with the prohibited acts of discrimination. The enforcement bodies are:

the Anti-Discrimination Board, with powers to investigate and conciliate complaints; and

the Equal Opportunity Tribunal, with powers to grant enforceable remedies.

Chapter 6 of this Paper deals with these enforcement bodies and raises issues for consideration regarding their role and efficiency in the resolution of discrimination disputes.

Promotion of equal opportunity

Affirmative action agency to ensure equal employment opportunity

3.34 Another Part of the Act creates the Office of the Director of Equal Opportunity in Public Employment which is responsible for ensuring and promoting equal opportunity in public employment. Chapter 6 of this Paper deals with this area and raises issues for consideration.

Education function

3.35 The Act places great emphasis on the role and value of education, which is achieved through the research and promotional functions of the Anti-Discrimination Board. The Equal Opportunity Tribunal and the Office of the Director of Equal Opportunity in Public Employment also have a role in promoting equal opportunity through education. Chapter 7 of this Paper deals with these agencies in relation to their educative function.

THE NEW SOUTH WALES APPROACH TO DISCRIMINATION

3.36 In order to understand the New South Wales approach to discrimination through the operation of the *Anti-Discrimination Act,* it is necessary to have some knowledge of the definition of discrimination in terms of the Act and the Act's response to such discrimination.

What is discrimination?

3.37 The crucial word for the purposes of the Act is “discrimination”. The basic meaning of “discrimination” is “to make clear a distinction; to differentiate”. The Oxford English Dictionary defines “discrimination” to mean “the making of a distinction, to give unfair treatment, especially because of prejudice”. There is however, no general definition of “discrimination” in the Act, but rather discrimination is described in relation to each ground.

The main features of the concept of discrimination in the Act

3.38 Although there is no general definition of discrimination in the Act, there are substantial similarities in the way discrimination is described for each ground. For present purposes, these similarities can be construed to constitute the main features of the concept of discrimination.

Less favourable treatment

3.39 In every instance, discrimination conveys the idea that one party is treated *less favourably* than another and not merely that there is a difference in treatment. This is commonly referred to as the “*comparability model*” because it requires a comparison to be made between the treatment of the person discriminated against and another real or hypothetical person of a different status (such as of a different race or sex, or some other category). For example, discrimination on the ground of physical impairment takes place if a person treats the physically handicapped person “*less favourably* than in the same circumstances, or in circumstances which are not materially different, he treats or would treat a person who is not physically handicapped”.

3.40 Implicit in the application of this comparability model is the assumption of prescriptive equality - that is, that the two parties *should* be treated equally and that they *can* be compared. It does not challenge the status quo. Instead, it only allows the disadvantaged to obtain the social benefits the advantaged enjoy to the extent that they are the same or perceived to be the same. It is the characteristics of the advantaged that have historically defined the criteria for entitlement. Consequently, this approach does not contribute to the re-organisation of social institutions to meet the needs of the disadvantaged, to the extent that their needs are *different* from the advantaged, given that the advantaged have *no comparable need*.

3.41 This approach causes particular problems when applied to persons with disabilities. Impairment does involve functional limitations or differences which may affect a person’s work performance or other activity. However, it is important to bear in mind that it is a person’s social and physical environment which largely determines the extent to which a disability will restrict the opportunities available. No consideration is given to the fact that it is not practically possible to compare a person with a physical handicap with a person without such an impairment. A quadriplegic’s difficulty in gaining access to a building is due not only to inability to walk, but also to the design of the building. People’s special needs and limitations in their abilities are not taken into account. The same is true to differing degrees in the case of other grounds.

Discrimination “on the ground of ... ”

3.42 A phrase common to the various kinds of prohibited discrimination is “on the ground of ” which simply means “on the basis of ” or “because of ”. For example “[a] person discriminates against another person *on the ground of* race if, ... ”. All other kinds of discrimination are phrased similarly. The interpretation of this phrase is important because it will decide whether or not discrimination has taken place. Interpreting it to mean that the particular ground was the substantial and operative factor that caused the discriminatory behaviour will have a different effect to interpreting it to mean that it was one of the factors resulting in the behaviour complained of, but not the crucial one. The trend in New South Wales seems to be that the proscribed ground must be the significant but not necessarily the sole or dominant factor in the decision-making process.

3.43 Another way of determining whether or not a discriminatory criterion was used as the basis of a decision is the “*but for*” test used in the United Kingdom and the United States of America. The “but for” test requires one to ask whether, but for a discriminatory element, the decision would have been made. If the answer is ‘no’, then the basis is regarded as discriminatory.

3.44 Also relevant to a discussion about the basis of discriminatory behaviour is the question regarding the position when such behaviour is based on a mixture of lawful and unlawful criteria. Although the Act does not expressly deal with this issue, the courts have decided that the presence of mixed factors will not avoid unlawful discrimination - that is, despite the presence of other criteria, the unlawful criterion is relevant if it caused the discriminatory conduct.

3.45 While it is unlawful to discriminate against a person on a designated ground, it is not unlawful to discriminate on the basis of association with a person or group of persons under the New South Wales Act. Thus, discrimination against a person on the ground of the person’s race is unlawful, but discrimination against a friend or associate of that person because of the association is not unlawful.

Types of discriminatory conduct

3.46 Discriminatory conduct, as described above, can be intentional or unintentional, direct or indirect.

Intentional or unintentional discrimination

3.47 The Act makes no mention of the relevance of a person’s motive or intention for determining whether discrimination has occurred. However, the courts have consistently held that if a person acts discriminatorily even without intending to, such conduct will be unlawful. Thus, actions spurred by beliefs and attitudes that are discriminatory, but without a conscious intention to discriminate, will still be unlawful discrimination.

Direct and indirect discrimination

3.48 Discrimination can either be direct or indirect. In the United States direct and indirect discrimination are referred to as "disparate treatment" and "disparate impact" respectively. The *Anti-Discrimination Act* 1977 (NSW) does not specifically use the terms direct and indirect discrimination, but discriminatory behaviour is commonly categorised as such. Both direct and indirect discrimination are prohibited for each ground.

Direct discrimination

3.49 Direct discrimination occurs when a person is treated "*less favourably*" than another person clearly on the grounds of that person's race, sex (or another prohibited ground). Such discrimination can be overt or on the basis of a characteristic appertaining or imputed to the person's status. For example, in relation to racial discrimination, direct discrimination is defined in s 7(1) as follows:

> A person discriminates against another person on the ground of his race if, on the ground of-
>
> (a) his race;
>
> (b) a characteristic that appertains generally to persons of his race; or
>
> (c) a characteristic that is generally imputed to persons of his race, he -
>
> (d) *treats him less favourably* than in the same circumstances, or in circumstances which are not materially different, he treats or would treat a person of a different race; or
>
> (e) segregates him from persons of a different race. [emphasis added]

3.50 The refusal to hire a person simply on the ground that the applicant is of a particular race would be an example of direct discrimination on the ground of race. Similarly, direct discrimination could occur on the basis of a *characteristic* which either appertains to or is imputed to relate to a particular race, rather than the race itself. Courts have defined a "characteristic" to mean "a character which is distinctive or typical or is a distinguishing peculiarity or quality which appertains generally to the persons of that sex" or other status, as the case may be. The Act does not provide any guidance on the meaning of the word "characteristic appertaining", except to say that pregnancy is a characteristic that appertains to women and that being accompanied by a guide dog is a characteristic appertaining to visually impaired persons. Generally speaking, a characteristic which appertains to a person of a particular status, is one which the majority of persons of that status have; a characteristic which is imputed to a person of a particular status is one which the majority of persons of that status are believed to have, whether or not it is so. Accordingly, if a person is refused employment because he speaks English with a foreign accent, the person could be discriminated against directly on the basis of a characteristic appertaining to persons of his race, which is speaking English with a foreign accent. Similarly, if a person is refused employment because of a manner of behaviour believed to be common among people of a particular race, such a refusal could be direct discrimination on the basis of a characteristic imputed to persons of that race.

3.51 This extension of the definition of direct discrimination beyond the purely mechanical statutory definitions of some (not all) of the grounds as set out in the definitions section of the Act (s 4), gives a wider ambit to the concept of discrimination in relation to the various grounds. For instance, "race" is defined in s 4 to include "colour,

nationality and ethnic or national origin". Although this definition is useful, it provides very limited information in comparison with the scope that characteristics appertaining and imputed lend to the definition of race.

Indirect discrimination

3.52 The concept of indirect discrimination first received judicial recognition in the United States, where it is called "disparate impact". It was later embodied in the United Kingdom legislation and subsequently imported into Australian legislation.

3.53 Indirect discrimination is treatment which appears to be "neutral" or "fair", or practices which are not overtly discriminatory in form, but which are discriminatory in impact and outcome, borne unequally by a particular group. As Justice Wilcox of the Federal Court said in *Styles v Department of Foreign Affairs and Trade* (1988) EOC 92-239:

> ... discrimination against a group of people on account of some shared characteristic - such as sex, race, often takes a subtle form. By reason of historical facts or ingrained attitudes, rules and practices which, upon their face, make no distinction between different groups of people - 'facially neutral' in the American terminology - may have the effect of operating unfairly upon a particular group. In such a case a disadvantage may be visited upon members of that group which is not made less real because it is indirect, unintended and even unwitting.

3.54 Of course, as John Basten stated in a paper presented at a seminar on "Indirect Discrimination and the Sex Discrimination Act" held by the Human Rights and Equal Opportunity Commission in March 1991:

> ... some practices which are neutral on their face may be deliberately imposed with discriminatory intent; such practices constitute disguised discriminatory treatment. Otherwise, facially neutral requirements are to be judged by their consequences or effects, rather than the intent or motivation of the employer.

3.55 Thus, indirect discrimination tends to occur in situations where a policy or act appears to be neutral or non-discriminatory in that it treats all people equally, such as a height requirement of 180 cm for all firefighters. In practice, however, the requirement may mean that certain races and women, who tend to be shorter, are less likely to obtain jobs. Similarly, it has been argued that another common form of indirect discrimination is the erection of physical barriers that prevent people with disabilities from gaining access to certain buildings and which consequently precludes them from accessing particular jobs, goods and services. This issue is currently before the New South Wales Equal Opportunity Tribunal ("the Tribunal") awaiting determination. The decision of the Tribunal in *Najdovska v Australian Iron and Steel Pty Ltd* (1986) EOC 92-176 is a good illustration of how complaints of indirect discrimination can strike at apparently neutral, although inherently discriminatory work practices. In that case, thirty-four women were retrenched as a result of a downturn in the steel industry in accordance with a "last on, first off" policy. The women complained that the policy was indirectly discriminatory because it had an unfavourable effect on them, as a result of previous delays in hiring women in the steel industry. The Tribunal held that the policy, though neutral on its face, had a disparate impact on the women caused by the unlawful discrimination (the delay in hiring) that had preceded it.

3.56 In order to establish indirect discrimination on any ground the *Anti-Discrimination Act* 1977 (NSW) requires that four elements must be satisfied. They are that the:

(i) person discriminating "requires the other person to comply with a requirement or condition";

(ii) requirement or condition be one that "a substantially higher proportion of persons not of the same [status, ie. race, sex, etc] as the other person comply or are able to comply";

(iii) requirement be "not reasonable having regard to the circumstances of the case"; and

(iv) "other person does not or is not able to comply".

3.57 Although the concept of indirect discrimination may seem to be relatively straightforward, its application has given rise to difficulties and consequently very few decisions have been based on indirect discrimination. The principles of indirect discrimination have only been the subject of appellate consideration in Australia in relation to sex discrimination. However, the difficulties apply equally to all grounds of discrimination. It has been suggested that many of the difficulties have been exacerbated by the form of the statutory criteria listed above. For instance, many cases have grappled with the application of the phrase "requirement or condition". Similarly, the courts have had difficulty in defining a 'base group' which is necessary for the purpose of assessing whether "a substantially higher proportion of persons not of the same [group] as the other person comply or are able to comply". In *Australian Iron and Steel Pty Ltd v Banovic* (1989) 89 ALR 1, the High Court confirmed that 'proportion' requires a comparison between two proportions. Justices Deane and Gaudron said, at 11, that the approach adopted:

> requires the selection of relevant base groups which do not themselves incorporate the effect of allegedly discriminatory practices and which can accordingly be used as reference points for ascertaining the effect of those practices.

3.58 The reason for adopting this approach stated by Justices Deane and Gaudron, also at 11, was that:

> The comparison of the proportions of complying men and women to the male and female populations to be divided by the condition or requirement in question will reliably reveal the extent of the significance, if any, of sex to compliance only if sex is not a factor influencing the composition of those populations.

3.59 While these matters have caused some difficulties, it appears that the courts have given a liberal interpretation and attempted to resolve the issues by focussing on the purpose of the legislation and the context of its application.

3.60 An issue that is yet to be satisfactorily resolved is that concerning the test that the requirement or condition "be not reasonable having regard to the circumstances of the case". In the United States case of *Griggs v Duke Power Co* (1971) 401 US 424 (1971), the Supreme Court analysed the concept of "disparate impact" and said that:

> The Act [Title VII of the *Civil Rights Act* 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is *business necessity* [emphasis added].

3.61 In the United Kingdom legislation the condition must be "justifiable". Some commentators consider the requirement of "business necessity" in *Griggs* and the United Kingdom test of "justifiable" to be stricter than the Australian test of "reasonable".

3.62 Although under-utilised, the concept of indirect discrimination has the capacity to strike at fundamental discriminatory employment structures and policies. It also has the capacity to illustrate how discrimination can be built into a system without any outward signs of unequal treatment. As Chris Ronalds observed in her book *Anti-Discrimination Legislation in Australia - A Guide:*

> elimination [of indirect discrimination] requires a certain amount of restructuring of the existing system. It is obviously the most important type of discrimination to eliminate as the ramifications of any restructuring are much wider and deeper than the solution to an individual complaint.

The distinction between direct and indirect discrimination

3.63 In the case of indirect discrimination it is clear that *reasonable* requirements or conditions do not constitute discrimination. This is not the position in the case of direct discrimination. The New South Wales Equal Opportunity Tribunal has held in various cases that direct discriminatory conduct cannot be justified on the basis of reasonableness. Thus, it will be more advantageous for a complainant to bring a case for direct discrimination, if that option is available.

3.64 The distinction between direct and indirect discrimination is sometimes blurred because direct discrimination includes "characteristics appertaining to" and "characteristics imputed" which are often misunderstood as forms of indirect discrimination. The distinction can have significant implications in relation to how the tribunal or court treats the case. For instance, failure to treat a homosexual person suffering or possibly suffering from HIV infection may be direct discrimination if HIV is considered to be a physical impairment. It may also be direct discrimination on the ground of homosexuality, based on a stereotype assumption that the person is in a high risk group for HIV infection. On the other hand, it may not be clear whether such discrimination is direct, or indirect on the ground that being within a high risk group for HIV infection the person was treated as if he or she had the infection.

3.65 Since indirect discrimination is about treatment that appears to be neutral and fair, it is often regarded as less blameworthy than direct discrimination. As Chloë Mason stated, in a paper entitled "Investigating Indirect Discrimination", presented at a seminar called "Indirect Discrimination and the Sex Discrimination Act" in March 1991:

> [t]he systematic nature and characteristic indirectness of indirect discrimination may give an impression that indirect discrimination is less important than direct discrimination and that indirect discrimination is a remote

experience. The experience of indirect discrimination, however can be frustrating especially in those cases in which practices which cause indirect discrimination are treated as 'commonsense'.

3.66 An important aspect of indirect discrimination, which affects its detection and prevention is recognition that it is *not* less important or less blameworthy than direct discrimination. Given that indirect discrimination causes significant problems to disadvantaged groups, a better understanding of this often misunderstood concept will assist in remedying practices which have been accepted in the past without recognition of their discriminatory impact.

What is the Act's response to discrimination?

3.67 As stated above, the legislative framework of the *Anti-Discrimination Act* has set up the following bodies:

The Anti-Discrimination Board, to administer the Act and to promote anti-discrimination and equal opportunity principles in NSW;

The Equal Opportunity Tribunal, to hold inquiries into matters referred to it by the Anti-Discrimination Board; and

The Office of the Director of Equal Opportunity in Public Employment, to ensure equal employment opportunity.

3.68 There are two stages at which the Act responds to discrimination:

before it occurs and a complaint is made, by means of the Board's educative function and by the part played by the Office of the Director of Equal Opportunity in Public Employment in ensuring equal employment opportunity;

after a complaint is made, by enforcing the Act either through the Anti-Discrimination Board's conciliation process or the Equal Opportunity Tribunal's inquiry process.

Complaints-based approach

3.69 An important pre-requisite for enforcing the Act in the event of discriminatory conduct arising is the need to make a complaint. If a person has been discriminated against, nothing can be done unless a complaint is made in writing to the Anti-Discrimination Board. This is why the Act is said to operate on a *complaints-based model*. The Board does not have self-initiating powers whereby it can proceed without complaint. It has been pointed out that there are limits inherent in a complaints-based model, the most important being that discrimination cannot be addressed unless a person is prepared to make a complaint. Even when a complaint is made and discrimination is established, the solution often only benefits the complainant and does not necessarily follow-up on systematic

discrimination that is often revealed through the individual complaint. This is dealt with in more detail in Chapter 6 of this Paper.

Issues for consideration

Structure of the *Anti-Discrimination Act* 1977 (NSW)

Question 24

It has been argued that the present approach (whereby certain types of discrimination, on specified grounds, in specified areas and subject to specified exceptions are prohibited) tends to produce an undue focus on definitional issues, while obscuring the basic harms the law is supposed to alleviate.

Should the *Anti-Discrimination Act* 1977 (NSW) ("the Act") be re-structured so that less emphasis is placed on the definitions of discrimination?

Question 25

The Act does not create or confer a right to equality or freedom from discrimination as does the *Racial Discrimination Act* 1975 (Cth).

(a) Should there be a general provision prohibiting discrimination and providing for a right to equality before the law or should the Act merely emphasise the detrimental effects of all forms of discrimination?

(b) Additionally, should there be specific grounds of discrimination?

Question 26

(a) Should the Act be structured differently?

(b) If so, how?

Question 27

Should the Act clarify its provisions by use of illustrations?

Question 28

Given the emphasis being placed on multiculturalism in many national policies, there may be an inherent tension in applying principles of non-discrimination on the ground of, say, sex with the ground of ethnic origin.

Are there particular problems concerning possible conflicts between grounds of discrimination?

(For issues concerning the inclusion of other grounds and matters of general importance to all grounds, see Chapter 5 of this Paper.)

Definition of discrimination

Question 29

(a) Is the comparability model an appropriate method of determining all or some types of discrimination?

(b) If not, should a different model be considered?

(c) Would a general merit test approach (whereby merit is defined with no need for comparison) be appropriate?

(d) If so, how should "merit" be defined?

(e) Is the "unfavourable treatment" model adopted in the Australian Capital Territory more appropriate?

(f) Alternatively, should tests of reasonableness and fairness be applied to the comparability model so that the emphasis will be on the result or effect of discrimination?

(g) Would a more appropriate approach (particularly for a disabled person in an employment situation) be to require an "accommodation" of the special requirements of the case?

(This issue is dealt with in more detail in Chapter 4, in the discussion relating to discrimination on the ground of physical and intellectual impairment.)

Question 30

If another approach is being suggested, should it be adopted across the board for all grounds of discrimination?

Question 31

(a) Should the phrase "characteristics generally imputed to" be clarified to state that the characteristic is one that is not actually possessed by the complainant but must be imputed to the complainant?

(b) Should it also include past and presumed attributes as is the case in some other jurisdictions?

Question 32

(a) Should the meaning of “on the ground of” be clarified in the Act?

(b) Should it mean:

- the sole ground;
- the main ground;
- a substantial or material ground; or
- simply one of many grounds for discrimination?

Question 33

How should behaviour based on a mixture of lawful and unlawful factors be regarded?

Question 34

Should the position relating to the presence of mixed factors be clarified in the legislation?

Question 35

Would a “but for” test, rather than a “significant and operative factor” test be more appropriate in determining the basis of discriminatory conduct?

Question 36

Should it be unlawful to discriminate on the basis of association?

Intentional or unintentional discrimination

Question 37

(a) Should there be a requirement of intent to discriminate in establishing discriminatory conduct, or should the emphasis continue to be on effect?

(b) Should the position with regard to intent be specifically stated in the legislation?

(c) Should it be a defence if it can be shown that the alleged discriminatory action was done for "good motive" or in the best interests of the business concerned or to avoid industrial unrest?

Direct and indirect discrimination

Question 38

It has been suggested that the distinction between direct and indirect discrimination needs to be clarified. The *Racial Discrimination Act* 1975 (Cth) does not distinguish between the concepts. Section 9(1) of that Act

refers to “a distinction ... based on race ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise ... of any human right or fundamental freedom”.

Should New South Wales follow suit in terms of a more general provision?

Question 39

At present the test of indirect discrimination requires a mathematical formulation to work out compliance by a substantially higher proportion of the majority non-disadvantaged group. Justice Priestley of the NSW Court of Appeal said, in *Australian Iron and Steel Pty Ltd v Najdovska* (1988) 12 NSWLR 587 at 614, that the provisions dealing with indirect discrimination "have two faults" which may preclude the Act from achieving its aims. They are: "the imprecision and inaptness of the language, particularly in regard to ‘requirement or condition’ and the requirement regarding compliance by a substantially higher proportion" which "by accident sometimes produce anti-discriminatory results and sometimes not".

It has been suggested that the difficulties the courts have had in applying the terms “requirement and condition” and in interpreting the proportionality test have now been satisfactorily resolved by the High Court in *Australian Iron and Steel Pty Ltd v Banovic* (1989) 89 ALR 1.

(a) Is there still a need to reformulate the test of indirect discrimination?

(b) If so, how?

(c) Should there be some legislative clarification of the meaning of “substantially higher proportion” in the definition of indirect discrimination applicable to the various grounds, or is the High Court’s interpretation sufficiently liberal?

Question 40

An American lawyer, Catherine Mackinnon in an article “Making Sex Equality Real” has suggested the adoption of the subordination principle by which women’s inequality is defined in terms of subordination to men rather than differences between the two groups. This model evaluates practices, policies and laws to assess whether they operate to maintain women in a subordinate position and avoids the necessity for legalistic analysis of what differences are invalid bases for disparate treatment.

Would it be worth considering something similar for all types of indirect discrimination?

Question 41

The courts have held that "inability to comply" means inability to comply in practice. Thus, a disabled person who uses crutches would be unable to comply with the requirement to climb stairs even if the person could do so with the aid of another.

Should the legislation clarify this matter?

Question 42

The *Anti-Discrimination Act* 1991 (Qld) provides a range of factors which are to be taken into account when determining whether a term, including a requirement or condition, is reasonable. The factors include:

(a) the consequences of failure to comply with the term;

(b) the cost of the alternative terms;

(c) the financial circumstances of the person who imposes, or proposes to impose the term.

Should similar and/or other factors be included in the NSW legislation to provide some guidance?

Question 43

Should the reasonableness test be more restrictive whereby the discriminator is required to show that the imposition of the condition or requirement was necessary in order to pursue the least discriminatory option reasonably available to the discriminator in the circumstances of the case?

Question 44

At present, the onus is on the complainant to prove that a neutral requirement is unreasonable in the circumstances. It has been suggested that the alleged discriminator is most likely to be able to justify the discriminatory conduct.

Should the justification for the discriminatory provision lie on the respondent rather than on the complainant?

Question 45

The Annual Reports of the Anti-Discrimination Board indicate that the vast majority of complaints (79% in 1990/91) continue to claim direct rather than indirect discrimination. It is believed that this apparent absence of incidence of indirect discrimination is not a realistic reflection of the situation.

(a) What is this lack of complaint due to?

(b) How can this situation be rectified?

(See also Chapter 4 (Discrimination on the grounds of physical and intellectual impairment) for further discussion on the conceptual problems that arise in relation to the application of indirect discrimination provisions in the context of impairment. For further discussion on general issues of concern common to all grounds, see Chapter 5 of this Paper.)

The Act's response to discrimination

Question 46

(a) Should the Act continue to be complaints-based only?

(b) If not, is there a more effective way of preventing discrimination?

(c) Alternatively, should the complaints-based approach be supplemented?

(d) If so, how?

(e) Should the Anti-Discrimination Board have self-initiating powers whereby the process of investigation and conciliation can proceed in the absence of a complaint?

(For further discussion on the enforcement bodies, see Chapter 6 of this Paper.)

BACKGROUND READING

Origins of discrimination legislation

Articles and books

LUSTGARTEN, L *Legal Control of Racial Discrimination* (McMillan, London, 1980) Chapter 1

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Annual Report 1978*

NICOMACHEAN ETHICS (Bobbs-Merril Co Inc, Indianapolis, 1962) 118

RONALDS, C *Anti-Discrimination Legislation in Australia - A Guide* (Butterworths, Sydney, 1979) Chapter 1

Legislative developments in Australia

Articles and Books

AUSTRALIA. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION *A Review of Exemptions* (AGPS, Canberra, 1992)

AUSTRALIA. PARLIAMENT. HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS [Chairman: Mr M Lavarch] *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (AGPS, Canberra, 1992)

AUSTRALIAN AND NEW ZEALAND EQUAL OPPORTUNITY LAW AND PRACTICE, Vols 1 and 2 (CCH Australia Ltd)

EINFELD, M "Human Rights Australia and the Justice System" (1989) 63 *Law Institute Journal* 738

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Discrimination - The Other Epidemic: Report of the Inquiry into HIV and Aids Related Discrimination* (1992)

RAYNOR, M "Discerning Discrimination in Western Australia: Equal Opportunity and Anti-Discrimination Legislation", paper presented at the Law Society of Western Australia Law Summer School (Paper 13, 1988)

THORNTON, M *The liberal promise: anti-discrimination legislation in Australia* (Oxford University Press, 1990)

THORNTON, M "Clutching at Straws: Anti-Discrimination Legislation in Australia" (1982) 23 *Refractory Girl* 21

VICTORIA. LAW REFORM COMMISSION *Review of the Equal Opportunity Act* (Report 36, 1990)

WERTHEIM, B "Victorian Equal Opportunity Law and Practice" (1989) 63 *Law Institute Journal* 724

(See also legislation listed in text.)

Legislative framework of the Anti-Discrimination Act 1977 (NSW)

Articles and Books

GAZE, B "Discrimination" in J Wallace and T Pagone (eds) *Rights and Freedoms in Australia* (Federation Press, 1990) Chapter 3

MALLOCH, M "Is Equal Opportunity Possible?" (1983) 8 (1) *Womanspeak* 10

MATHEWS, J "Protection of Minorities and Equal Opportunities" (1988) 11 (2) *University of New South Wales Law Journal* 1

The NSW approach to discrimination

Articles and Books

BASTEN, J "Indirect Discrimination and the Sex Discrimination Act", paper presented at a seminar on *Indirect Discrimination and the Sex Discrimination Act* (Occasional Paper No 6 from the Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, Sydney, June 1991)

HUNTER, R "Indirect Discrimination and the Law" (1989) 63 *Law Institute Journal* 734

HUNTER, R "Indirect Sex Discrimination" (1989) 14 (1) *Legal Services Bulletin* 18

LUSTGARTEN, L *Legal Control of Racial Discrimination* (McMillan, London, 1980) Chapters 1-3

MACKINNON, C "Making Sex Equality Real" in L Smith, *Righting the Balance: Canada's New Equality Rights* (Canadian Human Rights Reporter Inc, Saskatchewan, 1986)

MASON, C "Investigating Indirect Discrimination", paper presented at a seminar on *Indirect Discrimination and the Sex Discrimination Act* (Occasional Paper No 6 from the Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, Sydney, June 1991)

McCARRY, G "Discrimination 'on the ground of': a Note on an Overlooked Requirement" (1985) 13 *Australian Business Law Review* 250

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD AND EQUAL OPPORTUNITY TRIBUNAL *Annual Report 1991-1992*

RONALDS, C *Anti-Discrimination Legislation in Australia - A Guide* (Butterworths, Sydney, 1979)

ROWE, G C "Misunderstanding Anti-Discrimination law: The New South Wales Court of Appeal in Reddrop" (1986) 10 *Adelaide Law Review* 318

TONGUE, S "Indirect Discrimination: Some Recent Overseas Cases and Developments", paper presented at a seminar on *Indirect Discrimination and the Sex Discrimination Act* (Occasional Paper No 6 from the Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission, Sydney, June1991)

Cases

Australian Iron and Steel Pty Ltd v Banovic (1989) 89 ALR 1

Australian Iron and Steel Pty Ltd v Najdovska (1988) 12 NSWLR 587

Boehringer Ingelheim Pty Ltd v Reddrop (1984) EOC 92-108

Director-General of Education v Breen (1982)2 IR 93

Griggs v Duke Power Co 401 US 424 (1971)

Najdovska v Australian Iron and Steel Pty Ltd (1986) EOC 92-176

Styles v Department of Foreign Affairs and Trade (1988) EOC 92-239

Secretary, Department of Foreign Affairs and Trade v Styles (1989) 88 ALR 621

4. The Scope of The Anti-Discrimination Act

INTRODUCTION

4.1 As explained in Chapter 3 of this Paper, the *Anti-Discrimination Act* 1977 (NSW) ("the Act") does not impose a general prohibition on discriminatory behaviour. The scope of the Act is limited to the grounds of discrimination defined in the Act in certain areas of operation and subject to special and general exceptions. The discussion in this chapter provides an overview of the scope of the Act and raises some pertinent issues for consideration.

DISCRIMINATION ON THE GROUND OF RACE

Definition

4.2 Part 2 of the Act makes it unlawful to discriminate either directly or indirectly on the ground of race. In the definitions section of the Act, "race" is defined broadly to include "colour, nationality and ethnic or national origin".

> If an employer refuses to hire an otherwise qualified person simply because she is black, this is *direct* discrimination on the ground of race.

> If an employer requires a Sikh to wear a cap as part of a uniform and the wearing of the cap is not essential to the performance of the job, this could be *indirect* discrimination on the ground of race, since wearing a cap is a condition that cannot be met by Sikhs because it is a religious requirement that they must wear turbans.

Areas of operation

4.3 The areas in which discrimination on the ground of race are prohibited are set out below:

Work - including applicants and employees, commission agents, contract workers, including partnerships of six or more persons, trade unions, qualifying bodies and employment agencies [s 8-13].

Education [s 17].

Access to places and vehicles [s 18].

Provision of goods and services [s 19].

Accommodation [s 20].

Registered clubs [s 20A].

Exceptions

4.4 There are a large number of exceptions to the prohibition against racial discrimination. Some exceptions apply to specific areas of operation, while others apply to all areas in which discrimination on the ground of race is prohibited.

Exceptions to specific areas of operation

Work - genuine occupational qualification: there are a number of exceptions to the prohibition against the selection of a particular race for employment, namely the choice of a particular race for authenticity in a dramatic performance or other entertainment, as an artist's or photographic model or in a restaurant; or where providing a particular race with welfare services where those services can best be provided by a person of the same race [s 14].

- employment intended to provide training in skills to be exercised outside NSW [s 15].

- employment on a ship or aircraft if the employee was engaged for employment outside NSW [s 16].

Education - the prohibition does not apply to a "prescribed educational authority". This exception could enable prescribed authorities to conduct programs specially designed to benefit certain minority racial groups [s 17(3)].

Accommodation - the prohibition does not apply if the provider of accommodation or a near relative resides in the premises or where the accommodation provided is for no more than six persons [s 20(3)].

Registered Clubs - the prohibition does not apply if the principal object of the club is to provide benefits for persons of a specified race [s 20A(3),(4)].

Exceptions to all areas of operation

It is not unlawful to discriminate on the ground of race in any of the specified areas of operation with regard to:

Special needs - by providing special facilities or services to meet "special needs" of persons of a particular race in relation to their education, training, welfare or other benefits [s 21]; or

Sport - in selecting persons to represent a place in any sport or game or in applying eligibility criteria based on nationality, place of birth or length of residency in a particular area [s 22].

Issues for consideration

Divergence between *Anti-Discrimination Act* 1977 (NSW) and *Racial Discrimination Act* 1975 (Cth)

Question 47

The *Racial Discrimination Act* 1975 (Cth) prohibits discrimination by reason of race, colour, national or ethnic origin and in some cases immigration. Some provisions also prohibit discrimination by reason of the race, colour, national or ethnic origin of a person's relative or associate or by reason that the relative or associate is an immigrant. The *Anti-Discrimination Act* 1977 (NSW) does not have a comparable provision prohibiting discrimination on the ground of the race of a person's relative or associate. It has been submitted that this can be a particular problem in the areas of goods and services and accommodation.

Should discrimination on the ground of race include reference to the race of a relative or associate of a person as is the case in the *Racial Discrimination Act* 1975 (Cth)?

Question 48

Should the provisions prohibiting discrimination on the ground of race mirror the provisions in the *Racial Discrimination Act* 1975 (Cth)?

Definition of "race"

Question 49

(a) Is the definition of "race" in the *Anti-Discrimination Act* 1977 (NSW) adequate?

(b) If not, how should "race" be defined?

(c) Should it include ethno-religious groups, such as Islamic groups, Jews and Sikhs?

(d) Alternatively, should ethno-religious grounds (if included) be included as a basis for the offence of racial vilification only?

Areas of operation

Question 50

(a) Are the areas of operation adequate?

(b) If not, what other areas should be covered?

Exceptions

Question 51

Some submissions have suggested that the exceptions undermine the effectiveness of the Act in terms of prohibiting discrimination on the ground of race. Others have suggested that there should be further clarification of the exception relating to "special needs" to make it more effective.

(a) Do the exceptions undermine the effectiveness of the ground?

(b) If so, how?

(c) Should the exception relating to "special needs" be strengthened?

(d) If so, how?

(e) Are there other exceptions that should be included or clarified?

See also Chapters 3 and 5 of this Paper for discussion of other general issues of concern common to all grounds.

RACIAL VILIFICATION

4.5 Racial vilification is dealt with in Division 3A of the Act and has been unlawful since 1 October 1989. Racial vilification means any public act that could encourage racial hatred, serious racial contempt or severe racial ridicule. Racial vilification, being vilification on the ground of race, is based on the Act's definition of "race". Unlike other grounds of discrimination, racial vilification is not limited to specific areas of public life. The definition of a "public act" under the Act includes *any* form of communication to the public, *any* conduct observable by the public and the distribution of *any* matter that promotes racial hatred to the public. Thus, a racially offensive remark made in public about a person's appearance or ethnic origin may be treated as racial vilification. According to the Anti-Discrimination Board's Annual Report for 1991/92, the majority (61%) of racial vilification complaints during that period were about media reports, divided between print and electronic media.

4.6 The Act creates the criminal offence of "serious racial vilification" which is referred to the Attorney General and may result in criminal prosecution, and the lesser civil offence of "racial vilification". The Act also provides exceptions to conduct that would otherwise be treated as racial vilification. These include "a fair report of a public act" and acts done "for academic, artistic, scientific or research purposes or for other purposes in the public interest".

4.7 The New South Wales Government began a Review into the Racial Vilification Amendment in 1992, fulfilling the Government's undertaking to do so after the amendments had been in place for at least one year. The Report of this review will be considered by the Commission when it becomes available. The Federal Government has also introduced a proposal to make racial vilification unlawful and to create a criminal offence of inciting racial hatred. This proposal is contained in the *Racial Vilification Amendment Bill* 1992 (Cth) which was introduced in Parliament on 16 December 1992. If passed, it will amend the *Racial Discrimination Act* 1975 (Cth) making racial vilification unlawful. It will also amend the *Crimes Act* 1914 (Cth) to create an offence of racial incitement.

DISCRIMINATION ON THE GROUND OF SEX

Definition

4.8 Part 3 of the Act makes it unlawful to discriminate either directly or indirectly on the ground of sex. There is no definition of "sex", although the Part provides that:

> "man" means a member of the male sex irrespective of his age;
>
> "woman" means a member of the female sex irrespective of her age.

These definitions make it clear that *children* are intended to be included under this ground.

4.9 Of importance also is that *pregnancy* is specifically included as a characteristic that appertains to women (s 24(1A)). Consequently discrimination because of pregnancy will be treated as discrimination on the ground of sex. The Anti-Discrimination Board's Annual Report for 1991/92 reported a significant increase in the number of women lodging complaints about pregnancy discrimination in relation to employment. In 1991, the Anti-Discrimination Board resolved to conduct a public inquiry into the extent of discrimination against pregnant women and women of child-bearing age in the workforce. This inquiry, the NSW Inquiry into Pregnancy Discrimination and Maternity Leave, is a collaborative effort between the Board, the Women's Co-ordination Unit and the Department of Industrial Relations and Employment. The Report of this Inquiry will be considered by the Commission when it becomes available.

4.10 *Sexual harassment* is not specifically included or defined in the Act. However, it was recognised as an important form of sex-based discrimination in the case of *O'Callaghan v Loder* (1984) EOC 92-022. In attempting to define sexual harassment Judge Mathews said that "a person is sexually harassed if he or she is subjected to unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her". Since the *Loder* decision sexual harassment is considered to come within the scope of discrimination on the ground of sex. In *Hill v Water Resources Commission* (1985) EOC 92-127, the Equal Opportunity Tribunal decided that it was sufficient if the harassment produced a hostile working environment which adversely affected the conditions of employment. There was no need for the harasser to be in a supervisory capacity.

4.11 The *Sex Discrimination Act* 1984 (Cth) is aimed at eliminating discrimination on the grounds of sex, marital status and pregnancy in the federal sphere. Several aspects of the operation of that Act have been recently reviewed by the House of Representatives Standing Committee on Legal and Constitutional Affairs, chaired by Mr Michael Lavarch MP ("the Lavarch Committee") in its Report "Half Way to Equal" and by the Sex Discrimination Commissioner in the Report "A Review of Exemptions". Both Reports made substantial recommendations for amending the *Sex Discrimination Act,* many of which are contained in the *Sex Discrimination and Other Legislation Amendment Act* 1992 (Cth) and the *Human Rights and Equal Opportunity Legislation Amendment Act* 1992 (Cth), both assented to on 16 December 1992. The most notable amendments are listed in Chapter 3 of this Paper under the heading "Legislative Developments in Australia".

Areas of operation

4.12 The areas in which discrimination on the ground of sex are prohibited are similar to those provided for race and are set out below:

Work - including applicants and employees, commission agents, contract workers, including partnerships of six or more persons, trade unions, qualifying bodies and employment agencies [s 25-30].

Education [s 31A].

Access to places where liquor is sold [s 32].

Provision of goods and services [s 33].

Accommodation [s 34].

Registered clubs [s 34A].

Exceptions

4.13 There are a large number of exceptions to the prohibition against sex discrimination. Some exceptions apply to specific areas of operation, while others apply to all areas in which discrimination on the ground of sex is prohibited.

Exceptions to specific areas of operation

Work - pregnancy at time of application or interview, unless the woman did not know or could not have known of the pregnancy [s 25(2A)].

- employment in a private household, in a business employing less than six people or in a private educational authority [s 25(3)].

- genuine occupational qualification: there are a number of exceptions to the prohibition against the selection of a particular sex for employment, where the person's sex is defined as a "genuine occupational qualification" for the job. The Act sets out some of the circumstances in which being of a particular sex is a genuine occupational qualification, including such factors as: available accommodation in a residential job, providing a particular sex with personal educational or welfare services where the persons who receive the services might object to the services being performed by the opposite sex, and where the job requires a particular sex for reason of "physiognomy or physique, excluding physical strength or stamina", or authenticity in dramatic or other performances. The section

also states that a person's sex may be a "genuine occupational qualification" where the job is one of two to be held by a married couple. It is also possible for the Governor to make regulations setting out situations where being of a particular sex is a genuine occupational qualification for a particular job of a particular class or description [s 31].

Education - the prohibition does not apply to a "private educational authority" or to the refusal of entry to a male where the institution is solely for females or vice versa [s 31A(3)].

Provision of goods and services - "where a skill is commonly exercised in a different way in relation to men and women, a person does not ... [discriminate] by exercising the skill in relation to men only, or women only, in accordance with his normal practice" [s 33(2)].

Accommodation - the Act does not apply to provision of accommodation in premises occupied by the person offering the accommodation or by a near relative of that person or where the accommodation is for no more than six persons [s 34(3)].

Registered clubs - the prohibition does not apply if membership of the club is available to persons of the opposite sex only [s 34A(3)].

- with regard to the use or enjoyment of the club, it is not unlawful to discriminate in the terms of admission to membership, deny or limit access to benefits provided, deprive membership, vary terms of membership or subject the person to any other detriment, if it is not practicable for the benefit to be enjoyed by both sexes at the same time if they are allowed the benefit of the same or equivalent usage separately [s 34A(4)].

Exceptions to all areas of operation

It is not unlawful to discriminate on the ground of sex in any of the specified areas of operation with regard to:

Pregnancy or childbirth - by granting a woman rights or privileges in connection with pregnancy or childbirth [s 35];

Superannuation - in the terms and conditions that apply to a superannuation or provident fund [s 36];

Insurance - regarding the terms on which an annuity or other insurance policy is offered or obtained as long as the discrimination is based on actuarial or other statistical data and is reasonable [s 37]; or

Sport - by excluding people from participation in any sporting activity as long as they are not excluded from coaching or administrative positions [s 38].

Issues for consideration

Sexual harassment

Question 52

It has been suggested that even persistent advances made to members of the opposite sex in the employment area should not be regarded as sex discrimination unless:

- the employer makes it clear that a continuation of employment or current status or access to promotion or other benefit is dependent upon the employee's response; or

- the sexual advances are so severe and pervasive that they create a hostile work environment.

The *Sex Discrimination Act* 1984 (Cth) as recently amended, modelled on the parallel provisions in South Australia, the ACT and Queensland has re-defined its definition of "sexual harassment" so that it is no longer linked to proof of detriment or disadvantage in employment.

(a) Should the existing test in New South Wales be brought in line with the test now used in the federal sphere and other jurisdictions as stated above?

(b) Should sexual harassment be a separate ground of discrimination or should it be specifically included within the scope of sex discrimination?

(c) In either case, how should it be defined?

Question 53

If expressly included within the scope of the Act, in what areas should the prohibition against sexual harassment operate?

Pregnancy discrimination

Question 54

There has been some uncertainty as to whether pregnancy discrimination would always be sex discrimination. Commenting on the case of *Webb v EMO Air Cargo (UK) Ltd* [1992] IRLR 116, in the Law Society's Gazette No 18 (13 May 1992) at 19, Professor B W Napier said:

> [t]here should be no doubt that pregnancy and gender can be distinguished. While only women can become pregnant, not all women are pregnant. Consider a case where two females apply for a post, one of whom is pregnant. If the employer chooses to offer the job to the woman who is not pregnant and for that reason, it offends common sense to say the unsuccessful candidate suffered on the ground of sex. Sex is the quality which distinguishes men from women, not men from pregnant women or pregnant women from non pregnant. The fact that only women become pregnant does not mean that pregnancy can be identified with gender.

Does discrimination because of pregnancy amount to discrimination on the ground of sex or should pregnancy be a separate ground of discrimination?

Question 55

The Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia called "Half Way to Equal" (the Lavarch Report) recommended that potential pregnancy should be included as a ground of discrimination in the *Sex Discrimination Act* 1984 (Cth) because:

> [w]omen who are discriminated against because they express an intention to become pregnant, or because of the likelihood that they may become pregnant, should be able to lodge a complaint under the SDA [Sex Discrimination Act 1984 (Cth)]. The likelihood of pregnancy may already fall within the definition of sex discrimination under the Act - as an imputed characteristic of women; however, the Committee believes that it would be desirable for it to be specifically stated.

This recommendation is currently being considered by the Commonwealth Attorney General's Department.

Should potential pregnancy be included within the scope of the *Anti-Discrimination Act* 1977 (NSW)?

Question 56

Sections 25(1A) and 25(2A) of the *Anti-Discrimination Act* provide exceptions to pregnancy discrimination in the area of work, if at the time of applying for the job or being interviewed, the woman was pregnant, unless the woman could not have reasonably been expected to know of her pregnancy at that time. The *Sex Discrimination Act* 1984 (Cth) makes no such exceptions for any form of discrimination in employment on grounds of pregnancy.

Should the *Anti-Discrimination Act* adopt the federal approach?

Other forms of sex discrimination

Question 57

A study done in the United States by Dworkin and MacKinnon has argued that pornography is a form of sex discrimination because it promotes the subordination of women.

(a) Should the Act be expanded to include this concept?

(b) Are there other forms of sex discrimination that warrant specific inclusion in the Act?

Discrimination on the ground of family responsibilities is also considered a significant source of direct and indirect discrimination against women.

For discussion relating to the inclusion of "family responsibilities" as a possible ground of discrimination, see Chapter 5 of this Paper.

For a general discussion of the issues relating to indirect sex discrimination, see Chapter 3 of this Paper.

Other areas of sex discrimination - the private sphere

Question 58

It appears that many areas in which women are disadvantaged are not covered by the provisions of the Act because they occur within the private sphere of activity. The problems associated with the division between public and private life affect other grounds as well and are dealt with in Chapter 5 of this Paper.

Should the scope of the Act be extended to cover discrimination against women in the private/domestic sphere?

Exceptions

Question 59

(a) Are the exceptions to discrimination on the ground of sex appropriate?

(b) Do any of them tend to prevent the promotion and recognition of equality of men and women in society?

(c) If so, which exceptions do so and why?

For issues relating to the impact of protective legislation on women, see the discussion on "Industrial Relations and Discrimination Legislation" in Chapter 2 of this Paper and the discussion on "General Exceptions" (acts done under statutory authority) later in this Chapter.

See also Chapters 3 and 5 of this Paper for discussion of other general issues of concern common to all grounds.

DISCRIMINATION ON THE GROUND OF MARITAL STATUS

Definition

4.14 Discrimination on the ground of marital status is prohibited in Part 4 of the Act. "Marital status" is defined in the definitions section as:

> ... the status or condition of being -
>
> (a) single;
>
> (b) married;
>
> (c) married but living separately and apart from one's spouse;
>
> (d) divorced;
>
> (e) widowed; or
>
> (f) in cohabitation, otherwise than in marriage, with a person of the opposite sex.

The definition does not include homosexual relationships.

4.15 There are two cases of particular relevance to the interpretation of the term "marital status". They are:

> *Boehringer Ingleheim Pty Ltd v Reddrop* (1984) EOC 92-108 where it was decided that the term "marital status" is not broad enough to cover the identity of a person's spouse; and
>
> *Waterhouse v Bell* (1991) EOC 92-376 which was significant because it added "corruptibility at the hands of one's husband as a characteristic imputed to all married women" to the list of characteristics upon which a complaint of discrimination can be based.

The two cases have been distinguished from each other on the basis that in *Boehringer,* the possibility that Mrs Reddrop may have disclosed confidences to her husband who worked in a rival firm was a characteristic that was peculiar to her and not generally imputed to married women; whereas in *Waterhouse,* corruptibility was generally imputed to all married women.

Areas of operation

4.16 The areas in which discrimination on the ground of marital status are prohibited are similar to those provided for other grounds and are set out below:

Work - including applicants and employees, commission agents, contract workers, partnerships of six or more persons, trade unions, qualifying bodies and employment agencies [s 40-46]

Education [s 46A].

Provision of services [s 47].

Accommodation [s 48].

Registered clubs [s 48A].

Exceptions

4.17 As is the case with other grounds, the prohibition of discrimination on the ground of marital status is subject to exceptions, some of which apply to specific areas of operation and others which apply generally.

Exceptions to specific areas of operation

Work - employment in a private household, in a business employing less than six people or in a private educational authority [s 40(3)].

- if a job is one of two to be held by a married couple it is not unlawful to discriminate in relation to that job [s 46].

Education - students in a private educational authority are not covered by the discrimination provisions [s 46A(3)].

Accommodation - the Act does not apply to provision of accommodation in premises occupied by the person offering the accommodation or by a near relative of that person or where the accommodation is for no more than six persons [s 48(3)].

Exception to all areas of operation

It is not unlawful to discriminate on the ground of marital status in any of the specified areas of operation with regard to:

Superannuation - in the terms or conditions that apply to a superannuation or provident fund or scheme [s 49].

Issues for consideration

Scope of the definition of "marital status"

Question 60

It has been submitted that a gap exists between the marital status provisions and the homosexuality provisions in ensuring equality of treatment for homosexual couples. For instance, in *Wilson v Qantas Airways Ltd* (1985) EOC 92-141, two homosexual airline stewards who were cohabiting complained of discrimination on the ground of marital status because they were not permitted the privilege of being rostered together (whereas heterosexual couples employed by the airline were granted the privilege). The New South Wales Equal Opportunity Tribunal held that homosexuality was not a "marital" status; that the couple were more comparable to "golfing buddies" than to married heterosexual couples.

Should homosexual relationships be included within the scope of discrimination on the ground of marital status?

Question 61

It has been suggested that the effect of the case of *Boehringer* is inconsistent with that of *Waterhouse*, despite attempts to distinguish the cases.

(a) Should the legislation clarify the distinction made in the two cases?

(b) Should the definition of "marital status" be extended to include discrimination on the basis of the identity of one's spouse (as has been recommended by the Report of the Inquiry into Equal Opportunity and Equal Status for Women in relation to the *Sex Discrimination Act* 1984 (Cth))?

Question 62

Discrimination on the ground of "family status" is considered in Chapter 5 of this Paper.

If discrimination on the ground of family status is to be included in the Act, should it be linked to the ground of marital status?

Areas of operation

Question 63

Are the areas of operation adequate?

Exceptions

Question 64

Are the exceptions appropriate?

See also Chapters 3 and 5 of this Paper for discussion of other general issues of concern common to all grounds.

DISCRIMINATION ON THE GROUNDS OF PHYSICAL AND INTELLECTUAL IMPAIRMENT

Definition

4.18 Discrimination, both direct and indirect, on the grounds of physical impairment and intellectual impairment are prohibited in Parts 4A and 4B of the Act. Although the Act deals with the two grounds in separate Parts, this chapter will deal with them together, but will identify issues that are peculiar to each ground. Section 4(1) of the Act contains the following relevant definitions:

> **"Intellectual impairment"**, in relation to a person, means any defect or disturbance in the normal structure and functioning of the person's brain, whether arising from a condition subsisting at birth or from illness or injury;

> **"Intellectually handicapped person"** means a person who, as a result of disabilities arising from intellectual impairment, is substantially limited in one or more major life activities;

> **"Physical impairment",** in relation to a person, means any defect or disturbance in the normal structure and functioning of the person's body, whether arising from a condition subsisting at birth or some illness or injury, but does not include intellectual impairment;

> **"Physically handicapped person"**, means a person who, as a result of having a physical impairment to his body and having regard to any community attitudes relating to persons having the same physical impairment as that person and to the physical environment, is limited in his opportunities to enjoy a full and active life.

4.19 Direct discrimination relates to discrimination where the reason for that discrimination is the person's disability, whether physical or intellectual (but not mental illness), or a stereotyped assumption about the effects of the disability. Thus, if an employer has a policy not to employ people in wheelchairs, that would be an instance of *direct* discrimination on the ground of physical impairment.

4.20 Indirect discrimination relates to setting a term, condition or requirement which has the intentional or unintentional effect of disadvantaging the disabled person, which is not reasonable. Thus, if an employer insists that all employees must be able to reach a certain height where that is not an inherent requirement of the job, the resulting discrimination against people in wheelchairs will be *indirect* discrimination on the ground of physical impairment.

See also the discussion of direct and indirect discrimination in Chapter 3 of this Paper.

Areas of operation

4.21 The areas in which discrimination on the ground of physical and intellectual impairment are prohibited are set out below:

Work - including applicants and employees, commission agents, contract workers, partnerships of six or more persons, trade unions, qualifying bodies and employment agencies [s 49B-49I and s 49Q-49X].

Education [s 49J and s 49Y].

Provision of goods and services [s 49K and s 49Z].

Accommodation [s 49L and s 49ZA].

Registered clubs [s 49LA and s 49ZB].

Exceptions

4.22 Most of the exceptions apply to both physical and intellectual impairment, while a few apply to physical impairment only.

Exceptions to physical and intellectual impairment discrimination in specific areas of operation

Work - employment in a private household, in a business employing less than six people or in a private educational authority does not come within the ambit of the prohibition against discrimination. So also, in offering employment, and in setting terms and conditions of employment, it is not unlawful for an employer to discriminate, if the person because of the physical or intellectual impairment is unable to carry out the particular work or would require special services or facilities (which cannot reasonably be provided) to carry out the work. This exception also applies to commission agents, contract workers and partners [s 49B(3),s 49I and s 49Q(3), s49X].

Education - the prohibition does not apply to a private educational authority. It is also not unlawful for an educational authority which administers a school, college or university that caters solely for students who have a particular physical or intellectual impairment to refuse admission to an applicant who has a different impairment to that catered for by the school. Nor is it unlawful if an educational authority cannot reasonably provide services or facilities required by the intellectually or physically handicapped student, which are not required by students who are not physically or intellectually handicapped [s 49J(3) and s 49Y(3)].

Provision of goods and services - it is not unlawful for a provider of goods or services to refuse provision, if it appears reasonable to the provider to assume that the physically or intellectually impaired person would not be able to use the goods and services because of the particular impairment. Alternatively, it is not discriminatory if, despite assistance to use the goods or services, the person is still unable to do so because of the impairment [s 49K(2) and s 49Z(2)].

Accommodation - the Act does not apply to provision of accommodation in premises occupied by the person offering the accommodation or by a near relative of that person or where the accommodation is for no more than six persons [s 49L(3) and s 49ZA(3)].

It is also not unlawful to refuse accommodation if it appears on reasonable grounds that the physically or intellectually handicapped persons would only be able to use the accommodation with substantial risk of injury to themselves [s 49L(4)(b) and s 49ZA(4)].

Registered clubs - it is not unlawful to refuse an application for membership or discriminate against a physically or intellectually handicapped person, if that person requires services and facilities (in order to use benefits and facilities without inconveniencing others) not required by other (non-handicapped) persons, which cannot reasonably be provided or accommodated, depending on the circumstances of the case [s 49LA(5) and s 49ZB(3)].

Exceptions to physical impairment only in specific areas of operation

Accommodation - it is not unlawful to discriminate against a physically handicapped person if it is considered reasonable for someone to assume that, because of the physical impairment the person would be unable to gain access to the accommodation or benefit associated with the accommodation [s 49L(4)(a)].

Registered clubs - it is not unlawful to discriminate on the ground of physical impairment if the principal object of the club is to provide benefits only to physically handicapped persons with a particular physical impairment [s 49LA(3)].

Exceptions to physical and intellectual impairment discrimination in all areas of operation

Apart from the above exceptions that apply in particular areas of operation, there are other exceptions that apply generally to discrimination on the grounds of physical and intellectual impairment in all areas of operation with regard to:

Superannuation - in the terms and conditions that apply to a superannuation fund [s 49M and s 49ZC].

Insurance - regarding the terms on which an annuity, life assurance, accident or other insurance policy is offered, if the discrimination is based on actuarial, statistical or other information on which it is reasonable to rely [s 49N and s 49ZD].

Sport - by excluding a physically or intellectually handicapped person from participating in any sporting activity. This exception does not apply to coaching or administration of any sporting activity [s 49O and s 49ZE].

Issues for consideration

Approaches to disability discrimination

Question 65

Many of the preliminary submissions received by the Commission emphasised the need to recognise that discrimination on the ground of disability raises different questions compared with discrimination on the ground of race or sex. The direct discrimination provisions have been criticised because they require a comparison to be made between the physically or intellectually impaired person and other people "in the same circumstances or in circumstances which are not materially different". As explained in Chapter 3 of this Paper, such a comparison is particularly difficult in this area of discrimination since a direct comparison between the two cannot be made. People with disabilities often require very different services and may adopt different methods of doing things that cannot be compared with the needs or methods of non-disabled people. Indeed it has been suggested that the requirement of comparability is unrealistic for people with disabilities and may be a barrier to the successful use of the Act.

(a) Should a different approach to the comparability test be adopted?

(b) Would a more appropriate approach be to require an employer to adopt an individualised assessment of the job needs and the person's functional capacities in relation to a particular job, including an identification of any restrictions or special requirements and making "reasonable accommodation" in response to the person's special needs?

Question 66

The concept of "reasonable accommodation" has been incorporated in the United States *Americans with Disabilities Act* 1990 PL 101-336 (Fed). In an attempt to create a balance between the needs of people with disabilities and the interests of others, such as employers and service providers, the United States legislation has tempered the "reasonable accommodation" requirement with an "undue hardship" defence: employers and service providers would discriminate unlawfully if they did not "reasonably accommodate" the impaired person's requirement, unless to do so would cause "undue hardship".

(a) Should similar provisions be introduced to impairment discrimination in New South Wales?

(b) If so, should such a "reasonable accommodation" requirement be applicable in all areas of operation or limited to employment only?

(c) Should examples be provided in legislation or elsewhere as a guideline to clarify the meaning of "reasonable accommodation" and "undue hardship"?

Question 67

It is a defence if, in the [subjective] opinion of the employer, based on reasonable grounds, the person would be unable to carry out the work, or if in order to carry out the work the person would require services or facilities which in the [subjective] opinion of the employer, it is not reasonable to provide. There is no distinction made between essential and non-essential parts of the work.

Should there be such a distinction whereby the employer will be obliged to adjust the job description to accommodate the worker's inability to perform non-essential tasks, if it is reasonable to do so?

Question 68

The reasonableness test found in Parts 4A and 4B is subjective, whereas arguably if it is to be effective it should be objective. In particular, should there be some clarification of the wording in s 49I to ensure that a "reasonable" decision is one based on facts and reality, not fears and prejudices which "*appeared* to the employer, ... having regard to the circumstances of the case, it was reasonable to rely" on? [emphasis added] It appears from Supreme Court and Court of Appeal decisions, that, as presently drafted, it is what "appeared to the employer" that is important, however misguided the employer's opinion might be.

Since the term "reasonable" is used so frequently, should it be defined and if so, how?

Question 69

It has been suggested that disability discrimination issues will be more appropriately dealt with in the *Disability Services and Guardianship Act* 1987 (NSW). This suggestion is based on the German system where the discrimination provisions are built into the *German Disability Act* instead of in separate discrimination legislation.

Is this a viable option for New South Wales?

Types of discrimination covered

Question 70

The types of discrimination presently covered are direct and indirect discrimination. The Act does not cover discrimination because of imputed impairment (in the same way as it covers imputed homosexuality). By imputed impairment is meant an impairment which is suspected or presumed, but not actually suffered by the person discriminated against.

Should Parts 4A and 4B also prohibit discrimination because of past, future and imputed impairment and discrimination against a relative or associate of a person with a disability as is the position in some jurisdictions, including the *Disability Discrimination Act* 1992 (Cth)?

Question 71

It has been suggested that the inclusion of "characteristics generally appertaining to" and "characteristics generally imputed to" in the definitions of physical and intellectual impairment is inappropriate.

Would it be preferable to delete the references to "characteristics generally appertaining" and amend the provisions relating to "characteristics generally imputed" to clarify that they refer only to cases in which the characteristic is not actually possessed?

Question 72

The Act deems that being accompanied by a guide dog is a characteristic that appertains generally to people with a visual impairment. The *Discrimination Act* 1991 (ACT) has included discrimination against persons with "hearing dogs" for the assistance of a deaf person and "some other aid associated with the impairment" as discrimination on the ground of impairment.

(a) Should the deeming provision in New South Wales be extended to include people who use a guide dog because of a hearing or mobility impairment?

(b) What should be the position with regard to service dogs, ie dogs that do picking up, carrying things etc for disabled people?

(c) Should it also extend to discrimination because a person has a palliative or therapeutic aid, such as wheelchairs, canes etc or because a person is accompanied by another person, who is required to help the person with a disability?

(d) Alternatively, instead of declaring being "accompanied by a guide dog" as a characteristic appertaining to visually impaired people, would it be preferable to expressly define the circumstances in which it would be permissible to exclude guide dogs, and provide for a general prohibition on exclusion of guide dogs and other aids or their owners, in other circumstances.

Question 73

(a) Should there be protection against harassment and/or vilification on the grounds of physical and intellectual impairment?

(b) If so, should it be included in a definition of discrimination or should there be a separate definition of unlawful discrimination to cover harassment/vilification?

Question 74

It has been submitted that discrimination sometimes occurs because of information contained in a medical record - for instance, when a medical record shows that a person had once sought an HIV anti-body test.

Should discrimination on the ground of medical record be included within the Act?

Indirect discrimination

Question 75

Indirect discrimination has been identified as the commonest form of discrimination on the grounds of physical and intellectual impairment. It raises certain problems in relation to impairment since discrimination on these grounds is treated within the same conceptual framework as discrimination on other grounds. John Basten in a paper presented at a seminar entitled "Indirect discrimination and the *Sex Discrimination Act*" used the example of discrimination in employment to illustrate the conceptual problems:

> ... taking the common example of discrimination in employment, where the effect of a disability is to impose demands or restrictions on an employer, it cannot be said that the disability is an inherently irrelevant factor as might be said of race or sex. In that context, it is confusing to talk of treating a disabled person less favourably than in the same circumstances the employer treats or would treat a person who is not physically disabled.

According to John Basten:

> The only satisfactory solution to the conceptual problems raised by physical impairment is one which distinguishes between-
>
> (a) disabilities which are truly irrelevant to the circumstances of the case (in which case the beliefs of the discriminator, whether based on reasonable grounds or not, should be irrelevant);
>
> (b) the case where the disability does affect, for example, the work required to be done (where reasonable accommodation may be required); and
>
> (c) the case where the disability significantly affects work performance and the disadvantage cannot reasonably be accommodated.

Does the scheme referred to above provide a satisfactory solution ?

Definitions of physical and intellectual impairment

Question 76

The definitions of "intellectual impairment" and "intellectually handicapped person" have been criticised by the Equal Opportunity Tribunal, the Anti-Discrimination Board and the Supreme Court. It has been stated that the definitions have been inaccurately adopted from the World Health Organisation's International Classification of Impairments, Disabilities and Handicaps.

Some of the problems with the definitions that have been identified are:

(i) A person with an intellectual disability needs to be more disabled than a person complaining on the ground of physical impairment. Unlike physically handicapped persons who only need to show limitation in their "opportunities to enjoy life", an intellectually handicapped person is defined as being "substantially limited in one or more major life activities". It has been submitted that this causes particular problems for people with multiple disabilities. First, a disabled person may not know which of the disabilities has caused the discrimination and yet to complain it would be necessary to know whether it was because of the physical or intellectual handicap. Secondly, requiring a substantial limitation in a major life activity could mean that people whose impairments are controlled may not be seen to be substantially limited in a major life activity even if they were discriminated because of the impairment. For instance, a person with epilepsy who has not had a seizure for a while, may be discriminated against because of the epilepsy but may not be able to complain because there is no substantial limitation in a major life activity.

(ii) The definitions of "intellectually handicapped person" and "physically handicapped person" require that the person must first be impaired in terms of the definition of "intellectual impairment" or "physical impair-ment" respectively. It has been submitted that the fact that a person is required to demonstrate the existence of an impairment before a complaint can be made is a short-coming in the provisions as it entails an unnecessary two stage test of "impairment" and "handicap".

(iii) The definition of intellectual impairment makes reference to "structure and functioning of a person's brain". This means that, in order to claim the protection of the Act, a person must be able to identify the cause of the disability. However, it has been submitted that in most cases of intellectual disability, although the disability is recognisable, there is no known cause that can be identified.

(iv) A further difficulty with the way intellectual impairment is defined is that conditions which originate from the brain, such as epilepsy and cerebral palsy, are characterised as intellectual impairments rather than physical impairments. It has been submitted that such people have no wish to call themselves "intellectually handicapped" and that such a label is inappropriate and offensive to a person whose disability manifests itself as a dysfunction of the body.

(v) The reference to "structure *and* functioning" may exclude some types of impairment. For instance, epilepsy affects the functioning but not the structure of the brain and would therefore technically neither come within the definition of physical nor intellectual impairment. (It was however held in *Kitt v Tourism Commission* (1987) EOC 92-196, that the phrase "normal structure and functioning" denotes a single idea expressed in two words joined by a conjunction. Consequently, any defect in either structure or functioning could constitute a defect in structure and functioning.)

(a) Should physical and intellectual impairment be defined separately?

(b) Alternatively should there be a general "impairment" definition?

(c) If a general impairment definition is favoured, what sorts of impairment should be included in the general definition?

(d) Is the model adopted in the *Disability Discrimination Act* 1992 (Cth) (which is a single, wide ranging definition of disability) suitable for New South Wales?

Question 77

(a) Is the two stage test of "impairment" and "handicap" necessary?

(b) Would it be preferable to concentrate on whether or not the person has been discriminated against, rather than the type of impairment for the purpose of making a complaint.

Question 78

(a) Is the division between brain and body appropriate?

(b) Should the reference to "structure and functioning" be substituted with a reference to "structure or functioning"?

Question 79

The exclusion of mental illness from the protection of discrimination is a cause of concern among people with a mental illness and their representatives.

(a) Should mental illness be included?

(b) If so, should it be included as part of the general definition of impairment or should it be a separate ground?

(c) Alternatively, should the coverage of mental illness be limited to those who have had a mental illness in the past or are imputed as having a mental illness?

(d) How should mental illness be defined?

Question 80

Although the Anti-Discrimination Board does accept complaints of discrimination because of being HIV positive under the ground of physical impairment, there is considerable doubt as to whether the status of being asymptomatic HIV positive is covered by the definition of physical impairment. There are arguments that a person with asymptomatic HIV infection is neither physically handicapped nor physically impaired.

(a) Should the definition of impairment include provision for the presence of organisms that may cause disease, to clarify the position with regard to HIV?

(b) Alternatively, should discrimination on the ground of being HIV positive be a separate ground?

Question 81

It has been suggested that if the definition of impairment is clarified to include HIV, it should be accompanied by a specific exception for measures reasonably necessary to protect the health and safety of others. This may occur, for example, where discriminatory action is necessary to prevent or minimise the transmission of HIV or other communicable diseases. It has been suggested that this approach will uphold reasonable measures, while actions based on irrational fear or prejudice will be found unlawful. The uncertainty that may arise out of the use of the word “reasonable” may be diminished by reliance on medical knowledge.

(a) Should there be an exception for actions taken in reasonable reliance on medical opinion? (This would be similar to the defence applicable to discrimination in insurance where actions based on actuarial data on which it is reasonable to rely are excepted)

(b) Who should bear the onus of proof?

(c) Should it be up to the complainant to establish that there was no risk of transmission or should the person making the claim show that there was a scientific risk and that there was no alternative non-discriminatory action that could have been taken in the circumstances?

For further discussion, see the Report of the Inquiry into HIV and AIDS Related Discrimination called “Discrimination - The Other Epidemic”. Many of the recommendations made in that Report are currently being considered by the Attorney General. Other reports relevant to HIV/AIDS related law reform are listed in the “Background Reading” section at the end of this chapter.

Terminology

Question 82

Helen Wilson in an article entitled "A struggle to be waged" has stated that:

> [t]he terminology used in the Act - 'handicap' and 'impairment' - has the effect of placing the disability first and the person second. ... The legislation is remedial and aims at reducing ill founded and prejudicial beliefs held by some members of the community about the way certain disabilities affect a person's ability to participate in public life. It does not therefore seem appropriate to require people to use language which is suggestive of incapacity to establish their capacity to function in a positive way.

(a) Does the terminology presently used label complainants in a negative fashion?

(b) If so, how can this be improved?

See also the section on "The language of the Act" in Chapter 5 of this Paper.

Access

Question 83

Access to buildings and the lack of sufficient disabled parking facilities have been identified as major problems for people with disabilities. The problems of access include: inaccessibility due to steps, slippery surfaces that make it difficult for people in wheel chairs and the lack of convenient toilet facilities.

(a) Can these problems be resolved legislatively or otherwise?

(b) Should there be opportunity for people with disabilities to complain about problems of access in relation to proposed buildings, transport and other similar projects at the planning stage, before it becomes prohibitively expensive to provide reasonable access?

(c) If so, should this be a requirement imposed through the mechanism of the *Anti-Discrimination Act*?

Areas of operation

Question 84

It has been suggested that “work” for disabled people involves much more effort than it does for other non-disabled people. For instance, it is said to often require more perseverance, consistency and longer travelling time.

Does this comment warrant an amendment to the meaning of “work” for disabled people by making certain allowances in relation to their working conditions or by linking it to the concept of “reasonable accommodation”?

Question 85

Should the provisions relating to employment specifically cover voluntary workers and workers in sheltered workshops?

Question 86

(a) Are the areas of operation wide enough?

(b) Are there other areas that should be included?

Exceptions

Question 87

(a) Are the exceptions too wide?

(b) If so, in what ways?

Question 88

As is the case with discrimination on the ground of race under the *Anti-Discrimination Act* , and race, sex and disability under the federal discrimination legislation, should there be a provision which exempts special measures designed to meet the special needs of people with disabilities in New South Wales?

Complaints mechanisms

Question 89

It has been suggested that persons with physical and intellectual impairments have considerable difficulties making complaints under the Act. One suggestion was to establish an office of Ombudsman exclusively for the disabled.

Is this a viable option for New South Wales?

For discussion relating to the enforcement mechanisms of the Act, see Chapter 6 of this Paper.

See also Chapters 3 and 5 of this Paper for discussion of other general issues of concern common to all grounds.

DISCRIMINATION ON THE GROUND OF HOMOSEXUALITY

Definition

4.23 Part 4C of the Act makes it unlawful to discriminate directly or indirectly on the ground of homosexuality. Although homosexuality is not defined, the Act states that a reference to a person's homosexuality includes a reference to the person being thought to be a homosexual person, whether or not that is a fact.

Areas of Operation

4.24 The areas in which discrimination on the ground of homosexuality are prohibited are similar to those provided for other grounds and are set out below:

Work - including applicants and employees, commission agents, contract workers, partnerships of six or more persons, trade unions, qualifying bodies, and employment agencies [s 49ZH-49ZN].

Education [s 49ZO].

Provision of goods and services [s 49ZP].

Accommodation [s 49ZQ].

Registered clubs [s 49ZR].

Exceptions

4.25 As is the case with the other grounds, there are many exceptions to the prohibition. However, the exceptions only apply to specific areas of operation.

Exceptions to specific areas of operation

Work - employment in a private household, in a business employing less than six people or in a private educational authority [s 49ZH(3)].

Education - does not apply to a private educational authority [s 49ZO(3)].

Accommodation - the Act does not apply to provision of accommodation in premises occupied by the person offering the accommodation or by a near relative of that person or where the accommodation is for no more than six persons [s 49ZQ(3)].

Issues for consideration

Vilification

Question 90

(a) Should vilification based on perceived or actual homosexuality be made unlawful?

(b) If so, should this be a separate ground of discrimination?

Requests for information

Question 91

Should there be a prohibition against asking personal, intrusive and discriminatory questions which are not reasonably related to non-discriminatory decision making?

Personal association

Question 92

Article 2 of the UN Convention on the Rights of the Child provides that children shall not be discriminated against on the basis of their parents', legal guardians' or family's status.

Should there be a prohibition against discrimination on the ground of personal association with a homosexual person, particularly in view of Australia's ratification of the UN Convention on the Rights of the Child?

Question 93

It has been submitted that the privileges accorded to heterosexual couples are denied to cohabiting homosexual couples because of a refusal to treat the relationship as "marital status". See *Wilson v Qantas Airways Ltd* (1985) EOC 92-141, referred to in Issues for consideration in relation to discrimination on the ground of marital status, at Question 60.

(a) Is there an unjustifiable gap between the marital status provisions and the homosexuality provisions in ensuring equality of treatment for homosexual couples?

(b) If so, how should this be resolved - by an amendment to the marital status provisions recognising homosexual relationships; an amendment to the sex discrimination provisions to prohibit discrimination on the ground of the sex of a relative or associate; or some other way?

Question 94

It has been suggested that there is a public perception that homosexuality refers to gay men only and not to lesbians.

(a) Is discrimination on the ground of lesbianism adequately covered by the ground of homosexuality?

(b) Should lesbianism be specifically included in the Act or should a new ground of sexual orientation be included?

For issues concerning AIDS and HIV, see the discussion of discrimination on the grounds of physical and intellectual impairment.

See also Chapters 3 and 5 of this Paper for discussion of other general issues of concern common to all grounds.

COMPULSORY RETIREMENT FROM PUBLIC EMPLOYMENT ON THE GROUND OF AGE

Definition

4.26 Part 4E of the Act makes it unlawful to:

retire an employee from employment;

require an employee to retire from employment;

threaten to retire an employee from employment; or

engage in conduct with a view to causing an employee to retire from employment on the ground of age.

There is no definition of retirement in the Act. Section 49ZU(3) states that although the "... meaning of retirement may vary according to the particular circumstances", what does or does not constitute retirement may be specified in the regulations. There are, however, no such regulations presently in force.

Areas of operation

4.27 The prohibition had a staggered commencement ranging from 1 January 1991 to 1 January 1993. The prohibition will, after 1 January 1993 apply to:

all public sector employees (other than the excepted categories);

private sector employees (except those employed under Federal Awards that specifically provide for a retirement age); and

employees of county councils and local councils.

4.28 The effect of the provision is that from 1 January 1993, all employees (other than those excepted) will benefit from the prohibition of compulsory retirement. A recent decision of the Equal Opportunity Tribunal found that the Newcastle and Sydney Universities are "public authorities" under the *Anti-Discrimination Act*, and that a public sector employee includes anyone employed by a public authority.

Exceptions

4.29 The provisions prohibiting compulsory retirement on the ground of age do not apply to:

a judicial officer;

a police officer;

an officer who is not appointed for a term and who cannot be removed from office except following an address, declaration, resolution or other involvement of either or both Houses of Parliament.

4.30 Section 54 of the Act, which excepts from the operation of the Act acts done under statutory authority, has no effect in relation to the compulsory retirement provisions. Thus, it will be unlawful for an employer to retire a person in accordance with a compulsory retirement age prescribed in an Act, State award or other instrument having statutory authority. However, compulsory retirement ages in federal awards are not affected. Section 49ZU(3) of the Act defines an "award or agreement" to mean one within the meaning of the *Industrial Relations Act* 1991 (NSW).

Issues for consideration

Question 95

What problems, if any, do the compulsory retirement provisions cause to employers?

Question 96

Should the definition of "public authority" be clarified?

Question 97

Are the exceptions appropriate?

Question 98

Should the general exceptions to the Act, such as those relating to charities and religious bodies, apply to compulsory retirement?

See also Chapters 3 and 5 of this Paper for discussion of other general issues of concern common to all grounds.

OTHER UNLAWFUL ACTS

Introduction

4.31 Apart from prohibiting discrimination on certain grounds in certain areas of activity as described in the preceding section of this Paper, Part 5 of the Act also makes certain other acts generally unlawful without any reference to specific areas of activity. They are:

victimisation;

advertising to do an act that is unlawful under the Act;

aiding unlawful acts; and

liability of principals and employers.

Victimisation

4.32 Victimisation is not a criminal offence under the *Anti-Discrimination Act.* It is an unlawful act which can be investigated, conciliated and, if appropriate, referred to the Equal Opportunity Tribunal. Section 50 makes it unlawful for the discriminator to subject the victimised person "to any detriment" because the victimised person has:

(a) brought proceedings against the discriminator under the Act;

(b) given evidence or information in connection with proceedings brought under the Act;

(c) made an allegation against the discriminator; or

(d) done anything under or by reference to the Act in relation to the discriminator or any other person.

4.33 It is also unlawful to subject the victimised person to "any detriment" because the discriminator knows or suspects that the victimised person intends to do any of the above. The Act provides further that where a person is victimised as a result of making an allegation that is false and not made in good faith, there is no unlawful victimisation.

4.34 Under the *Racial Discrimination Act* 1975 (Cth) and the *Sex Discrimination Act* 1984 (Cth) victimisation is treated as a criminal act, which is prosecuted in a court and attracts specified penalties. The recent amendments to those Acts contained in the *Sex Discrimination and Other Legislation Amendment Act* 1992 (Cth) now additionally enable complaints of vilification to be considered through a process of conciliation. The effect of the new provisions is the creation of a parallel civil action for unlawful vilification bringing the *Racial Discrimination Act* and the *Sex Discrimination* Act into line with the *Disability Discrimination Act* 1992 (Cth) whereby victimisation is both a criminal offence and an unlawful act.

Issues for consideration

Scope of "victimisation"

Question 99

Victimisation takes place only if the person victimised is subjected to any detriment. The courts have held that "subjected to" means that the person victimising intended to cause the detrimental consequences.

Should the meaning of "subjected to" be clarified in the legislation?

Question 100

Should it be necessary that the allegation must be false and lacking in good faith to avoid the operation of the victimisation provision?

Type of offence

Question 101

Should victimisation be a criminal offence as well as an unlawful act?

Advertisements

4.35 Section 51 of the Act makes it unlawful to "publish or cause to be published an advertisement that indicates an intention to do an act that is unlawful under this Act". Thus, an advertisement inviting job applicants of a particular sex or race may be in breach of the Act if it does not qualify under a specified exception. However, it is a defence if the defendant can prove that he or she believed, on reasonable grounds, that the advertisement was not unlawful under the Act.

4.36 Although the Act states that it is an offence to publish or display an advertisement which is discriminatory, news and other items presented in both the printed and electronic media do not come within the scope of the legislation.

Issues for consideration

Scope of the Act

Question 102

(a) Should the scope of the Act be broadened to include discrimination in news items in the media?

(b) If so, how should it be framed?

(c) Could it be framed similarly to the definition of "public act" in the racial vilification provisions?

Question 103

Should advertisements based on sex and other stereotypes be unlawful under the Act, even if they are not discriminatory against a particular person?

Exceptions

Question 104

Should there be a defence based on reasonable belief that the act is not discriminatory?

Question 105

Is it necessary to have exceptions to unlawful advertisements?

Penalty

Question 106

(a) Should the penalty, currently $1000, be increased?

(b) Should a distinction be made between individuals and corporations for the purposes of the penalty?

(c) If so, what should the penalty be for individuals and corporations?

Aiding unlawful acts

4.37 Section 52 makes it unlawful to cause, instruct, induce, aid or permit another person to do an act that is unlawful under the Act. A person who does so will be jointly and severally liable with the person who actually did the act.

4.38 In the case of *M v R Pty Ltd* (1988) EOC 92-229, an employee was held jointly liable with the employer for the sexual harassment perpetrated by the employee against another employee. Applying s 52 of the Act, the Tribunal held that the offending employee caused, induced, aided or permitted the relevant unlawful acts on the part of the employer company.

Issues for consideration

Question 107

(a) Does the provision relating to aiding unlawful acts require amendment?

(b) If so, in what ways?

Liability of principals and employers

4.39 Section 53 of the *Anti-Discrimination Act* 1977 provides that principals and employers are liable for the acts done by an agent or employee, unless the principal or employer did not authorise the doing of the act, either expressly or impliedly.

4.40 The case of *Hill v Water Resources Commission* (1985) EOC 92-127, involved alleged incidents of harassment which were perpetrated on the complainant by her co-workers, some who worked under her rather than her supervisors. With regard to the level of the employer's liability the case established that employers could be held liable for the acts of their employees.

4.41 However, it has been suggested that an employer should not be responsible for the discriminatory actions of managerial and supervisory employees if the employer has acquainted those employees with the requirements of the legislation. In the case of non-managerial / supervisory employees, it has been suggested that the employer should not be responsible under any circumstances, unless those circumstances constitute such a severe invasion as to create a hostile work environment which, though directly notified about, the employer has chosen to ignore.

Issues for consideration

Question 108

Should the employer be responsible for actions of:

(a) a supervisor or manager in relation to an employee for whom

(i) he/she is responsible, or

(ii) he/she is not responsible for directly or indirectly.

(b) a non-supervisory/non-managerial employee in relation to any other employee?

Question 109

Should the employer's liability in various situations be spelt out in the legislation?

Question 110

What defences should an employer have?

GENERAL EXCEPTIONS

4.42 As explained in Chapter 3 of this Paper, in addition to the specific exceptions that apply to each ground, there are also general exceptions that apply to all grounds established by the Act. The Act contains the following general exceptions:

Acts done under statutory authority - acts done under any other Act, regulation, ordinance, by-law, rule or other subordinate legislation; an order of the Tribunal; an order of any court, including a wage fixing award; or an industrial agreement [s 54];

Charities - any document which confers "charitable benefits" on persons of a class [s 55];

Religious bodies - acts done by religious bodies, including ordination, training or education, appointment of persons by a religious body or any other practice of a religious body that conforms to the doctrines of that religion [s 56];

Voluntary bodies - in relation to admission to membership and benefits to members of voluntary bodies [s 57]; and

Establishments providing housing accommodation for aged persons - housing which includes self care units, retirement villages, hostels and nursing homes [s 59].

Issues for consideration

Question 111

It has been stated in submissions that the general exceptions make significant actual as well as symbolic inroads into measures to counter discrimination and promote equality, devaluing the principles of anti-discrimination embodied in the Act.

Should all general exceptions be repealed allowing only for the grant of exemptions by the President of the Anti-Discrimination Board on application by the person seeking the particular exemption?

Question 112

Rather than apply the general exceptions to the whole Act, should the structure of the Act be changed to accommodate them in certain circumstances, within particular grounds and areas of operation only?

Question 113

Is the provision of short-term, temporary exemptions a preferable means of allowing for exceptional circumstances?

Question 114

Are there other ways of approaching exceptional circumstances?

Acts done under statutory authority

Background

4.43 The exception created by s 54 of the Act was considered the "most important" by the Anti-Discrimination Board in its submission to the Niland Inquiry conducted by the Department of Industrial Relations ("Transforming Industrial Relations in New South Wales"). Explaining the effect of this exception in that submission the Board stated:

> [s]ection 54 allows discrimination which is necessary to comply with other laws to take effect without contravening the *Anti-Discrimination Act.* Accordingly, as an exception of significant importance, it limits the jurisdiction of the *Anti-Discrimination Act.*

Thus, even if an act amounts to unlawful discrimination in terms of the *Anti-Discrimination Act*, if another law permits it, then it is acceptable and not an offence.

4.44 When the Act was introduced, the intention was that s 54 "should be read in conjunction with" s 121 "which will enable the Board to review all the legislation passed by this Parliament since its inception". This implies that if the reviews reveal inconsistencies with the principles outlined in the *Anti-Discrimination Act*, the ordinary course of legislative review will remedy the inconsistencies, enabling the s 54 barrier to be lifted over a period of time. However, almost 15 years down the track, the s 54 barrier remains.

Status of Anti-Discrimination Act in relation to other legislation

4.45 It has been suggested that the controversy surrounding the necessity or otherwise for the s 54 exception should be considered in the light of the status that should be accorded to the *Anti-Discrimination Act* which has been characterised as a human rights and equal opportunity law.

4.46 The general legal principles of interpretation developed to assign a hierarchy to different forms of legislation include the following:

Acts of Parliament override regulations;

where a law deals specifically and comprehensively with a subject, it will normally override laws that refer to the subject in passing; and

the later in time prevails.

4.47 However, the effect of s 54 changes the status of the *Anti-Discrimination Act* in the following ways:

Regulations can override the Act;

other general laws can override the specific provisions of the Act; and

laws made after the Act do not need to recognise or reflect its provisions.

Comparison with other jurisdictions

4.48 In the United States of America and Canada, discrimination laws are entrenched so that all other laws must conform with them. In Australia, all the states that have discrimination laws took effect from the proclaimed date of operation; none had retrospective effect. Thus, all laws and regulations in force at the time of the enactment of the discrimination laws continue unchallenged even if they are inconsistent with the discrimination laws. However, not all states are alike in their treatment of laws passed after their respective discrimination laws. For instance, South Australia's *Equal Opportunity Act* allows no exception for acts done under legislative authority, while Victoria has a similar exception to New South Wales. When the *Sex Discrimination Act* 1984 (Cth) came into operation in August 1984, there were a number of discriminatory state and federal Acts. In recognition of the

need to provide an opportunity for state and federal governments to review and amend existing legislation and policy, s 40 of that Act provided for a sunset clause to gradually lower the barrier to the review of discriminatory acts done under statutory authority. A two year exemption was provided where a person was acting in direct compliance with any federal or state Act, regulation, rule, by-law or determination in force at the commencement of the *Sex Discrimination Act.*

Section 54 - a problem?

4.49 In the case of *Najdovska v Australian Iron and Steel Pty Ltd* (see the discussion of indirect discrimination in Chapter 3) the employer argued that s 36 of the *Factories Shops and Industries Act* 1926 (NSW), (which specified the weights that women whatever their age and physical capabilities are allowed to handle, thereby precluding them from some occupations) prevented it from hiring women in many job classifications. According to the employer, this meant that no discrimination occurred, and in any case acts done in compliance with other statutory authority were exempt. The Tribunal did not accept the respondent's argument. Section 36 of the *Factories, Shops and Industries Act* has since been repealed but the conflict between acts that would normally be unlawful under the *Anti-Discrimination Act* but exempt because done under statutory authority, continues.

4.50 Occupational health and safety legislation is aimed at providing safe and healthy working conditions. However this legislation has been littered with discriminatory provisions. (See the discussion on impact of occupational health and safety legislation on discrimination legislation in Chapter 2.) They relate to such matters as handling of heavy weights, shiftwork, the provision of special amenities and facilities, lead processing, industrial processes, underground mining and apprenticeship. Many such laws which either prohibit women from doing certain work or limit the circumstances in which they perform such work are indicative of the social values of the day. They have their origin in piecemeal legislation introduced in the late nineteenth and early twentieth centuries. Such legislation was designed to protect those seen to be most vulnerable to exploitation and injury at work, but ironically has now resulted in being the justification for discriminatory practices against those very groups it sought to protect. And yet, reproductive hazards represent a challenge for public policy formulation in this area. For instance, it is well documented that certain exposure to lead can cause miscarriages, foetal abnormalities and developmental defects. Generally speaking, there is no doubt that women, because of their reproductive function, are more vulnerable to reproductive hazards than men. However, the policy of excluding women from employment in these circumstances highlights the conflict between two social goals in the workplace: equal employment opportunity and occupational health and safety. This conflict raises the inevitable question, how far is it possible to resolve the tension between the two, while taking into account business profitability.

4.51 Another area in which the s 54 exception causes particular concern is in relation to state industrial awards, which can override the *Anti-Discrimination Act*. However, it is understood that the Attorney General is currently considering the removal of awards and industrial agreements from the scope of s 54.

Issues for consideration

Status of the *Anti-Discrimination Act*

Question 115

(a) What status should be given to the *Anti-Discrimination Act* to other legislation?

(b) Should it continue to be subordinate in relation to other legislation, statutory instruments and awards?

Scope and effect of s 54

Question 116

If the s 54 exception is to continue, should it include a "sunset clause" - ie a specific time frame within which discriminatory provisions in other Acts and statutory instruments will be removed?

Protective legislation and discrimination legislation

Question 117

(a) Can selectively protective legislation be justified today?

(b) If so, in what areas?

Question 118

(a) Should employers be required or permitted to solve the problem of reproductive hazards by banning members of certain vulnerable groups (eg women) from the hazardous processes?

(b) Alternatively, should employers be required to achieve the same level of safety for all workers?

Question 119

Where does business profitability fit in when striking the balance between equal employment opportunity and occupational health and safety considerations?

Question 120

How should decisions be made in the face of scientific uncertainty, when the risk and the consequences of exposure are not fully documented?

Question 121

What defences should be included in anti-discrimination legislation?

Question 122

The *Anti-Discrimination Act* 1991 (Qld) includes exemptions for discriminatory acts that are "reasonably necessary" to protect public health and to protect the health and safety of people at a place of work.

Should this form of exemption be considered for New South Wales?

Question 123

There is also some concern that s 54 is an inadequate basis for a defence that an employer's actions are based on a reasonable concern for occupational health and safety.

Should there be a specific occupational health and safety defence?

See also the discussion of "Industrial Relations and Discrimination Legislation" in Chapter 2 of this Paper.

Charities

4.52 Provisions of any deed or other instruments that confer charitable benefits on a class identified by reference to any of the grounds of discrimination and any acts done to give effect to such provisions are excepted from the operation of the Act. Although the exception is limited to the provisions of deeds and instruments, there has been criticism of this exception.

Voluntary bodies

4.53 Voluntary bodies are excepted from the operation of the Act in relation to admission to membership and the provision of benefits to members. The exception does not apply to other areas of operation, such as employment or provision of services. Despite the limited nature of this exception, there is some concern that while many such organisations do provide valuable support and other services to the community, their activities escape public scrutiny and public accountability as regards discriminatory conduct in relation to membership and benefits.

Issues for consideration

Question 124

Should the exceptions relating to charities and voluntary bodies be repealed, continued or modified in some way?

Religious bodies

4.54 Although religion is not a ground of prohibited discrimination, the Act contains various exceptions that protect the autonomy of religious organisations. Section 56 is one of those exceptions. (For further information see the discussion on the inclusion of religion as a ground of discrimination in Chapter 5.) The effect of this exception is that religious bodies can discriminate on the prohibited grounds (such as race, sex, marital status etc) in the appointment and training of religious personnel and any other practice which conforms to their doctrine or is necessary to avoid injury to the religious susceptibilities of adherents.

Issues for consideration

Question 125

There has been some concern, particularly in the context of the ordination of women priests, about the continuing exemption of religious bodies from sex discrimination provisions. It has been argued that the continuing exemption of religious bodies from sex discrimination is inappropriate, when at the same time such organisations have sought protection from the NSW courts to enforce discrimination.

Should religious bodies continue to be excepted from the operation of the whole Act?

Question 126

The *Anti-Discrimination Act* provides that it is unlawful to discriminate against a student on the ground of race [s 17]. Although there is no specific exception

relating to private educational authorities on the ground of race, the general exception for religious bodies is said to provide a loophole whereby race discrimination is justified by its connection with religion. This result is also said to be inconsistent with the provisions of the *Racial Discrimination Act* 1975 (Cth) which applies to private educational authorities.

Should the general exception for religious bodies be reviewed with a view to making it consistent with federal legislation?

Establishments providing housing accommodation for aged persons

4.55 As stated above, there are various types of housing for aged persons. The rights of residents are protected by both federal and state legislation. For instance, the rights of residents of self care units and hostels are generally protected by the terms of the *Retirement Villages Act* 1989 (NSW) and its Code of Practice. Hostel residents' rights to care and private nursing home residents' rights are similarly protected by federal legislation. It has been pointed out that there is now an unacceptable degree of conflict in principle between the users' rights enunciated under the federal and state legislation on the one hand, and the exclusion of supported accommodation for the aged from the operation of the *Anti-Discrimination Act* on the other.

4.56 Another criticism of the exception is its actual wording. By using the term "institution" with reference to the establishments providing housing for aged persons, it is alleged that attitudes and stereotypes of the past are being reinforced by the legislation. The trend over the last ten years has been to move away from the concept of institutionalisation towards a process of de-institutionalisation and from the stereotype of the infirm aged as inmates of institutions in favour of the older resident living in a different type of home.

Issues for consideration

Question 127

(a) Should the exception relating to establishments providing housing accommodation for aged persons be repealed or modified?

(b) If modified, how?

Question 128

Is the wording of this exception discriminatory or prejudicial?

MINISTERIAL EXEMPTIONS

4.57 In addition to the special and general exceptions which allow individuals and organisations to be excused from the operation of the Act, the Act also makes provision for exemptions to be granted by the Minister, on the recommendation of the Anti-Discrimination Board. Such exemptions can be granted in respect of:

a person or class of persons;

an activity or class of activity; or

any other matter or circumstance specified in the order.

Exemptions so granted, remain in force for a maximum of five years and can be extended. Exemptions can also be revoked or varied.

4.58 The Annual Report of the Anti-Discrimination Board for 1991/92 states that:

> exemptions are likely to be granted where a program or scheme is designed to help a particular disadvantaged group in the community, especially where the disadvantage is the result of past discrimination or stereotyped attitudes. An exemption allows the person or group to provide special programs for the members of the target group, and to advertise the scheme or program. It means that people outside the target group will not be able to claim unlawful discrimination.

4.59 During 1991/92 exemptions were granted to the State Government Employees Credit Union for a period of five years from the operation of s 33(1) and s 51 to provide scholarships for women in the public sector. See Annual Report of the Anti-Discrimination Board for 1991/92 for details of other exemptions granted during the period.

Issues for consideration

Question 129

Do Ministerial exemptions serve a useful purpose?

Question 130

Should the Anti-Discrimination Board be responsible for recommending the exemptions?

Question 131

It has been suggested that the Act should work on the basis of such exemptions rather than special and general exceptions.

Is this a valid suggestion?

BACKGROUND READING

General

AUSTRALIAN AND NEW ZEALAND EQUAL OPPORTUNITY LAW AND PRACTICE, Vol 1 (CCH Australia Ltd)

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Annual Reports* 1978 to 1991-1992

See also cases cited in (1989-1990) *Equal Opportunity Cases* (CCH Australia Ltd, 1991) and (1991) *Equal Opportunity Cases* (CCH Australia Ltd, 1992) in relation to the various grounds of discrimination.

Race

Articles and Books

JAMIESON, P "Discrimination: Ethnic Communities and Equal Opportunity Legislation" (1986) 8 *Migration Action* 17 (An article based on the report of a project conducted by the Ecumenical Migration Centre for the Equal Opportunity Board of Victoria and prepared by P Jamieson)

LUSTGARTEN, L "Racial Inequality and the Limits of the Law" (1986) 49 *Modern Law Review* 69

NETTHEIM, G "Justice and Indigenous Minorities: A New Province for International Law" in A Blackshield (ed) *Legal Change: Essays in Honour of Julius Stone* (Butterworths, Sydney, 1983)

RADIS, M "Legislative Treatment of Vulgar Racism: The Frames of Reference for Social Reform" (1988) 10 *Migration Monitor* 14

SPERLING, K and MASON, D "Racism in the Media: If Legislation, What Kind?" (1988) 11 *Migration Monitor* 16

SULLIVAN, G and THOMANN, D "Disqualification on the Basis of Race: A Critical Development in US Racial Relations" (1992) 21 *Anglo-American Law Review* 20

Racial Vilification

Articles and Books

ALLEN, D and GIBSON, J "The Issue of Racial Vilification" (1990) 64 *Law Institute Journal* 709

LASTER, K "A Justified Omission?" (1989) 14 *Legal Services Bulletin* 258

SEEMANN, J "Racial Vilification Legislation and Anti-Semitism in NSW: The Likely Impact of the Amendment" (1984) 12 *Sydney Law Review* 565

Sex, sexual harassment and pregnancy

Articles and Books

AUSTRALIA. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION *A Review of Exemptions* (AGPS, Canberra, 1992)

AUSTRALIA. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION *Indirect Discrimination and the Sex Discrimination Act* (Occasional Paper 6, 1991)

AUSTRALIA. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION *Ten years of the Convention on the Elimination of All Forms of Discrimination Against Women* (Occasional Paper 4, 1990)

AUSTRALIA. PARLIAMENT. HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS.[Chairman: Mr M Lavarch] *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (AGPS, Canberra, 1992)

CHARLESWORTH, H "Pornography as Sex Discrimination" (1989) 63 *Law Institute Journal* 736

CLARKE, L "Pregnancy and Dismissal" (1986) 15 *Anglo-American Law Review* 310

DU-FEU, V and WILLIAMS, A "The EEC influence in Sex Discrimination Law" (1991) 141 *New Law Journal* 1220

HARRISON, K "Pregnancy and Discrimination in the Court of Appeal" (1992) 142 *New Law Journal* 462

HERVEY, T "Justification for Indirect Sex Discrimination in Employment: European Community and United Kingdom Law Compared" (1992) 40 *International and Comparative Law Quarterly* 807

LIDEN, S "Difference and Exceptionality" (1990) 15 *Legal Service Bulletin* 118

MACKINNON, C *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Massachusetts 1987)

McCALLUM, R C "Discriminating Against Mothers - Part-time Work, Child Care and the Family" (1985) 59 *Law Institute Journal* 692

McGINLEY, G P "Judicial Approaches To Sex Discrimination in the United States and the United Kingdom - A Comparative Study" (1986) 49 *Modern Law Review* 413

NAPIER, B W "Fertile Ground for Discrimination" (1992) 89 (18) *Law Society's Gazette* 19

O'DONAVAN, K and SZYSZCAK, E *Equality and Sex Discrimination Law* (Basil Blackwell, Oxford, 1988)

SCHWARZ, M "Men Win Discrimination Claim" (1990) 15 *Legal Services Bulletin* 120

SCUTT, J A "Legislating for the Right to be Equal: Women, the Law and Social Policy" in C V Baldock and B Cass (eds) *Women, Social Welfare and the State in Australia* 223 (Allen & Unwin, Sydney, 1988)

SULLIVAN, R "Sex Equality and the Australian Body Politic" in S Watson (ed) *Playing the State: Australian Interventions* 173 (Allen & Unwin, Sydney, 1990)

THORNTON, M "(Un)equal Pay for Work of Equal Value" (1981) 23 *Journal of Industrial Relations* 466

THORNTON, M "Sex Discrimination Legislation In Australia" (1982) 54 *Australian Quarterly* 393

THORNTON, M *The Liberal Promise: anti-discrimination legislation in Australia* (Oxford University Press, Melbourne, 1990)

THORNTON, M "The Public/Private Dichotomy: Gendered and Discriminatory" (1991) 18 *Journal of Law and Society* 448

TIFFIN, S “Against the Odds : Fighting Sexual Harassment Under Anti-Discrimination Legislation” (1984) 27 *Refractory Girl* 7

TINGLE, L “Protecting Sex and Sensibility” *The Australian (*October 23, 1992)

Cases

O’Callaghan v Loder (1984) EOC 92-022.

Hill v Water Resources Commission (1985) EOC 92-127

Webb v EMO Air Cargo (UK) Ltd [1992] IRLR 116

Marital Status

Articles and Books

MacCULLUM, S and BRADBROOK, A J “Discrimination Against Families in the Provision of Rented Accommodation” (1978) 6 *Adelaide Law Review* 439

ROWE, G C “Misunderstanding Anti-Discrimination Law: The New South Wales Court of Appeal in Reddrop” (1986)10 *Adelaide Law Review* 318

Cases

Boehringer Ingleheim Pty Ltd v Redropp (1984) EOC 92-108

Waterhouse v Bell (1991) EOC 92-376

Wilson v Qantas Airways Ltd (1985) EOC 92-141

Physical and intellectual impairment

Articles and Books

ANDERSON, J “Anti-discrimination laws for people with intellectual disabilities” (1987) 1 (5) *Interaction* 19

ASTOR, H “Discrimination in Employment on the Ground of Physical Impairment” (1988) 1 *Australian Journal of Labour Law* 79

ASTOR, H “Anti-Discrimination Legislation and Physical Disability: the Lessons of Experience” (1990) 64 *Australian Law Journal* 113

ASTOR, H “Indirect discrimination in the provision of government services” (1992) 3 (4) *Legal Link* 10

ASTOR, H and NOTHDURFT, J “Anti-discrimination law and physical disability: A leap in the dark” (1986) 11 *Legal Service Bulletin* 250

AUSTRALIA. Commonwealth Disability Anti-Discrimination Legislation Committee *National Disability Discrimination Legislation* (Discussion Paper, 1991)

AUSTRALIA. DEPARTMENT OF HEALTH, HOUSING AND COMMUNITY SERVICES *HIV/AIDS and Anti-Discrimination Legislation* (Canberra, February 1991)

AUSTRALIA. DEPARTMENT OF HEALTH, HOUSING AND COMMUNITY SERVICES *Final Report of the Legal Working Party of the Intergovernmental Committee on AIDS* (Canberra, November 1992)

AUSTRALIA. PRIVACY COMMISSION *Report of the Privacy and HIV /AIDS Working Party* (Canberra, April 1992)

BROWN, M R "AIDS Discrimination in the Workplace: the Legal Dilemma" (1987) 92 *Case & Comment* 3

BURDEKIN, B "AIDS and Human Rights Legislation", paper presented at the *3rd National Conference on AIDS* (Hobart, 1988) 693

CARROL, P (of Trowbridge Consulting) *AIDS and Superannuation in Australia - the evidence* (Commonwealth Department of Health, Housing and Community Services, September 1992)

HODGE, D, SMITH, A and PATTERSON, D "HIV Status, Sexuality and Discrimination in Australia: Whose Turn to (En)act?" (1990)14 (6) *National Aids Bulletin* 48

INNES, G "The Rhetoric Reality Gap" (1987) 12 *Legal Service Bulletin* 163

JOHNSTONE, R "Physical Disability in Employment" (1989) 63 *Law Institute Journal* 728

KLUCK, M J "Prohibiting Employment Discrimination on the basis of Disability: the need to expand California Law" (1981) 14 *U C Davis* 731 - 65

LARRIERA, A "Minister pledges AIDS laws action" *The Sydney Morning Herald* (December 2 1992) at 6

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Discrimination and Intellectual Handicap* (December 1981)

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Discrimination - the Other Epidemic* Report of the Inquiry into HIV and AIDS Discrimination (Sydney, April 1992)

NOTHDURFT, J and ASTOR, H "Laughing in the Dark - Anti-Discrimination Law and Physical Disability in New South Wales" (1986) 28 *Journal of Industrial Relations* 336

SIMPSON, J "Law for the Intellectually Handicapped" (1984) 9 *Legal Service Bulletin* 220

SEEMAN, J A "Disabling or Enabling the Equal Opportunity Act? Waters v The Public Transport Corporation of Victoria" *Australian and New Zealand Equal Opportunity Law and Practice* 91 - 702

TILLET, G "AIDS, Discrimination and the Law", paper presented at the *3rd National Conference on AIDS* (Hobart, 1988)

WATERS, P "The Coverage of AIDS-related Discrimination Under Handicap Discrimination Laws: the US and Australia compared" (1990) 12 *Sydney Law Review* 377

WILSON, H "A Struggle to be Waged" (1989) 14 *Legal Service Bulletin* 20

WILSON, K "AIDS and Discrimination" (1991) 65 *Law Institute Journal* 908

Cases

Ellis v Metropolitan Transit Authority (1988) EOC 92-232

Jamal v Secretary, Department of Health (1988) EOC 92-234

Kitt v Tourism Commission of New South Wales (1987) EOC 92-196

Waters v Public Transport Corporation (1991) EOC 92-390

Woods v Wollongong City Council (1991) EOC 92-393

Homosexuality

Articles and Books

AMES, J "Anti-discrimination plans inadequate says gay group" (1992) 89 (42) *Law Society's Gazette* 9

ATKINSON, M "Homosexual Law Reform" (1992) 11(2) *University of Tasmania Law Review* 206

Compulsory retirement

Articles and Books

LEWIS D "Academics win right to work beyond 65" *The Sydney Morning Herald* (November 3, 1992) at 7

MARK, S "Age discrimination and compulsory retirement - how discriminatory are your current employment policies and practices?", paper presented at the IIR Conference on *Age Discrimination and the Abolition of Compulsory Retirement - Implications for Government and Industry* (Sydney, 7-8 October 1992)

Other Unlawful Acts

Cases

M v R Pty Ltd (1988) EOC 92-229

Hill v Water Resources Commission (1985) EOC 92-127

General Exceptions

Articles and Books

AUSTRALIA. SEX DISCRIMINATION COMMISSIONER *Sex Discrimination Act 1984, A Review of Exemptions* (AGPS, Canberra, August 1992)

See also the background reading listed in relation to "Industrial Relations and Discrimination Legislation" in Chapter 2 of this Paper.

5. General Observations on the Scope of the Act

INTRODUCTION

5.1 Having considered the issues raised in Chapter 3 regarding the structure of the Act and the main features of discrimination, and the issues specific to particular grounds raised in Chapter 4, this chapter considers some general issues of concern that have an impact on the overall scope of the Act.

GROUNDS OF DISCRIMINATION

Is there a case for extending the grounds of discrimination in NSW?

5.2 The *Anti-Discrimination Bill* 1976 (NSW), as originally introduced, included nine grounds of discrimination: race, sex, marital status, age, religious or political conviction, physical handicap or condition, mental disability and homosexuality. Trade union membership was also inserted by the Legislative Council. However, after much opposition, the *Anti-Discrimination Act* as finally passed in 1977 included only three grounds: sex, marital status and race. The other grounds were relegated to s 119(a) of the Act for investigation by the research staff of the Board.

5.3 During its 15 years of operation, the Act has been amended on many occasions, extending its scope to include some of the grounds originally proposed and others. Such categories are, however, never permanent and need re-consideration as new sources of prejudice can arise in the community. It has been suggested that there are now several grounds that are not covered by the Act that individuals and interest groups are keen to see included.

5.4 A counter argument to adding further grounds to the *Anti-Discrimination Act* is that the list could be limitless, inevitably resulting in some categories being inadvertently excluded and therefore discriminated against. Indeed, this argument can be taken further to query the need to specify any grounds at all. In this context, the Constitutional Commission, in its Final Report (1988) suggested that the Constitution should be amended to entrench equality rights therein and emphasised the value of enumerating the grounds of discrimination. It stated, at para 9.481 that:

> ... having regard to the United States and Canada [the Constitution and Charter of Rights respectively, which provide a broadly worded equality provision] it is preferable to enumerate in the Constitution an exhaustive list of grounds on which discrimination is prohibited. This would avoid the kinds of problems the courts have faced in Canada in recent years when trying to establish the relationship between the enumerated and unenumerated grounds of non-discrimination. It would also avoid the establishment of what many critics of the United States equal protection clause see as an arbitrary hierarchy of rights and interests. Another important consideration is that the recommendation we propose would substantially curtail the volume of litigation which statements of these rights tend to generate.

5.5 However, Canada's general inclusiveness has been cited as a virtue, making the law adaptable to needs which cannot be foreseen. For instance, HIV discrimination may not have been an issue 15 years ago.

5.6 There is also the question of whether adding more grounds will in fact make the Act more effective or whether it will merely be a tokenistic gesture that will impede the effectiveness of the Act, given the scarce resources available for its operation. More important is the question of the interaction between equality rights and fundamental freedoms and, as raised in Chapter 3, the interaction of principles of discrimination one with another, particularly in view of the multi-cultural nature of Australian society.

Issues for consideration

Question 132

(a) Should the scope of the Act be widened to include more grounds?

(b) What are the advantages/disadvantages of adding more grounds?

(c) Will adding more grounds infringe on fundamental freedoms?

Question 133

Is there an alternative method of dealing with all types of discrimination?

Question 134

What will be the resource implications if the scope of the Act is widened by adding more grounds?

Question 135

Is the Bill of Rights approach, whereby freedom from discrimination is a right, preferable to adding more grounds of discrimination?

What grounds should the Act contain?

5.7 There seems no "correct" answer to this question. Different grounds are prohibited in Australia and around the world for different reasons. A survey of the laws in other Australian jurisdictions shows that discrimination is prohibited on a wide range of grounds, including the following:

race

colour

sex

religion

political opinion

national extraction

social origin

marital status

physical impairment

intellectual impairment

age

sexuality

pregnancy

parenthood

trade union activity

criminal record

compulsory retirement on the ground of age

transsexuality

breast feeding

mental illness

The Table in Appendix 1 has details of the grounds that are prohibited in each jurisdiction in Australia.

5.8 The Constitutional Commission in its Final Report (1988) recommended that the following grounds should be explicitly prohibited in the Constitution:

> race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.

The Commission went on to state, at para 9.485, that:

> ...while we have chosen to present the grounds of non-discrimination in the form of an exhaustive list, this does not preclude additional protections against discrimination by legislation or amendment to the Constitution ... it is more appropriate to protect such emerging rights as those concerned to prohibit discrimination on the ground of physical or intellectual impairment, or age, by legislation, at least for the time being.

5.9 There are also other grounds which have not been prohibited elsewhere and could probably be considered to fall within existing grounds. These grounds include discrimination on the basis of appearance, accent, geographical location and social status.

Issues for consideration

Question 136

What is the most satisfactory rationale or basis for deciding which grounds should be included in discrimination legislation?

Grounds canvassed for inclusion in New South Wales

5.10 Interest groups and individuals have, in submissions to the Commission, canvassed the inclusion of additional grounds in the *Anti-Discrimination Act* 1977 (NSW). The Anti-Discrimination Board has also considered many of these grounds in various specific Reports and in its Annual Reports over the years. (Details are provided in the Background Reading section at the end of this chapter.) The following is a discussion of the additional grounds canvassed for inclusion in New South Wales.

Transsexuality

5.11 A transsexual person is one who is born as a member of one sex, who has a deep inner conviction that he or she is really of the other sex and who, driven by that conviction, assumes characteristics of the other sex and lives as a member of that other sex. Discrimination because of transsexuality is not covered specifically in the Act. Nor does it come within the Act's sex or homosexuality grounds because transsexuality concerns gender identity rather than sexuality or sexual orientation. To the discriminator it is the *change* of sex that provides the motivation for discrimination. This situation has led to calls for the inclusion of transsexuality as a ground of discrimination under the Act.

Issues for consideration

Question 137

(a) Should transsexuality be included as a separate ground of discrimination?

(b) If so, how should it be defined?

Question 138

What areas of operation should be covered?

Question 139

If included as a ground of discrimination, should it be subject to any exceptions?

Religion

5.12 Although the Act does not make discrimination on the ground of religion unlawful, it does contain various exceptions which protect religious organisations and aspects of their operations from what would otherwise be unlawful discrimination. For example, religious educational institutions (as private educational authorities) are excepted from the education and employment provisions of the Act on all grounds except race. So also, the general exemptions to the Act apply to:

anything done under statutory authority (as in statutes incorporating religious bodies which impose a religious test, for example, the *Baptist Union Incorporation Act* 1919 (NSW));

charitable instruments conferring benefits on persons identified by reference to any of the grounds (as in charitable trusts for the administration of church property);

religious bodies and their practices (as in religious tests for access to theological training);

membership of non-profit voluntary bodies (as in religious social clubs); and

housing accommodation and ancillary services for aged persons (as in nursing homes and retirement villages run by religious bodies for their adherents).

5.13 While these exceptions do have a role in protecting group rights, they cannot overcome the problems posed by discrimination and intolerance based on religion and belief. The Anti-Discrimination Board in its research report on “Discrimination and Religious Conviction” recommended that religious conviction be introduced as a ground of discrimination.

Issues for consideration

Question 140

(a) Should religion be included as a ground of discrimination?

(b) If so, how should religion be defined?

Question 141

(a) Should religious conviction include the absence of religious belief?

(b) Should it also apply to customary religious practices and non-mainstream religious groups?

Question 142

(a) Should forcible interference with a person's religious beliefs, such as the use of "de-programming", amount to unlawful discrimination?

(b) Alternatively, should some other law cover such coercive actions?

Question 143

Should religious obligations, such as the observation of holy days, or the requirement to wear a particular form of dress etc, be accommodated?

Question 144

When religious obligations require some form of accommodation by employers etc, should the accommodation test be similar to that suggested for impairment - ie that reasonable accommodation be made without undue hardship?

Question 145

What are the areas in which the prohibition should operate?

Question 146

(a) Should the prohibition be subject to exceptions?

(b) If so, what should the exceptions be?

Question 147

Should religious vilification be included?

Question 148

Is it appropriate to include religion within the ground of race?

See also Issues for consideration relating to Discrimination on the Ground of Race and in particular the question of inclusion of ethno-religious beliefs in the definition of race, in Chapter 4.

Political conviction and trade union membership

5.14 The United Nations *Universal Declaration of Human Rights* states that:

> [e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, ... religion, political or other opinion, ... or other status.

5.15 With regard to the inclusion of freedom from discrimination on the grounds of political, religious and ethical belief, the Constitutional Commission stated, at para 9.484, that:

> [they] correspond with the most fundamental rights which liberal constitutions have sought to protect and that their inclusion in a proposed provision on equality of rights is a legitimate conclusion derived from the central tenets of liberal thought and practice.

5.16 Although the Anti-Discrimination Board recommended that political conviction should be included as a ground of discrimination in its report entitled “Discrimination and Political Conviction”, it has not yet been included as a ground under the Act.

5.17 It has also been suggested that the *Anti-Discrimination Act* be amended to protect the rights of unionists and non-unionists. In its submission to the Green Paper on Industrial Relations in NSW (the Niland Report, 1990), the Anti-Discrimination Board considered two options in this regard. They were:

(i) making trade union membership and non-trade union membership a ground of discrimination under the *Anti-Discrimination Act*; or

(ii) making political conviction a ground under the *Anti-Discrimination Act* and recognising that the choice to join or not to join a trade union is an issue of political conviction.

5.18 Having considered the two options, the Board concluded that:

amending the Anti-Discrimination Act to protect an individual's right to join or not to join a Trade Union is unnecessary and would be a duplication of those rights already found and balanced within the framework of the Industrial Arbitration Act [now repealed]. ... The Board considers that the appropriate jurisdiction in which to balance the rights of the trade unionist *vis a vis* non-trade unionists is the Industrial Commission.

Issues for consideration

Question 149

(a) Should political conviction and/or activity be included as a prohibited ground of discrimination?

(b) If so, how should it be defined?

Question 150

In what areas should the prohibition apply?

Question 151

Should trade union membership be included?

Question 152

If included as a ground of discrimination, should the prohibition be subject to any exceptions?

Mental illness / Psychiatric disability

5.19 Many submissions have been received by the Commission on the need to include mental illness within the scope of the Act. It has been suggested that much of the discrimination against people with mental illness occurs during their contact with real estate agents and in the employment, education and training areas. (See also the Issues for consideration in relation to Physical and Intellectual Impairment in Chapter 4.)

Issues for consideration

Question 153

(a) Should mental illness and/or psychiatric disability be included within the scope of the Act?

(b) If so, should it be a separate ground of discrimination or should it be included within the definition of impairment?

(c) Should it include past mental illness and psychiatric disability?

(See Issues for consideration in relation to Physical and Intellectual Impairment in Chapter 4.)

Question 154

If included within the Act, what should the areas of operation be?

Question 155

(a) What exceptions, if any, should it be subject to?

(b) Would it be reasonable to include an exception that it will not be discriminatory to refuse employment if a person is currently on medication that is confirmed by medical evidence to be potentially dangerous in the context of the particular job?

Age

5.20 Unlike other grounds of discrimination, it has been pointed out that age discrimination has the potential to directly affect every person covering the human life span, from all walks of life and all levels of ability. Thus, younger people claim that they face the stereotype barrier that they are unreliable and inexperienced. Older people claim that they face the myths of frailty and lower productivity. Indeed, it has been pointed out that a major aspect of discrimination on the ground of age results from community attitudes and legislation (which presume that older people cannot think for themselves). An example cited was that rules of some incorporated associations disenfranchise members once they take up residence in a retirement complex.

5.21 Age discrimination legislation, despite protest, has been introduced, or is being contemplated, in many jurisdictions. In New South Wales, there is an Opposition Bill outlawing age discrimination which has passed through the Lower House and presently awaits debate in the Upper House. The Government has also released a Discussion Paper entitled “Age Discrimination-Options for New South Wales” in May 1992. The Paper contains proposals for the amendment of the *Anti-Discrimination Act* 1977 (NSW) to prohibit discrimination on the ground of age. The areas of activity recommended are employment, education, provision of goods and services, accommodation, registered clubs and access to places and vehicles.

Issues for consideration

Question 156

Should age discrimination be included within the scope of the Act as a prohibited ground of discrimination?

Question 157

(a) Should discrimination on the ground of age refer to chronological age, ie the number of years since birth. In other words, should it cover all ages or be restricted to certain groups only, such as older people?

(b) Alternatively, should it cover persons above a stipulated age, for example, 15, 18 or 21?

Question 158

Should there be a "special measures" provision aimed at meeting the special needs of particular age groups in the community?

Question 159

(a) How would the inclusion of age as a prohibited ground of discrimination impact on junior wage rates?

(b) Should junior wage rates be exempted from age discrimination legislation?

Question 160

Should insurance be exempted from age discrimination?

Unborn children

5.22 The Preamble to the United Nations *Declaration of the Rights of the Child* states:

[w]hereas the child, by reason of his mental and physical immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

Accordingly, there has been a suggestion that the scope of the Act be extended to protect the rights of unborn children from discrimination.

Issues for consideration

Question 161

(a) Is the *Anti-Discrimination Act* the appropriate forum for the protection of the rights of unborn children?

(b) If so, should it be a separate ground or should it be included within "age" as a ground?

(c) What parameters should the ground operate within?

Family status / family responsibilities / parenthood

5.23 It has been suggested that, in relation to Australia's international obligations, the possibility of implementing some aspects of the *International Labour Organisation Convention ("ILO") 156* on discrimination against those workers with family responsibilities should be considered in New South Wales. The Preamble to the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* states:

> a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.

5.24 Discrimination against families, particularly in the provision of accommodation, is a problem that is evidenced by the Issues Paper entitled "Housing Choice: Reducing the Barriers" released in September 1992 by the National Housing Strategy. Although discrimination in the provision of accommodation is prohibited on various grounds, it is suggested that the legislation does not specifically help the prospective tenant with children. If rental accommodation is refused because of children, it would not be possible to succeed in a complaint on the basis of sex or marital status.

5.25 The recent amendments to the *Sex Discrimination Act* 1984 (Cth) contained in the *Human Rights and Equal Opportunity Legislation Amendment Act* 1992 (Cth) give effect to Article 8 of *ILO Convention 156* which provides that family responsibilities shall not, as such, constitute a valid reason for termination of employment. The issues of part time work and leave for family reasons and the more complex issue of indirect discrimination on the basis of family responsibilities are still being considered.

Issues for consideration

Question 162

Should discrimination on the ground of family responsibilities be included:

as a separate ground of discrimination;

within the scope of discrimination on the ground of sex; or

within the scope of discrimination on the ground of marital status?

Question 163

If family responsibilities / family status is to be included, how should it be defined?

Question 164

Should inflexible hours in the work place and practices which ignore the competing dual roles of women as primary carer in the home and worker be considered as grounds for indirect discrimination?

Question 165

Should parenthood be a separate ground or should it be included in the context of family responsibilities?

Question 166

In what areas of operation should discrimination on the ground(s) of family status and / or parenthood be prohibited?

Question 167

What exceptions, if any, should the prohibition be subject to?

See also Issues for consideration in relation to Sex Discrimination in Chapter 4 of this Paper.

Prisoners and ex-prisoners

5.26 There is considerable concern regarding the discriminatory and arbitrary treatment of prisoners and ex-prisoners as well as their families, particularly their children and associates. Some of the notable areas of discrimination are with regard to the provision of accommodation, medical services and visiting access.

Issues for consideration

Question 168

(a) Should the scope of the **A**ct be expanded to include prisoners and ex-prisoners and their associates?

(b) If so, what should the areas of operation be?

(c) Should the prohibition be subject to any exceptions?

Other grounds

Appearance

5.27 It has been suggested that much discrimination takes place on the basis of the appearance of a person; for instance, whether a person looks old or young, attractive or unattractive, sophisticated or otherwise. Such discrimination may not always be linked to sex or other existing grounds of discrimination.

Accent

5.28 It has been suggested that discrimination on the basis of a foreign or unfamiliar accent is common, particularly in the employment area. While a foreign accent may be a characteristic appertaining to a particular race, and could therefore amount to discrimination on the ground of race, its alleged frequency in occurrence as a common form of discrimination has resulted in calls for its consideration as a separate ground of discrimination by some members of the community.

Geographical location and social status

5.29 Geographical location often dictates the social status of a person. In any event, whether treated together or individually, it has been suggested that discrimination because of geographical location and social status commonly occurs.

Issues for consideration

Question 169

(a) Should discrimination on the grounds of appearance, accent, geographical location and social status constitute separate grounds of discrimination under the Act?

(b) Are there other ways of preventing such discrimination?

Question 170

If they do warrant inclusion in the Act, how should they be approached in terms of areas of operation, exceptions etc?

Question 171

Are there other grounds that should be considered for inclusion within the Act?

Discrimination on the basis of association

5.30 Discrimination on the basis of association is not unlawful under the Act. Such discrimination is unlawful in some other jurisdictions, for instance, in the Australian Capital Territory and Queensland. It is also precluded by the *Racial Discrimination Act* 1975 (Cth).

Issues for consideration

Question 172

(a) Should discrimination on the basis of association be made unlawful in New South Wales?

(b) If so, should it apply to all grounds of discrimination?

Question 173

(a) Should the term "association" be defined?

(b) If so, how?

(c) Should it be limited to relatives or should it have a wider coverage?

(d) If so, would discrimination on the basis of "personal association" afford such wider coverage?

Vilification

5.31 The only form of vilification that is presently covered under the Act is racial vilification. It has been suggested that the offence of vilification should be extended to other grounds as well, in particular homosexual and HIV/AIDS status vilification.

Issues for consideration

Question 174

(a) Should the offence of vilification be extended to some or all grounds?

(b) If so, should it be drafted on the model of the racial vilification provisions?

(c) Alternatively should there be one offence of vilification applicable to all grounds?

AREAS OF OPERATION

The distinction between public and private spheres of activity

5.32 A notable feature about the prohibited grounds and areas of discrimination is that their operation is limited to the "public" sphere of activity as in work, education, goods and services and clubs. The "private" sphere of activity, notably domestic life and private education, does not come within the scope of the Act. Thus, discrimination on the ground of sex is prohibited in the employment area, but if it takes place in the home or in the street it is not prohibited. While this distinction is most relevant to sex discrimination, where domestic life is said to be the main area of inequality for women, it is also relevant to race, impairment and homosexuality. This distinction between the public and private spheres is recognised by the Victorian Equal Opportunity legislation which classifies the prohibited grounds into the categories of "status" and "private life". However, the areas of operation are restricted to public life which results in much the same situation as that prevailing in New South Wales. (See "Overview of Discrimination Legislation in Other Jurisdictions" in Chapter 3.)

Issues for consideration

Question 175

(a) Should principles of anti-discrimination be extended to the "private" sphere of activity?

(b) Would this result be achieved if a general right to equality is established?

(c) Alternatively, should areas of private and public activity be specifically nominated?

Areas covered

5.33 It is also important to note that while there is some overlap in the areas of operation of the various grounds, not all areas are covered in all grounds. For instance, access to places and vehicles is covered by provisions relating to race discrimination only, while access to places where liquor is sold is covered by the sex discrimination provisions only. This could result in the position where it would be unlawful to preclude a person from a public place or vehicle on the ground of race, but it would not be unlawful to do so on any of the other grounds.

Issues for consideration

Question 176

(a) Should discrimination on all grounds be prohibited in all areas?

(b) Is there a justification for having different areas of operation for different grounds?

Question 177

Does the definition of "services" under the Act need to be reviewed to clarify whether "access to services" comes within its ambit?

Discriminatory questions

5.34 The asking of questions or requiring information that could be a basis for discrimination is not unlawful in New South Wales. Though subtle, this is seen as an area in which discrimination on most grounds takes place constantly.

Issues for consideration

Question 178

(a) Should it be unlawful to discriminate in the area of requests for information?

(b) If so, should it apply to all grounds or in relation to particular grounds only?

Question 179

How should such discriminatory questions be defined?

Question 180

What exceptions, if any, would be justified?

EXCEPTIONS

Special exceptions

5.35 The exceptions that apply to the various grounds, while meant to provide a balance, are in some situations said to be the result of entrenched discriminatory attitudes which devalue the effect of the legislation. Particular concern has been raised regarding the need for exceptions relating to private educational authorities and small employers with fewer than six employees.

Private educational authorities

5.36 Private educational authorities are excepted from the operation of the Act on all grounds of discrimination, other than race. Although they are not theoretically excepted from race discrimination, it has been suggested that the general exception applicable to religious bodies and voluntary bodies can be utilised to discriminate on the ground of race. (For details, see the discussion of General Exceptions (in relation to religious bodies) in Chapter 4.)

5.37 The main concern regarding this exception seems to be based on whether it serves any useful purpose. The definition of private educational authorities makes no distinction between religious-based or non-religious-based private schools. Consequently, one view is that there is no need for this specific exception when s 56 (general exception for religious bodies) will potentially exempt all religious-based private schools and s 57 (general exception for voluntary bodies) will potentially cover the non-religious schools and early childhood centres which are non-profit and therefore voluntary.

5.38 Another reason for concern is that the exception creates unequal rights for teachers in public and private schools. Whereas discrimination on any of the proscribed grounds will be unlawful if the aggrieved person was a teacher in a public school, a teacher in a private school will not have the same protection under the Act.

5.39 The main argument in favour of preserving this exception is that private religious-based educational authorities should be allowed to be discriminatory in the choice of their teachers. It has been suggested that the exception allows discrimination against beliefs and practices, not persons, in that it is necessary that teachers be practising adherents of the particular faith of the school. The *Sex Discrimination Act* 1984 (Cth) approach to exemptions for educational institutions established for religious purposes is that employers can only discriminate in employment on the grounds of sex, marital status and pregnancy if the discrimination is “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed” (s 38).

Issues for consideration

Question 181

Is there benefit in preserving the exception applicable to private educational authorities?

Question 182

Should such an exception apply to all or some grounds?

Question 183

(a) Will private schools be able to avail themselves of the genuine occupational qualification exception instead of having to rely on the private educational authority exception?

(b) If so, what other purpose does this exception serve?

Question 184

(a) Alternatively, should an exception similar to that contained in s 38 of the *Sex Discrimination Act* 1984 (Cth) be considered?

(b) If so, should it be considered for all grounds or some grounds only?

(c) Should the elements of reasonableness and objective assessment of the circumstances be included when considering "religious susceptibility"?

Small employers

5.40 Employers of less than six employees are not required to adhere to the principles of the Act. This exception is considered to be unfair and unnecessary by some, as it justifies discriminatory conduct by such employers. Others claim that it would not be practical in economic terms for small employers to comply with all the provisions of the Act.

Issues for consideration

Question 185

Should small employers continue to be excepted from the operation of the Act?

Question 186

Should economics be a consideration in justifying discrimination?

Question 187

Is there a way of striking a balance between business profitability and non-discrimination?

Special measures

5.41 An exception to Part 2 of the Act which deals with race discrimination is that the Act does not apply to "anything done in affording persons of a particular race access to facilities or services to meet special needs ... in relation to their education, training or welfare, or any ancillary benefits". There is no such exception in relation to any of the other grounds.

Issues for consideration

Question 188

Should "special measures" be allowed for all other grounds?

Question 189

Should the focus be on the concept of neglect of a special need, instead of excepting "special measures"?

"Reasonable accommodation"

5.42 The concept of "reasonable accommodation" has been introduced in the United States in the context of disability discrimination and is explained in the issues for consideration in relation to physical and intellectual impairment discrimination in Chapter 4. While it is most commonly referred to in the context of disability, there have been suggestions that it may also be relevant in other areas of discrimination.

Issues for consideration

Question 190

(a) Can the "reasonable accommodation" requirement be adopted in other areas of discrimination?

(b) If so, does it need to be modified when used in different areas of discrimination?

THE LANGUAGE OF THE ACT

5.43 Some interest groups and individuals consider the language and terminology used in the Act to be offensive, even discriminatory. For instance, people with disabilities find that the use of the terms “handicap” and “impairment” has the effect of focusing on the disability rather than on the person. (See also the Issues for consideration in relation to the definitions of physical and intellectual impairment.) Similarly, in relation to discrimination on the ground of sex, it has been suggested that the use of the generic pronoun “he” tends to perpetuate a form of sex discrimination.

Issues for consideration

Question 191

(a) Does the language and terminology used in the Act have a discriminatory effect on all or some groups the legislation seeks to protect?

(b) If so, how best can this problem be rectified in relation to the groups affected?

BACKGROUND READING

Articles and Books

AUSTRALIA. CONSTITUTIONAL COMMISSION [Chairman: Sir Maurice Byers] *Final Report of the Constitutional Commission*, Vol 1 (AGPS, Canberra, 1988).

AUSTRALIA. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION. *A Review of Exemptions* (AGPS, Canberra, 1992)

AUSTRALIA. NATIONAL HOUSING STRATEGY *Housing choice: reducing the barriers* (Issues Paper, 1992)

AUSTRALIA. PARLIAMENT. HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS [Chairman: Mr M Lavarch] *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (AGPS, Canberra, 1992)

AUSTRALIAN AND NEW ZEALAND EQUAL OPPORTUNITY LAW AND PRACTICE, Vol 1 (CCH Australia Ltd)

BOWLES, M “Forms of Discrimination “ (Unpublished Paper, Sydney, Undated)

BRADBROKE, A J and MacCALLUM, S “Discrimination Against Families in the Provision of Rented Accommodation” (1978) 6 *Adelaide Law Review* 439

DUNDERDALE, I “The human rights of transsexuals” (1992) 17 (1) *Alternative Law Journal* 23

FINLAY, H and WALTERS, W *Sex Change: the Legal Implications of Sex Reassignment* (Melbourne, 1988)

HILL, J "Religious Discrimination in New South Wales: A Report" (1984) 61 *Australian Catholic Record* 290

McCALLUM, R C "Discriminating against mothers - part-time work, child care and the family" (1985) 59 *Law Institute Journal* 692

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Annual Reports* 1977 - 1991/92 (In particular, for "Age discrimination" see Annual Reports 1981/82, at 64-7; 1983/84, at 113-4; 1984/85, at 129-30; 1987/88, at 19. For "Criminal conviction" see Annual Report 1983/84, at 111. For "Mental Illness" see Annual Reports 1981/82, at 61-2; 1982/83, at 102-5. For "Religious discrimination" see Annual Reports 1983/84, at 115-9; 1984/85, at 131-7; 1985/86, at 48. For "Social origin" see Annual Report 1982/83, at 95-6. For "Transsexuality" see Annual Reports 1984/85, at 87-8; 1988/89, at 30; 1989/90, at 40; 1990/91, at 59; 1991/92, at 53.)

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Discrimination and Age* (Research Report pursuant to s 119 of the *Anti-Discrimination Act* 1977 (NSW), 1980)

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Discrimination and Political Conviction* (Report, 1980)

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Discrimination and Religious Conviction* (Report, 1984)

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Discrimination - The Other Epidemic* (Report of the Inquiry into HIV and Aids Related Discrimination, April 1992)

NEW SOUTH WALES. ATTORNEY GENERAL'S DEPARTMENT *Age Discrimination - Options for New South Wales* (Discussion Paper, May 1992)

NEW SOUTH WALES. ETHNIC AFFAIRS COMMISSION *Planning for religious development in New South Wales* (Sydney, 1990)

NEW SOUTH WALES. LAW REFORM COMMISSION *Names: Registration and Certification of Births and Deaths* (Discussion Paper 17, 1987)

NILAND, C "Anti-Discrimination law - An Option for people with Psychiatric Disabilities?" (Unpublished Paper delivered to the Citizens' Rights Seminar, 29 May 1987.)

PAUWELS, A *Non-Discriminatory Language* (AGPS, Canberra, 1991)

SHEEN, J "Religious discrimination and church resistance to social change in New South Wales" (1988) 7 (3) *Social Alternatives* 13

THORNTON, M *The Liberal Promise: anti-discrimination legislation in Australia* (Oxford University Press, Melbourne, 1990)

THORNTON, M "The Public/Private Dichotomy : Gendered and Discriminatory" (1991) 18 (4) *Journal of Law and Society* 448

WOLF, N *The Beauty Myth* (Vintage, London, 1991)

6. The Act's Enforcement Mechanisms

INTRODUCTION

Historical background

6.1 The Act, when enacted in 1977, initially established a Counsellor for Equal Opportunity to investigate and conciliate complaints and an Anti-Discrimination Board with both judicial and education/research functions. In 1980 it was amended to establish the Office of the Director of Equal Opportunity in Public Employment. It was amended again in 1981 to establish the Equal Opportunity Tribunal to take over the judicial role of the Anti-Discrimination Board. An amendment in 1982 abolished the office of the Counsellor whose functions were taken over by the Anti-Discrimination Board.

The present structure

6.2 The Act, in its present form, has established three bodies which are responsible for various aspects of enforcement of the Act. They are:

the Anti-Discrimination Board ("the Board") - mainly responsible for the administration and promotion of equal opportunity in New South Wales; administered by the President of the Board who is responsible for investigating and conciliating complaints about discrimination.

the Equal Opportunity Tribunal ("the Tribunal") - responsible for conducting inquiries into complaints that are referred to it under the Act; these are mainly complaints which are beyond conciliation.

the Office of the Director of Equal Opportunity in Public Employment ("the Director's Office") - primarily responsible for ensuring that all State Government Departments and statutory authorities prepare and implement equal opportunity management plans.

How does the Act assist those calling on it for help?

6.3 Although the Board, the Tribunal and the Director's Office each have a role in enforcing the Act, the Board and the Tribunal are the main dispute resolution arms of the Act. The Director's Office, though required to enforce the principles of the Act in Government Departments, is not responsible for, or involved in, dispute resolution. The flow chart on the next page (adapted from the CCH *Australian and New Zealand Equal Opportunity Law and Practice* with the permission of CCH Australia Limited) depicts the involvement of the Board and the Tribunal in resolving a complaint of discrimination.

THE ANTI-DISCRIMINATION BOARD

The structure of the Board

6.4 Part 8 of the Act establishes the Anti-Discrimination Board. The Board consists of a full-time member, who is the President of the Board, and four part-time members. The President is the head of approximately 35 staff based in offices in Sydney, Wollongong and Newcastle.

[Link to text only version of table]

The functions of the Board

6.5 The objectives of the Board are to eliminate discrimination and promote equality and equal treatment of all human beings. To achieve these objectives Division 4 of Part 9 of the Act sets out the functions of the Board. They are:

> to carry out investigations, research and inquiries relating to discrimination and in particular discrimination on the grounds of , and characteristics appertaining to persons on the grounds of age, religious or political conviction, mental disability and membership or non-membership of a trade union;
>
> to research and formulate policy on discrimination and human rights issues;
>
> to arrange and co-ordinate community education programs, consultations, discussions and seminars;
>
> to review the laws of New South Wales to ensure that they do not have a discriminatory effect;
>
> to improve the Board's services to disadvantaged groups by consulting with Government, business, industrial and community groups; and
>
> to hold public inquiries and to inquire into any matter that the Minister refers to it regarding conflicts or potential conflicts between laws and practices and the *Anti-Discrimination Act*.

Part 9A of the Act provides that the Director of Equal Opportunity in Public Employment may also refer matters regarding equal opportunity management plans to the Board for investigation.

As stated earlier, the President of the Board is ultimately responsible for investigating and conciliating complaints.

How does the Board operate?

A complaint must be made

6.6 If a person has been discriminated against, nothing can be done unless a complaint is made in writing to the President of the Anti-Discrimination Board. The complaint must normally be made within six months after the

date on which the discriminatory act occurred, but the President may accept a complaint outside the six month period "on good cause being shown".

6.7 Complaints can be made in any language, including braille. It is because a complaint must be made that the Act is said to operate on a "complaints-based" model. The Board does not have self-initiating powers whereby it can proceed without a complaint. It has been pointed out that there are limits inherent in a complaints-based model, the most important being that systemic discrimination cannot be addressed unless a person is prepared to make a complaint. Disadvantaged persons often fear that they will suffer further disadvantage if they complain and consequently do not complain.

Who can make a complaint?

6.8 Discrimination can be experienced by a person or a group of persons. A complaint can be made by the person discriminated against (ie an individual action) or by two or more persons either on their own behalf or on behalf of themselves and others (ie a representative action). A complaint may also be made by a person or persons under the age of 18. However, a complaint cannot be made by a trade union on behalf of one or more of its members.

6.9 A group action is also called a *representative action*, ie an action on behalf of a number of individuals, each of whom alleges unlawful discrimination in the same or similar circumstances against the same respondent. A person who lodges a representative complaint is not precluded from lodging an individual complaint as well. However, the powers of the Tribunal in the case of group or representative actions are limited. Consequently, in practice, most complaints are made by individuals.

6.10 Although the Act does allow representative actions, it does not allow *class actions,* that is, an action brought by an individual or a group of individuals on behalf of a class of persons beyond those named in the complaint. Some of the class will be persons discriminated against in the past, while others will be discriminated against in the future. In one sense a representative action is a limited form of class action, the limitation being that in representative actions the only member of the class that can claim damages is the person(s) named in the complaint. In the case of class actions, the whole class can recover damages.

Complainant must be affected

6.11 The person(s) making the complaint must be affected by the alleged discrimination. Thus, a person not affected by the alleged discrimination cannot make a complaint on behalf of an affected person, unless the affected person is "intellectually handicapped" as defined by the Act. Even then, the Act requires that the person with the intellectual handicap "desires" that the complaint be lodged on his or her behalf. There is no provision allowing a parent or guardian to make a complaint on behalf of a child.

Investigation of the complaint

6.12 When a complaint is received, the President is required to investigate the complaint. Investigation of a complaint is not necessarily limited to the two parties. It may involve as many people as is necessary to properly assess the discriminatory matter; for instance, it may involve the examination of policies and practices of relevant government agencies. The President can decline to entertain the complaint if, on investigation of the complaint, the President finds that it is frivolous, vexatious or lacking in substance, or that for any other reason it should not be entertained; for instance, if the ground of discrimination alleged is not covered by the Act; or the complainant is not the affected party; or the time period has lapsed. If the complaint is declined, the President must inform the complainant in writing of the reasons for declining.

Conciliation of the complaint

6.13 New South Wales, like most other States, has adopted a conciliation model which uses this process as the first stage of dispute resolution, in the hope that recourse to the Tribunal can thereby be avoided. Accordingly, if on investigation of the complaint, the President believes it may be resolved by a process of conciliation, the President must endeavour to do so. The conciliation officers in the Board's Conciliation Branch are the staff primarily involved in the conciliation process.

Features of the conciliation model

6.14 The following are some of the notable features of the conciliation model.

The most important feature of the conciliation model is that it is an informal process aimed at reaching a settlement acceptable to both parties. Neither the complainant nor the respondent needs to be represented by a lawyer. Parties cannot be so represented unless the President allows it.

Any agreement must be reached by the parties themselves. The conciliator is not an advocate for one or other of the parties; the emphasis is not on who is right or wrong but rather on educating the parties about their obligations under the Act and establishing a workable resolution to the conflict.

The legislation does not prescribe the procedures or conduct to be adopted in the conciliation process. However, the legislation does impose a requirement of confidentiality of the conciliation process.

The President can require either or both parties to appear separately or together.

The President can request the inspection of documents but cannot require the production of documents.

6.15 The conciliation process is traditionally justified on the grounds that it is inexpensive, speedy and informal. The confidentiality of the process also encourages co-operation between the parties. Confidentiality can also be advantageous for certain complainants who find it difficult to speak about the incident complained of in public. However, it has been suggested that it has significant disadvantages in that the outcome is invisible and is only of relevance to the parties; it cannot be used as a model for others, or as a means of developing a lobby group to change policy for the benefit of the community at large. Lack of knowledge of comparable cases has been said to disadvantage the plight of complainants even further. As Margaret Thornton stated in "Equivocations of Conciliation: the Resolution of Discrimination Complaints" (1989) 52 (6) *Modern Law Review* 733:

> [t]he secrecy surrounding conciliation precludes group empowerment to a marked degree, particularly in the case of stigmatised groups involving grounds which are conceptually and probatively problematic, such as physical and intellectual impairment ... As a strategy, deformalisation is a double-edged sword. On the one hand, it encourages victims of discrimination to file complaints because of the guarantees of privacy and confidentiality, factors which also encourage respondents to co-operate. On the other hand, it precludes public scrutiny.

Remedies at the conciliation level

6.16 The legislation does not contain any provisions as to how a dispute might be resolved. Nor does it impose any limits on the type of agreements that can be reached at the conciliation stage. Thus it is possible that a complainant could claim damages in excess of the Tribunal's upper limit of $40,000 and be paid the sum claimed, if the respondent agrees to do so.

6.17 The voluntary nature of the remedies reached by conciliation would probably preclude a respondent from challenging the agreement at a later stage. A complainant may be able to challenge the agreement on the basis that he or she was forced to agree because of pressure from the respondent. However, in keeping with the voluntary nature of the remedies, unlike orders made by the Tribunal, there are no penalties for non-compliance with the agreement reached at the conciliation level. Another important aspect of the conciliation process is the confidentiality attached to it. This is a particular advantage to complainants who do not favour public awareness of their complaints.

When does the President refer matters to the Equal Opportunity Tribunal?

6.18 There are four circumstances when the President can refer matters to the Equal Opportunity Tribunal for resolution. They are:

(i) when the President believes that the complaint cannot be resolved by conciliation;

(ii) when the President has endeavoured to resolve the complaint by conciliation but has failed;

(iii) when the President believes that the nature of the complaint is such that it should be referred; and

(iv) when the President has informed the complainant that he or she has declined to entertain the complaint, but the complainant serves notice in writing on the President within 21 days, which requires referral to the Tribunal. This does not apply where the reason for declining was the complainant's failure to disclose or allege contravention of the Act.

6.19 When referring matters to the Tribunal the President must provide a report to the Tribunal of the investigations made. However, in keeping with the requirement of confidentiality of conciliation proceedings, evidence of anything said or done during the proceedings is not admissible in the Tribunal proceedings. The President must inform the parties if the matter is being referred to the Tribunal and a copy of the report can be made available to the parties.

6.20 In circumstances where a breach of the Act may result in irreparable damage to the complainant and time is of the essence, the President can apply to the Equal Opportunity Tribunal to issue an interim order even before

the complaint is referred to it. The interim order can be made to preserve the existing situation of the parties, or the rights of the parties, until the complaint has been resolved by the President or the Tribunal. For instance, if it is alleged that an employer is about to dismiss an employee on a discriminatory ground, an interim order can be sought to prevent the dismissal until the matter is determined by the President or the Tribunal. Although the Act is silent as to the principles to be followed in applying for interim orders, the courts have held that the principles applicable under the general law are to be followed.

Issues for consideration

Complaints-based model

Question 192

It has been suggested that the model based on individual complaints is not designed to remedy systemic discrimination.

(a) Should the Act continue to be complaints-based?

(b) Should the complaints-based approach be supplemented?

(c) If so, how?

Question 193

The Commissioners appointed to administer the federal discrimination legislation have the power to proceed as if a complaint had been lodged, if it appears to the Commission that a person has acted unlawfully under the respective legislation. Some states, though not New South Wales, have similar provisions in their legislation.

Should the President of the Board (in NSW) have self-initiating powers, whereby the process of investigation and conciliation can proceed in the absence of a complaint?

Question 194

Although there are cases before the Tribunal where the estate of the deceased is pursuing a discrimination action, the issue of whether a complaint will lapse with the death of the complainant has not yet been determined. It has been suggested that the problem of discrimination goes beyond the affected party to policies and practices that must be considered and reviewed. If a complaint lapses with the death of the complainant, discriminatory practices which caused the discriminatory conduct will inevitably continue. Additionally, it can have the effect of encouraging respondents to delay, particularly if the complainant is ailing.

Should the Act be amended to specifically allow a complaint to be pursued after the death of the complainant?

Question 195

Should any person with a genuine private concern, or a body with a charter to uphold social justice matters and undertake advocacy roles, have a right to complain under the Act?

Method of making a complaint

Question 196

Should complaints be able to be made other than in writing?

Question 197

(a) Should the Act clarify what is meant by expressing a “desire” to complain in the case of persons with an intellectual disability?

(b) How should it be clarified?

Question 198

(a) Should the Act be amended to allow complaints to be made on behalf of people whose disability prevents them from expressing a “desire” to complain?

(b) If so, should there be some guidance on who could represent such persons?

Question 199

Should the Board be given authority to accept complaints on behalf of persons with certain disabilities?

Question 200

It has been pointed out that some disadvantaged people, particularly those who have a physical disability, find it difficult to make contact with the Board by telephone or in person, let alone in writing.

Should the Board be required in exceptional circumstances to attend at a disadvantaged person’s home to conduct a preliminary investigation?

Complainants

Question 201

Should unions be able to make complaints on behalf of their members?

Question 202

Should parents or guardians be allowed to make complaints on behalf of children under 18 years of age?

President's discretion

Question 203

The President has a discretion to decline to entertain a complaint. However that discretion can be negated at the option of the complainant, by the complainant requiring the President to refer the complaint to the Tribunal, except where the complainant does not disclose any contravention of the Act.

Is the provision regarding the President's discretion unnecessary in the light of the complainant's right to require reference to the Tribunal?

Investigation of the complaint

Question 204

Section 89 of the Act requires the President to "investigate each complaint lodged". It appears that there is some uncertainty as to what is involved in the process of investigation.

(a) Should the President inquire into the complaint and into the merits of any response to the complaint or merely exchange allegations and replies between the parties?

(b) Does the investigation involve advocating for the complainant?

(c) If the resources of the Board do not permit proper investigation, what benefit will the mandatory requirement to investigate provide to the complainant?

(d) Should it be discretionary for the President to investigate a complaint as is the case with conciliation?

The conciliation process

Question 205

It appears that the concept of conciliation is not understood by many complainants and respondents. It has also been said that it is hard to determine when the investigation process ceases and the conciliation process begins. This can have far-reaching implications in relation to an inquiry into a complaint in terms of admissibility of certain statements made, and documents given, to a conciliator.

(a) Should there be some clarification of what is meant by conciliation and the distinction between the processes of investigation and conciliation under the Act?

(b) Should conciliation proceedings continue to be confidential?

(c) What are the possible alternatives?

Question 206

The priority given to the process of conciliation irrespective of the ground of discrimination is also seen as a problem. This is said to be most evident in the case of discrimination on the ground of race, where the process of conciliation treats racism as an individual, personal act and overlooks the institutional racism which impacts profoundly on society.

Should conciliation continue to be given priority irrespective of the ground of discrimination?

Question 207

The legislation does not specify how complaints are to be conciliated. There have been cases that have discussed the actual conduct of conciliation proceedings, but different decisions have been reached as to whether or not rules of “natural justice” (fairness) should be observed.

Should the procedure and conduct of conciliation proceedings be prescribed by legislation?

Question 208

(a) Should the President be given authority to require the production of documents and the provision of information at the conciliation level?

(b) If so, should a time limit be fixed within which the parties must respond?

(c) Should such a time limit be subject to penalties?

Legal representation

Question 209

There is no right to legal representation at the conciliation stage except by leave of the President. Even if the President allows legal representation, legal aid is not available for proceedings before the Board; the Legal Aid Commission will only grant legal aid if a complaint is referred to the Tribunal.

Consequently, complainants without funds to pay a private solicitor will have no access to legal representation during conciliation proceedings.

Should legal representation be allowed as of right in conciliation conferences?

Remedies at the conciliation level

Question 210

The legislative scheme imposes certain limits regarding the type of remedies that can be ordered by the Tribunal. No such limits operate at the conciliation level. Thus, it is possible for a complainant to seek a settlement at the conciliation level that is expressly or impliedly precluded from the orders open to the Tribunal; for instance it is possible to make an offer of settlement for $60,000 when the Tribunal is bound by an upper limit of $40,000. On the other hand, respondents have been known to make inadequate counter offers which complainants feel pressured to accept, because of the power imbalance that invariably exists between the two parties.

Should there be some limits on the types of agreements that can be sought at the conciliation level, including a provision for minimum and maximum damages ?

Time limit for complaints

Question 211

The statutory time limit for lodging a complaint with the Board is currently six months from the date of occurrence of the discriminatory act. It has been submitted that the Act's relatively recent enactment means, that despite conscious efforts by the Board to educate the community, there are still many segments of the community that are unaware or unsure of the concepts established by the Act or its scope of operation. (For instance, in the case of pregnancy discrimination, the time limit may often co-incide with the birth of the baby, making it awkward for a person to proceed with a complaint.) Although the President currently has a wide discretion to accept late complaints ("on good cause being shown"), it has been submitted that there is considerable delay in considering whether or not to accept late complaints, which can prejudice the complainant.

(a) In view of the above, and the fact that the statutory time limit for civil actions involving damages for personal injury is three years, should the time limit for lodging a complaint with the Board be extended?

(b) If so, what should the time limit be?

(c) If the time limit is extended, should the President continue to have a wide discretion to accept late complaints?

(d) Whether or not the time limit is extended, should there be a limitation imposed on the cut-off date for entertaining late complaints?

(e) Should "good cause" be defined?

(f) Alternatively, should it be a requirement that certain listed factors be considered in determining whether good cause has been shown?

Question 212

If good cause has been shown for accepting a late complaint, the President is under no obligation to give the respondent reasons for such a decision. It has been suggested that in the absence of such reasons being provided, it is difficult for the respondent to have a fair opportunity to appeal the decision.

Should the President be required to provide reasons for the decision to accept late complaints in writing to the respondent?

Question 213

How should the time limit be determined when the discriminatory conduct is a continuous course of conduct?

Time limit for investigation and conciliation

Question 214

A major criticism of the Board's operation is the delay in investigating and conciliating a complaint.

(a) Is this criticism justified?

(b) Should the process be subject to a strict and enforceable timetable?

Question 215

The President of the Board has no statutory time period within which an unresolved complaint must be referred to the Tribunal.

(a) Should such a time limit be imposed?

(b) If so, what should the time limit be?

(c) Should the time limit be subject to special circumstances which permit deferral of unresolved complaints?

(d) If so, should the special circumstances be defined?

Penalties

Question 216

There are various specific offences which attract penalties under the Act. For instance, failing to comply with a notice requiring appearance before the President for the purpose of attempting to resolve the complaint by conciliation is an offence punishable with a penalty of $500. Wilful obstruction of the President in the exercise of power is an offence punishable by a penalty of $1000. However, none of the penalties prescribed under the Act make a distinction between offending corporations/departments and individuals.

Should such a distinction be made by imposing different penalties on corporations/departments and individuals?

Question 217

The maximum level of the penalties imposed under the Act is $1000.

Should the level of penalties for some/all offences be increased or decreased?

Administrative matters

Question 218

(a) Should the Anti-Discrimination Board have more branch offices?

(b) If so, where?

Question 219

(a) Is the Board's effectiveness in administering the legislation limited by its current level of resources?

(b) If so, in what areas?

THE EQUAL OPPORTUNITY TRIBUNAL

The structure of the Tribunal

6.21 Part 7A of the Act establishes the Equal Opportunity Tribunal. The Tribunal presently consists of a senior judicial member, three judicial members and seven non-judicial or lay members. All Tribunal members are appointed by the Governor on the advice of the Executive Council of the New South Wales Cabinet and work part-time on the Tribunal. Usually three members, comprising a judicial member and any two lay members, sit for any one hearing. However, the senior member or any judicial member can sit alone to decide a question of law or procedure or on an application for an interim order. The Tribunal is administered by a registrar who provides procedural and administrative support to the judicial and lay members.

The functions of the Tribunal

6.22 The Tribunal is responsible for conducting inquiries into each discrimination complaint referred to it and is required to examine all the material before reaching a conclusion. If the Tribunal finds that the complaint is substantiated it can make certain orders. If the complaint is not substantiated the Tribunal can dismiss the complaint. If a complaint has been settled after the matter was referred to the Tribunal, it must formally dismiss the complaint. Complaints can be referred to the Tribunal either by the President of the Anti-Discrimination Board, in the circumstances referred to above, or by the Minister.

How does the Tribunal operate?

Matter must be referred

6.23 First, a matter must be referred to the Tribunal by:

the Board in one of the circumstances set out at para 6.18, together with a referral report (which provides the Tribunal with background information on the matter being referred); or

the Minister, who may refer any matter for inquiry as a complaint.

Parties must be informed

6.24 When a complaint is referred to the Tribunal, it must inform each party to the inquiry (except someone to whom it grants leave to appear as a party) of the time and place of the inquiry. The parties to any inquiry are the complainant, the respondent, any person joined by the Tribunal and any person to whom the Tribunal grants leave to appear as party. A party to an inquiry, may, by leave of the Tribunal, be represented by a solicitor, counsel or agent.

First directions hearing

6.25 The first directions hearing is the initial hearing at which preliminary matters, such as whether the parties are being legally represented, are clarified. It is the stage at which the President's referral report is released to the parties. The Tribunal also sets a timetable for the filing (that is, lodging documents with the Tribunal) of points of claim and defence, replies and affidavits. There is no legal provision in the Act regarding the filing of these documents, but it is common practice to do so.

6.26 Points of claim, which should usually be filed by the complainant within three weeks after the first directions hearing, contain information regarding the ground(s) and area of discrimination, details of alleged discriminatory acts, and particulars of the loss suffered and remedies sought.

6.27 The respondents are usually directed to file points of defence to the points of claim within three weeks after the points of claim document is filed, admitting, denying or not admitting the allegations made in the points of claim. The points of defence will also contain information regarding any statutory defences or exceptions on which the respondent seeks to rely.

6.28 The complainant can file points in reply to the defence, usually within three weeks after the defence is filed. The complainant's and respondent's affidavits must be filed within four weeks and any further affidavits within two weeks.

6.29 The timetable set out above can vary depending on the complexity of the case. If the case is mainly concerned with the interpretation of the Act, rather than a dispute over the facts, the parties may be directed to prepare an agreed statement of facts. There are, however, instances when the parties may be directed to prepare an agreed statement identifying what facts, law and issues are in contention.

Second directions hearing

6.30 A second directions hearing is sometimes arranged, to clarify any other preliminary matters, before the matter is set down for a final hearing.

Conciliation encouraged

6.31 The emphasis on conciliation is not limited to the Board alone. It is extended to dispute resolution in the Tribunal whereby the Tribunal has a responsibility to try to resolve complaints by conciliation. The Act requires the Tribunal to take all reasonable steps to effect an amicable settlement and in doing so may adjourn an inquiry at any stage to facilitate such a settlement. Often a settlement is reached either at the preliminary stages, after the first directions hearing and before the commencement of the final hearing, or at the commencement of the final hearing.

The Tribunal hearing

6.32 The main characteristic of a Tribunal hearing is that it is meant to proceed with as little formality and legal technicality as possible. The Act specifically states that the Tribunal is not bound by rules of evidence. In conducting a hearing, the Tribunal may "inform itself of any matter it thinks fit" and must act "according to equity, good conscience and the substantial merits of the case" (s 108). It is possible for the Tribunal to have an officer of the Board assist it in conducting the inquiry. As a general rule hearings are held in public. However, the Tribunal has the power to direct that all or part of an inquiry must be held in private.

Procedure at Tribunal hearing

6.33 There are no formal rules or regulations regarding the procedure to be adopted at Tribunal hearings. However, certain procedures have evolved over time that tend to follow the procedures adopted in the Supreme Court. These procedures relate to the filing of documents like the points of claim and defence, and the examination and cross examination of witnesses.

6.34 The Tribunal is required to give each party to an inquiry "reasonable opportunity" to call or give evidence, examine or cross-examine witnesses and make submissions to the Tribunal. It is also required to determine as a preliminary matter whether the complaint before it should be dealt with as a representative complaint in terms of the criteria prescribed by the Act (s 103).

Onus and standard of proof

6.35 The complainant must establish the facts which support the complaint. The Act requires the respondent to prove any exceptions that are relied on. The Tribunal must be satisfied on a balance of probabilities that the events complained of occurred and that they amount to a breach of the Act.

Decision of the Tribunal

6.36 The Tribunal can dismiss any complaint because it has not been substantiated, decline to take any further action in the matter or make certain orders if a complaint has been substantiated. The orders that a Tribunal can make will depend on whether the action is an individual complaint, a racial vilification complaint, a representative complaint or a matter referred by the Minister as a complaint.

6.37 In the case of *individual complaints,* if the complaint is substantiated, the Tribunal can make an order for one of the following:

Damages - that the respondent pay the complainant damages not exceeding $40,000 for loss or damage suffered;

Injunction - that the respondent be prohibited from continuing or repeating any conduct considered unlawful under the Act;

Redress - that the respondent perform any reasonable act or course of conduct to redress the loss or damage suffered by the complainant;

Voidance of contract or agreement - that the whole or part of a contract or agreement that contravenes the Act is void unless, as stated in s 54 of the Act, it is done in pursuance of another Act, regulation, rule or ordinance, order of the Tribunal or any court or industrial agreement.

6.38 In the case of *racial vilification complaints* if the complaint is substantiated the Tribunal has the additional special powers to order the following:

Publication of an apology or retraction (or both) - that the respondent publish an apology or retraction (or both) regarding the subject of the complaint in accordance with the Tribunal's directions as to the form and manner of publication.

Implementation of non-discriminatory policy - that the respondent develop and implement a program or policy aimed at eliminating unlawful discrimination.

6.39 If the complaint is lodged by two or more complainants, the Tribunal cannot order an aggregate of more than $40,000 for the one public act of racial vilification.

6.40 In the case of *representative complaints* and *complaints referred by the Minister* the Tribunal does *not* have the power to order damages or redress. The only remedies that the Tribunal has power to order are limited to an *injunction* and *voidance of a contract.*

6.41 The *Federal Court of Australia Act* 1976 (Cth) was amended in 1991 to provide an extended representative procedure. The new Part IVA of the Act headed "Representative Proceedings" allows an action to be brought by a group covering all members of the class, unless a member "opts out" of the group. It also allows the Federal Court to order damages in group actions thereby allowing liability and damages to be resolved at the same time in appropriate cases. The *Sex Discrimination and Other Legislation Amendment Act* 1992 (Cth) passed in December provides for representative complaints contained in the federal racial, sex and disability discrimination legislation

to be brought closely in line with provisions relating to representative actions contained in the *Federal Court of Australia Act* 1976 (Cth).

6.42 Apart from the substantive remedies which are dealt with in s 113 of the Act, the Tribunal can, on application by the President of the Board, make an interim order pending the determination of the complaint, to preserve the status quo between the parties or the rights of the parties to the complaint (s 112).

6.43 The Tribunal is not compelled by law to give reasons for its decisions. However, if a party to an inquiry makes a formal request for the reasons, the Tribunal is bound to give its reasons.

Compliance with orders

6.44 Unlike the position with remedies at the conciliation level which are voluntary in nature and are consequently not statutorily enforced, it is an offence to fail to comply with the Tribunal's orders of injunction, redress, publication of apology/retraction, implementation of a program/policy aimed at eliminating unlawful discrimination or its interim orders. Failure to comply with any such orders attracts a penalty of $1000. An amount ordered by the Tribunal to be paid as a result of the inquiry, for instance by way of damages, may be registered as a judgment debt in the appropriate court.

Costs

6.45 Parties to an inquiry are required to pay their own costs unless:

the Tribunal dismisses the complaint because it is "frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained" (s 111); or

"there are circumstances that justify" a costs order (s 114).

Consequently, even if the complaint is substantiated, the complainants must generally meet their own costs.

Appeals

6.46 A party aggrieved by a decision of the Tribunal can appeal to the Administrative Law Division of the Supreme Court (if the judicial member of the Tribunal is not a judge) or to the Court of Appeal (if the judicial member of the Tribunal is a District Court judge). An appeal can only be made on a question of law within the time period prescribed by s 118 of the Act. Currently appeals on questions of fact are not allowed.

Issues for consideration

Parties

Question 220

Under s 98 and s 100 of the Act, if the Tribunal is of the opinion that a person ought to be joined to the inquiry, it has the power to do so by notice in writing to that person.

Should those so joined by the Tribunal be included in the definition of "respondent"?

Conduct of hearing

Question 221

The conduct of the hearing in the Tribunal is meant to proceed in an informal manner. However, it has been suggested that informality can work to the disadvantage of parties.

If so, how can this problem be avoided?

Question 222

Should the Tribunal have a more interventionist role, whereby, for instance, it takes part in determining the evidence necessary to resolve matters?

Onus of proof

Question 223

It is clear that the onus of proof lies entirely on the complainant to substantiate the complaint whether it be as a result of direct or indirect discrimination.

In England, although there is a similar formal burden on the complainant, if the complainant shows less favourable treatment in prohibited circumstances, such as employment, the respondent is then required to provide an explanation. A similar rule exists in the United States. The *Anti-Discrimination Act* 1991 (Qld) provides that in a case involving indirect discrimination, the onus is on the respondent to prove, on the balance of probabilities, that a term complained of is reasonable. The Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia, "Half Way

to Equal" has recommended that the *Sex Discrimination Act* 1984 (Cth) be amended to place the burden of proof on the respondent in indirect discrimination cases. The reasoning behind this recommendation was that it is the respondent that would be in possession of evidentiary material that could justify the discriminatory provision. As one submission to the Inquiry stated:

> The employer (or other alleged discriminator) who applied the requirement or condition is the person most likely to be able to say why it is reasonable. It may have had consideration to industrial or other issues affecting its workforce as a whole, of which the individual complainant would have no knowledge.

If the recommendation is implemented by an amendment to the *Commonwealth Act*, the result will be an inconsistency between Commonwealth and NSW legislation relating to onus of proof with regard to sex discrimination.

Should these considerations be taken into account when reviewing the onus of proof under the Act?

Legal representation

Question 224

Although legal representation is not "a right", if a party requests it, the Tribunal seldom refuses. It has been pointed out that this causes an imbalance, indirectly making legal representation essential for the other party, usually the complainant, to be able to counter the legally represented party, usually the respondent. This could sometimes be a problem for the complainant, who may not have the resources to be legally represented and yet may not qualify for legal aid.

(a) Should there be strict guidelines for granting legal representation to parties?

(b) If legal representation is granted to one party, should there be facilities for provision of subsidised legal advice to the other?

Question 225

In Canada, if a complaint is taken to a Tribunal it is brought "by" the State Equal Opportunity Agency, given that human rights are regarded as a public law matter.

(a) Should a similar system be devised in NSW?

(b) Alternatively, would the provision of a public "counsel" within the Anti-Discrimination Board, with particular expertise in anti-discrimination law, to present the case of the unrepresented party eliminate some of the difficulties?

Damages

Question 226

It has been suggested that the $40,000 limit on damages (which has existed for the last six years) is inadequate and acts as a disincentive to pursuing complaints and penalises complainants. The Commonwealth discrimination legislation has no limits on damages while the maximum amount of damages that can be awarded in the District Court will be $250,000 from 1 July 1993.

(a) Should there be an upper limit on the damages that can be awarded?

(b) If there should be an upper limit, what should the upper limit be?

Question 227

The Act vests a general discretion in the Tribunal to award damages "by way of compensation for any loss or damage suffered". It is silent as to whether exemplary damages (ie damages over and above compensatory damages awarded as a mark of disapproval, aimed at punishing the wrongdoer) can be awarded.

Should the Tribunal be specifically allowed to order exemplary damages particularly in the following circumstances:

- where the respondent persistently offends against the Act;

- where there is evidence of victimisation of the complainant by the respondent; or

- where the respondent has unreasonably rejected settlement offers causing delay and hardship to the complainant?

Question 228

In the United States, the concept of "front pay" is a remedy that has been developed in discrimination cases. If a person can establish that he/she would have been employed if not for the unlawful discrimination, the person will be paid a future wage until he/she can be employed. It has been suggested that the wording "compensation for any loss or damage suffered" does not preclude the notion of front pay although the upper limit of $40,000 does.

Should the concept of "front pay" be considered if the limit on damages is either increased or removed?

Question 229

There have been instances when parties have attempted to circumvent the ceiling on damages imposed on the Tribunal, by pleading each incident in a course of conduct as a "complaint".

Should the definition of "complaint" be amended to avoid this situation?

Question 230

Should the present limitation whereby the Tribunal is precluded from making an award to anyone but the complainant be removed?

Order to require change in policies

Question 231

If a discriminatory policy has adversely affected a complainant, but also others, should the Tribunal be empowered to order the respondent to change the policy as it affects everyone instead of only in respect of the complainant? In other words, should the Tribunal be empowered to make orders regarding policies and practices which go beyond an individual complaint, if that complaint identifies broader discrimination?

Class actions

Question 232

At present, in a representative complaint, the Tribunal can only deal with liability. It cannot order damages or action for redress. Thus, even if an order as to liability is made in favour of the complainants, they will be unable to obtain any damages or action for redress unless each of the complainants pursue an individual action. It has been submitted that this method of obtaining relief is unnecessarily costly and time consuming for the parties, the Board and the Tribunal. It has also been pointed out that the limitation in respect of the non-availability of the remedies of damages and redress in representative actions is a deterrent to bringing group actions. It would also appear to be in conflict with the established legal principle that a court will always refuse an injunction to restrain the commission of a wrong if it is satisfied that damages are a sufficient remedy.

Should the Tribunal have the same powers to make orders for class actions that it has in respect of individual complaints namely, power to order damages and redress?

Question 233

Should the *Anti-Discrimination Act* be amended to incorporate a similar class action provision to that contained in the *Federal Court of Australia Act* 1976 (Cth) and adopted by the recently passed *Sex Discrimination and Other Legislation Act* 1992 (Cth) into federal discrimination legislation (ie whereby complaints can be lodged by a group of individuals on behalf of a class which covers all members of the class) to allow the Tribunal to resolve liability and damages/redress at the same time?

Costs

Question 234

As stated above, the Tribunal, though empowered to award costs (ie to order that one party - usually the losing party - pay the other's costs of attending and participating in the hearing) in some circumstances, usually does not do so unless the circumstances are exceptional. Instead the Tribunal orders that each party to an inquiry must pay their own costs.

Should the circumstances in which costs may be awarded be more wide-ranging? For instance, should the Tribunal be able to award costs to the complainant if the complainant has made reasonable settlement offers that the respondent has unreasonably refused?

Question 235

It has been suggested that a system similar to the "offer of compromise" system available in the District and Supreme Courts should be available under the Act. (An offer of compromise system provides that, if the amount of the settlement offer made by the complainant is either met or exceeded by judgment, the respondent must pay the complainant's solicitor/client costs.)

Should such a system be available under the Act?

Question 236

In *AIS v Banovic* (1989) 169 CLR 165, the High Court allowed the respondent leave to appeal on the basis that it indemnify the complainants for costs, whether the respondent won or lost because it was considered a "test" case.

If the respondent is defending a matter because it is viewed as a test case by the respondent, should the complainant be awarded costs?

Question 237

Hilary Astor and Christine Chinkin in their book "Dispute Resolution in Australia" adverted to the fact that the nature of discrimination disputes is such that "they are very likely to be disputes between

parties of unequal power" involving "respondents who are more powerful than the complainant by virtue of status and access to financial and other resources ..."

(a) Should the Tribunal be required to pay more attention to the financial status of the parties when making orders for costs, if, for instance, the respondent is a large corporation and the complainant is an already disadvantaged individual of little financial means?

(b) Should the result of the inquiry (ie the success or otherwise of the complaint made) have some relevance to whether or not the complainant is liable for costs?

Question 238

At present, in terms of s 51 of the *Income Tax Assessment Act* 1936 (Cth), a corporate respondent's legal costs are a tax deductible expense when the litigation is pursued in the course of defending or producing assessable income. It has been pointed out that this can operate as an incentive to prolong an inquiry. Conversely, a successful complainant may be subject to a higher rate of taxation through receipt of damages representing lost income. This can be a disincentive to complainants approaching the Tribunal.

(a) Should the taxation implications of inquiries and awards be reviewed?

(b) How should these issues be resolved?

Incentives to settle

Question 239

It has been submitted that the matters raised above show that the Act provides respondents with disincentives rather than incentives to settle. (These include: complainant unlikely to obtain costs; ceiling on award of damages; no provision for exemplary damages; no pre-judgment interest payable on damages awarded by Tribunal; and some litigation costs tax deductible for corporate respondent.) It has also been submitted that complainants are consequently seriously prejudiced by delays in the resolution of conflicts.

Should the Act provide incentives for respondents to settle?

Tribunal's powers

Question 240

The Tribunal's powers are limited to dismissing a complaint or finding a complaint substantiated. Although withdrawal of a complaint is often a desirable way of resolving a complaint before the Tribunal there is no provision for a complainant to withdraw a complaint.

How should this anomaly be addressed?

Penalties

Question 241

There are specific penalties set out in the Act for offences relating to the Tribunal. They are:

- presence at a private Tribunal hearing without direction [s 101B(5)];
- failure to obey directions regarding publication/disclosure/broadcast of proceedings of Tribunal [s 110A(1),(3)];
- failure to comply with Tribunal order [s 116]; and
- obstruction of Tribunal [s 124].

All the above offences attract a penalty of $1000. However, none of these offences makes a distinction with regard to whether the offender is a corporation, department or an individual.

(a) Should there be such a distinction?

(b) Should the penalties be increased?

Tribunal rules

Question 242

There has been some concern about the lack of Tribunal Rules to govern the procedure at Tribunal hearings.

(a) What are the advantages/disadvantages of having such rules?

(b) Alternatively, should the Tribunal merely adopt some of the District Court Rules or have some informal guidelines on procedure?

(c) If rules should be drafted, what should be included in such rules?

Appeals

Question 243

It has been pointed out that there has been a marked difference in the interpretation of the provisions and policy of the Act between the Tribunal and the Supreme Court on appeal.

How can this problem be resolved?

Question 244

At present, a party can only appeal on a point of law from a decision of the Tribunal to the Supreme Court. Prior to 1981, it was also possible to appeal on questions of fact. It has been suggested that appeals on questions of fact should be resumed.

Should appeals on questions of fact be allowed?

Delays in resolving complaints

Question 245

A constant criticism of the Tribunal has been that there are serious delays in determining complaints. The Tribunal has suggested that the main reasons for such delays are the lack of full-time members and insufficient administrative support.

Should the Tribunal consist of some full-time members?

Question 246

Should a time limit be imposed for the production of documents, provision of information or response to communication and subject to penalties, if breached?

Question 247

The following suggestions have been made with a view to reducing delays and making the Tribunal more efficient in the handling of disputes:

- the Tribunal Registrar to conduct mentions/directions hearings and issue and sign subpoenas (except in situations where there is some doubt as to whether a subpoena should issue);

- the Judicial Member for a particular matter to hand down a decision or dismiss a complaint sitting alone (except where the issue of costs is to be argued at the same time);

- the Senior Judicial Member to be able to delegate powers to one of the Judicial Members to accommodate absences;

- the Tribunal to be given specific power to make orders in chambers in the absence of the parties if the parties consent and the Tribunal considers it expedient; and

- the Tribunal to be given specific power to punish for contempt.

Should these suggestions be considered and implemented by legislative amendment?

Question 248

Would the costs and delays be reduced by allowing for the admission of more written rather than oral evidence, and by setting a time limit within which decisions must be made?

Tribunal membership

Question 249

(a) Should it be mandatory that the Tribunal consist of representatives from each of the disadvantaged groups identified under the Act?

(b) Are there other interests that should be represented in the Tribunal membership?

Administrative matters

Question 250

Is the Tribunal's effectiveness in enforcing the legislation limited by its current level of resources?

Question 251

Some Government Departments have within their structure a complaints unit which receives and investigates complaints. However, there is no provision within the Act for the transfer of complaints about discrimination between such agencies and the Tribunal.

Should there be a formal referral process whereby agencies such as complaints units can directly refer investigated complaints to the Tribunal for inquiry?

OFFICE OF THE DIRECTOR OF EQUAL OPPORTUNITY IN PUBLIC EMPLOYMENT

What is equal employment opportunity?

6.47 Equal employment opportunity is a concept that has been developed to address the problems of the historical exclusion of disadvantaged groups from the workplace. It has been suggested that affirmative action is the means of achieving such equal opportunity. Affirmative action principles recognise that certain steps aimed at promoting equality in employment need to be undertaken to eliminate discriminatory practices and policies to ensure that the employment system is fair to all employees and applicants for employment.

The focus of Part 9A

6.48 As stated in Chapter 1 of this Paper, one of the aims of the *Anti-Discrimination Act* 1977 (NSW) as set out in its Preamble is to "promote equality of opportunity". Part 9A of the Act deals with equal opportunity in public employment.

6.49 The Act as a whole is based on the recognition that individual and group actions which perpetuate patterns of unlawful discrimination need to be changed for the benefit of the affected individuals and the community as a whole. Thus, the Act is structured to provide legal rights and remedies for specified groups by making certain actions and behaviour unlawful to eliminate existing discrimination. This does not, however, overcome the effects of past discrimination entrenched in employment policies and practices which have a continuing discriminatory impact on the community. To deal with this aspect of the ill-effects of discrimination the Act was amended in 1980 to introduce the concept of equal opportunity in public employment by adding Part 9A to the Act. The Director's Office was established to administer Part 9A of the Act.

Objects of the Part

6.50 The objects of Part 9A are:

(a) to eliminate and ensure the absence of discrimination in employment on the grounds of race, sex, marital status and physical impairment; and

(b) to promote equal employment opportunity for women, members of racial minorities and physically handicapped persons,

in the authorities to which this Part applies.

Application of the Part

6.51 Part 9A applies to:

all departments specified in certain schedules to the *Public Sector Management Act* 1988 (NSW);

all declared authorities under the *Public Sector Management Act* 1988 (NSW);

all higher education institutions in New South Wales, except the Catholic College of Education and the NSW Conservatorium of Music;

the Police Service; and

other persons, groups of persons or bodies declared by the Governor to be relevant authorities.

How are the objects of the Part achieved?

6.52 The objects of Part 9A are achieved through the work of the Director's office which was established to administer the Part. The Charter and Mission Statement of the Director's Office is based on the functions of the Director listed in s 122I of the Act. It is set out in the Director's Report for the year ended 30 June 1991 as follows:

On the basis of Part IXA of the NSW Anti-Discrimination Act 1977 and other legislation dealing with equal opportunity in public sector employment-

The Office of the Director of Equal Opportunity in Public Employment on behalf of the Government, is to see to it that -

public sector employers devise, implement and maintain employment management practices which are free of unlawful discrimination on the grounds of race, sex, marital status and physical impairment;

all persons engaged in public sector employment enjoy effective and genuine equality in the conduct of their daily work and in the pursuit of their working life goals;

in particular, employment opportunities for women, Aboriginal people, people of non-English speaking background and people with physical disabilities, are promoted by public sector employers.

Our role is to monitor and provide advice to public sector organisations to assist them generate and foster change to ensure equitable access to jobs, career paths and training and equitable conditions of employment for EEO group members.

6.53 Crucial to achieving the objects of the Part is the preparation and implementation of equal employment management plans by every organisation to which the Part applies (s 122J).

What is an equal employment management plan?

6.54 An "equal employment opportunity management plan" is a document which contains an organisation's action plan for achieving equal employment opportunity within the work force. Guidance on the matters to be included in such a plan are provided in s 122J and relate to the following:

devising of policies and programs to achieve the objects of the Part;

the communication of those policies and programs to persons within the organisation;

the collection and recording of appropriate information;

the review of the organisation's personnel practices to identify discriminatory practices;

the setting of goals and targets to assess the success of the plan;

other means of evaluating the policies and programs devised;

revision and amendment of the plan; and

the appointment of persons within the organisation to implement the management plan.

6.55 In addition to preparing and implementing the management plans, organisations are also required to review the plans annually and provide a copy of the plan to the Director together with other information regarding activities undertaken in keeping with the plan, and results of such activities (s 122L).

Director's functions in relation to management plans

6.56 The Director is required to assist and advise authorities in drafting management plans and to evaluate the effectiveness of the plans in achieving the objects of the Part. In so doing, if the Director is dissatisfied with any matter relating to the preparation, implementation or amendment of a plan, the matter can be referred to the Anti-Discrimination Board for investigation.

6.57 At the conclusion of an investigation, the Board can make recommendations to the Director on the matter referred and/or furnish a report to the Minister with or without recommendations. The Minister can then direct an authority to amend its management plan in a specified manner.

Issues for consideration

Objects and focus

Question 252

The objects of Part 9A cover discrimination on the specified grounds of race, sex, marital status and physical impairment. The Part does not cover the other prohibited grounds of discrimination, namely, intellectual impairment or homosexuality. Nor does it make any reference to the prohibition of compulsory retirement on the ground of age.

(a) Should Part 9A cover all grounds and unlawful conduct covered by the Act?

(b) What is the justification for not doing so?

Question 253

Should the focus of the Act, which is to "render unlawful [certain nominated] types of discrimination and to promote equality of opportunity between all persons" be achieved at any cost or should the means of achieving these objects be balanced against business profitability, resource implications and other similar criteria?

Question 254

It has been pointed out that the reporting system required by Part 9A of the Act with regard to monitoring proposed activities and programs to eliminate discrimination and promote equal opportunity is time consuming and labour intensive.

(a) Should the system be simplified?

(b) If so, how can it be simplified while still satisfying the objects of the Act?

Application

Question 255

The *State Owned Corporations Act* 1989 (NSW) ("the Act") makes provision for the establishment and operation of Government enterprises as State owned corporations. While the provisions of the *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth) are specifically adopted by the Act, the provisions of Part 9A do not apply to State owned corporations.

(a) Should Part 9A apply to State owned corporations?

(b) Are there other agencies that should be covered by Part 9A?

Penalties

Question 256

It is an offence punishable by a penalty to obstruct the Director in the exercise of functions under the Act. The penalty does not make a distinction between departments and individuals.

Should different penalties be imposed on departments and individuals?

Compliance and enforcement

Question 257

If the Director is dissatisfied with a management plan, the matter is referred for investigation to the Anti-Discrimination Board.

Should the Director have more powers in ensuring compliance with objects of the Part?

Question 258

Is the Anti-Discrimination Board the appropriate agency to conduct the investigation?

Question 259

Recent legislation amending the *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth) provides that companies that fail to comply with affirmative action legislation will be denied funding and contracts with the Department of Administrative Services.

(a) Is it appropriate for similar measures to be considered in NSW for failure to comply with Part 9A?

(b) Are there other methods by which compliance could be encouraged?

Interaction between enforcement mechanisms: the Board, the Tribunal and the Director's Office

Question 260

Part 9A of the Act is administered by the Premier, while the rest of the Act is administered by the Attorney General.

Is the division in terms of administration of the Act appropriate and/or necessary?

Question 261

(a) Should principles relating to equal opportunity in employment to be dealt with in the *Anti-Discrimination Act* or in a separate Act?

(b) If it is appropriate that Part 9A remain within the Act, should there be more interaction between Tribunal decisions and the assessment of the effectiveness of management plans by the Director's Office? For instance, should the Director's Office be required to follow-up work practices of organisations which have been a party to a Tribunal decision?

BACKGROUND READING

The Act's enforcement mechanisms

Articles and Books

ASTOR, H and CHINKIN, C "Conciliation of Discrimination Disputes" in *Dispute Resolution in Australia* (Butterworths, Sydney, 1992)

AUSTRALIA. PARLIAMENT. HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS [Chairman: Mr M Lavarch] *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (AGPS, Canberra, 1992)

AUSTRALIAN AND NEW ZEALAND EQUAL OPPORTUNITY LAW AND PRACTICE, Vols 1 and 2 (CCH Australia Ltd)

BRYSON, D “Mediator and Advocate: Conciliating Human Rights Complaints” (1990) 1 (3) *Australian Dispute Resolution Journal* 136

MULCAHY, N “Conciliation and Race Complaints” (1992) 3 (1) *Australian Dispute Resolution Journal* 21

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD *Annual Reports 1978 to 1991-1992*

NILAND, C “Managing Diversity”, paper presented at the *Equal Opportunity and Anti-Discrimination in Employment ’91 Conference* on 27 September 1991

SADURSKI, W “The Second Generation of American Affirmative-Action Decisions” (1989) 12 (1) *Sydney Law Review* 159

THORNTON, M “Anti-Discrimination Remedies” (1984) 9 *Adelaide Law Review* 235

THORNTON, M “Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia” (1989) 52 (6) *Modern Law Review* 733

WILENSKI, P “Equal Employment Opportunity - Widening The Agenda” (1985) 12 (1) *Canberra Bulletin of Public Administration* 42

WILLS, S “Big Visions and Bureaucratic Straitjackets” (1986) 96 *Australian Left Review* 23

7. Legislation Vs Education

THE CASE FOR AND AGAINST ANTI-DISCRIMINATION LAWS

7.1 Many countries around the world, including the United States of America and the United Kingdom, have some form of anti-discrimination legislation. Being a signatory to a number of international conventions which require a commitment to non-discriminatory treatment of people and reflecting the international trend towards equality of opportunity and anti-discrimination, Australia has passed wide-ranging anti-discrimination laws at federal and state level over the past 20 years. This trend towards introducing anti-discrimination legislation, generally supported by parties of different political persuasions, is indicative of its value and worth. Indeed, the absence of such laws is becoming more the exception than the rule.

7.2 To confirm the value of anti-discrimination legislation in New South Wales, the Anti-Discrimination Board in all its Annual Reports has a chapter on "Handling Complaints" which includes statistics on the number of complaints received and finalised under the Act during the year in question. In 1991/92 the Board handled a total of approximately 12,000 inquiries, of which 1243 were written complaints. The breakdown of the written complaints finalised (not received) during 1991/92 is as follows:

29% were conciliated;

52% not proceeded with due to withdrawal of complaint or loss of contact;

3% declined as frivolous, vexatious, lacking in substance, or not revealing a contravention of the Act;

11% referred to the Human Rights and Equal Opportunity Commission; and

5% referred to the Equal Opportunity Tribunal for hearing.

7.3 While these statistics are indicative of the number of complaints made, they should not be accepted as the extent of discrimination experienced. Many people affected by discriminatory conduct do not know that they can complain, are afraid of complaining, or for some other reason have not complained, which means that the problem of discrimination is much larger than it appears.

7.4 On the other hand, there are some who argue that discrimination laws should be repealed; that they impair productivity and that they are costly and inefficient. Epstein in "Forbidden Grounds: The Case Against Employment Discrimination Laws" (1992) 105 *Harvard Law Review* 2080, argues that employment discrimination laws in particular do more harm than good to intended beneficiaries. He states that employment discrimination is unlike force or fraud because victims of discrimination are free to search for the best available job offer while victims of force or fraud are unable to choose a trading partner. Thus, competition among employers in the labour market acts as a powerful check on discrimination and makes discrimination laws, particularly employment discrimination laws unnecessary. According to Epstein, any remaining discrimination, which he calls "voluntary segregation", is economically efficient and should not be prohibited. In other words, the market should be left free to regulate discrimination for itself.

7.5 There is another view that describes anti-discrimination legislation as tokenistic, making little or no impact in the wider scheme of things. This is more a criticism of the form that the legislation takes than the necessity for the legislation itself. Margaret Thornton summarises this view in an article entitled "Sex Discrimination Legislation in Australia" (1982) 54 (4) *Australian Quarterly* 393 thus:

> [a]lthough describing complaint-based anti-discrimination legislation as tokenistic has become something of a cliche, 'tokenism' does nevertheless most aptly encapsulate its essence. First, the legislation operates within narrow parameters, further severely weakened by the exceptions and, secondly, the procedure of the complaint-based system is fraught with obstacles designed to deter all but the most intrepid complainant faced by an intractable respondent because of the almost insuperable burden of proof, the fear of public humiliation and indignity, together with the possibility of substantial costs.

7.6 Creighton, commenting on the then new Victorian *Equal Opportunity Act* in an article entitled "The Equal Opportunity Act - Tokenism or Prescription for Change" (1978) 11 *Melbourne University Law Review* 503, while condemning it and its South Australian and New South Wales counterparts of tokenism, concluded that:

> [t]okenism as it undoubtedly is, it is better to have the EOA [*Equal Opportunity Act*] than to have nothing so long as it is not allowed to obscure the need for a much more radical approach to the problems with which it purports to deal. Even a rather half-hearted gesture like the EOA can serve a useful purpose as a consciousness-raising exercise both for the victims of discrimination and for the perpetrators of it.

Issues for consideration

Question 262

In adopting a "first principles" approach to the review of the *Anti-Discrimination Act* 1977 (NSW) and in the light of the diverging views stated above, the Commission welcomes views on the following, with particular reference to the NSW Act.

(a) Is there a need for anti-discrimination legislation?

(b) Has it been effective in reducing discriminatory practices?

(c) How best can its effectiveness be measured?

(d) Is there a better way of dealing with discrimination issues than by legislation?

LEGISLATION OR EDUCATION?

7.7 Some opponents to legislation in the area of anti-discrimination argue that what is needed is vigorous community education not legislation. They believe wrongful discrimination is largely the result of "wrong" attitudes which can only be changed by education and that the law can at most only change behaviour, by consistent enforcement, not attitudes.

7.8 On the other hand, stressing the importance of legislation, Justice Elizabeth Evatt, giving evidence in a private capacity to the Inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into Equal Opportunity and Equal Status for Australian Women, said that:

> ... laws enacted by Parliament in relation to matters of current social interest play an important part in changing attitudes.
>
> There is a very interesting process involved in public opinion, legislation and judicial decision making; they each feed into the other. But where the leaders, the elected members, see that there is an issue which is fully justified in terms of human rights and internationally accepted standards, and they legislate for it, that legislation will work towards change, if it is carefully planned and implemented appropriately.

7.9 Yet it is suggested that legislation and education need not be considered as mutually exclusive alternatives. Even if law has only a limited role in social change and reform in immediately changing behaviour not attitudes, attitudinal rehabilitation through community education, with its inevitable long term focus, should be an adjunct to legislation. Martin Luther King said:

> [m]orality cannot be legislated but behaviour can be regulated. Judicial decrees may not change the heart, but can restrain the heartless.

7.10 The result may be that, if community education produces its desired result in the long term, the need for legislation may diminish in time. However, in the short term there may be merit in linking legislative reform to community education.

7.11 The stance adopted in New South Wales seems to be that legislation and education do go hand in hand in combating discriminatory practices. This view may be implied in the words of the Preamble to the Act:

> [a]n Act to render unlawful racial, sex and other types of discrimination in certain circumstances [by means of the legislation] and to promote equality of opportunity between all persons [by means of education].

In other words, they are two indispensable, complementary ways of reaching the common end of equality of opportunity.

NOT BY LAW ALONE: THE ROLE OF EDUCATION

How is education undertaken in NSW?

7.12 Education to promote human rights can be undertaken in various ways. Under the Act, the Anti-Discrimination Board ("the Board"), the Equal Opportunity Tribunal ("the Tribunal") and the Office of the Director of Equal Opportunity in Public Employment ("the Director's Office") each have a role in this regard.

The Board's role

7.13 As stated in Chapter 6, the role of education is an important function of the Anti-Discrimination Board. Section 119 of the Act sets out details of how the Board should accomplish this function "for the purpose of eliminating discrimination and promoting equality and equal treatment of all human beings". The Board places great emphasis on its role in preventing discrimination by education through:

information provision;

policy development and research;

interaction with the community and interest groups;

interaction with potential respondents; and

interaction with major institutions and organisations.

7.14 Some of the recent educational incentives taken by the Board include the following:

producing and distributing publications in English and in other languages;

providing speakers on request at seminars and conferences for employers, managers and service providers, for educational institutions, private and public sector organisations etc;

establishing a new program of talks focusing on key organisations, such as the Registered Clubs Association, which already provide information and resources for particular sectors of the community;

establishing an employer advisory service;

training teachers within the Adult Migrant Education Services (AMES) and ensuring that sessions on anti-discrimination laws become an established part of the courses run by the AMES;

preparing display material for use at public displays;

contributing to the educational initiatives of others, whether as speakers, as representatives of the Board or through the publication of written material; and

general policy development and research.

The Tribunal's role

7.15 Apart from the activities of the Board, such as those described above, the substantiation of a complaint can have a general educative effect on the community. An appropriate remedy together with the publicity that follows can not only deter potential perpetrators but also encourage prospective complainants to initiate actions where they have been previously unsure of their rights. It can also contribute to public awareness of what constitutes unacceptable discriminatory conduct. The Equal Opportunity Tribunal has a role in this regard as its decisions serve to educate the community on the Act and its objectives. By contrast, the conciliation process does not have this potential for community education because the statutory requirement of confidentiality precludes it from having an impact upon the community at large. As Hilary Astor and Christine Chinkin have stated in their book *Dispute Resolution in Australia* at 274:

> Respondents may admit unlawful organisational practice in private but decline or fail to take measures to remedy the situation. Their admission cannot be later used to effect much needed change since it was made in a confidential setting. The outcomes of conciliations cannot be used to demonstrate the possibility of success or the level of settlements, nor to encourage others to negotiate or make complaints about discrimination.

The role of the Director's Office

7.16 Though restricted to public employment, the Office of the Director of Equal Opportunity in Public Employment has a significant impact in reducing discrimination in the work place. This is evidenced by the results of a survey of the Equal Employment Opportunity Program conducted in April 1990. The purpose of the survey was to determine progress under the program since the first survey in 1985 and the enactment of Part 9A in 1980. Some of the key findings of the survey were that:

women have increased their representation in the more senior levels of the clerical administrative stream since 1985;

the representation of people of non-English speaking background in the public sector has increased substantially during the period 1985-1990; and

Aboriginal staff are proportionally better represented in specialist professional and specialist professional support occupations than they were in 1985 and "less clustered" in the wages area.

7.17 The above findings are not indicative of a complete change for the better in the workplace. In fact, given that women represented 38.2% of clerical administrative staff at lower levels in 1990, women are still under-represented at more senior levels. The same is true for other disadvantaged groups. However, the findings are indicative of a change for the better, slow though it may be. This change appears to reflect the impact of Equal

Employment Opportunity programs in the work place which inevitably has an impact on the community. The very fact that all employees of public sector departments and authorities must comply with Part 9A will have an educative effect on those public servants.

Issues for consideration

Accessibility and awareness of legislation

Question 263

While anti-discrimination legislation in most jurisdictions is contained in Acts of Parliament, it appears that the regulation making power that exists in New South Wales and elsewhere has not been used. Another possibility that has been suggested is to supplement the legislation with Codes of Practice and guidelines that will endorse and give effect to the principles of anti-discrimination in a more "user friendly" manner than Acts of Parliament.

(a) Will the inclusion of a "user friendly" Code of Practice, as an appendix to the legislation, assist in making the legislation more accessible and effective?

(b) Alternatively or additionally, should regulations be used to supplement legislation and education in combating discriminatory practices?

(c) In either case, what implications should follow the breach of a regulation or Code of Practice?

Question 264

Despite the emphasis placed on the role of education in combating discriminatory practices in the community, many groups and individuals are still unsure of their rights and duties under the Act. A particular concern of disability groups is the inaccessibility of the written word and the inability to make complaints due to insufficient education about the Act. One suggestion has been to introduce audio-taped versions of the Act.

Are there other more effective ways of reaching the various disadvantaged groups?

Question 265

It has also been said that the Act in its present form is difficult to understand.

Is there a need for developing a "plain English" version of the Act?

Question 266

Should it be a requirement that the principles embodied in the Act are included in secondary school and vocational courses?

Question 267

There also appears to be very little, if any, impact made outside the main cities.

(a) Is there a need for the Board to have more branch offices or rely more on community relations campaigns and outreach programs?

(b) How else can the non-metropolitan community be reached?

Question 268

It has been suggested that the Act should be publicised to a much larger degree in the print and electronic media, the private sector and among people of non-English speaking backgrounds.

How best can the Act be publicised among these and other groups?

Question 269

The statistics show that many more complaints are finalised by the conciliation process via the Board than by the judicial process via the Tribunal.

Since the conciliation process could have an impact upon the community but for the confidentiality element, should it be made more accessible to the public by lifting or modifying the confidentiality requirement?

(See also discussion and Issues for consideration in Chapter 6 regarding the conciliation process.)

Interaction between Board, the Tribunal and the Director's Office

Question 270

Should the Director's Office be required to liaise with the Board and Tribunal in following up organisations and employers against whom discrimination complaints have been made?

Other initiatives

Question 271

How else can education be made more effective and far reaching in preventing discrimination?

A QUESTION OF RESOURCES

7.18 While the Act has many deficiencies in terms of its scope and operation as identified in this Paper, even if all the legislative problems are resolved, the Act's effectiveness will be greatly influenced by the available resources. This issue of allocation of adequate resources has been raised by various organisations and interest groups in submissions made to the Commission. Adequate resourcing will have an impact on the Act's administration and enforcement as well as on its overall impact on the community at large in the provision of quality services.

Issues for consideration

Question 272

Are there particular areas that require increased resources?

Question 273

In Germany, it is a legislative requirement that at least one disabled person must be employed for every 16 employees in the work place; non-compliance results in a substantial fine that is used to fund services for vocational training/employment.

Should resources be generated by alternative means, such as those used in Germany?

BACKGROUND READING

ASTOR, H and CHINKIN, C "Conciliation of Discrimination Disputes" in *Dispute Resolution in Australia* (Butterworths, Sydney, 1992)

BREST, P “In Defense of the Anti-Discrimination Principle” (1976) 90 *Harvard Law Review* 1

CREIGHTON, W B “The Equal Opportunity Act - Tokenism or Prescription For Change?” (1978) 11 *Melbourne University Law Review* 503

EPSTEIN, R P “Forbidden Grounds: The Case Against Employment Discrimination Laws” (1992) 105 *Harvard Law Review* 2080

EVANS, G “Discrimination and Human Rights”, papers presented at the 22nd Australian Legal Convention (Brisbane, 1983) published by Queensland Law Society for the Law Council of Australia

NEW SOUTH WALES. ANTI-DISCRIMINATION BOARD AND EQUAL OPPORTUNITY TRIBUNAL *Annual Report 1991 - 1992*

PAUWELS, A *Non-discriminatory Language* (AGPS, Canberra, 1991)

THORNTON, M “Sex Discrimination Legislation in Australia” (1982) 54 *Australian Quarterly* 393

Appendix 1

COMPARATIVE TABLE OF GROUNDS AND AREAS OF OPERATION IN AUSTRALIAN DISCRIMINATION LEGISLATION

This table is current to *8 January 1993*. Please note that exceptions to discriminatory conduct included in the various Acts have *not* been taken into account in the preparation of the Table.

Key to abbreviations of legislation used in Table

Cth (RDA)	Commonwealth (Racial Discrimination Act 1975)
Cth (SDA)	Commonwealth (Sex Discrimination Act 1984)
Cth (DDA)	Commonwealth (Disability Discrimination Act 1992)
ACT	Australian Capital Territory (Discrimination Act 1991)
NT	Northern Territory (Anti-Discrimination Act 1992) - **Legislation not yet in operation**
NSW	New South Wales (Anti-Discrimination Act 1977)
VIC	Victoria (Equal Opportunity Act 1984)
TAS	Tasmania (Anti-Discrimination Bill 1991) - **Bill lapsed on propogation of Parliament in 1992; No state discrimination legislation in operation to date.**
SA	South Australia (Equal Opportunity Act 1984)
WA	Western Australia (Equal Opportunity Act 1984)
WA (CC)	Western Australia (Criminal Code)
WA (SCA)	Western Australia (Spent convictions Act 1988)
QLD	Queensland (Anti-Discrimination Act 1991)

UNLAWFUL ACTS/ PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Advertising - intention to do unlawful act	AIDS/HIV[2]	Age	Aiding contrav the Ac
General Prohibition[3]	Cth (RDA) Cth (SDA) Cth (DDA) ACT NT NSW VIC TAS WA QLD			Cth (SDA) C ACT NT NS TAS SA W
Access to Premises		Cth (DDA) ACT VIC TAS WA	TAS WA	
Access to Vehicles		VIC TAS WA	TAS WA QLD	
Accommodation		Cth (DDA) ACT NT VIC TAS QLD	NT TAS SA WA QLD	
Administration of laws		Cth (DDA) QLD	QLD	
Application forms		WA	WA QLD	
Clubs[4]		Cth (DDA) ACT NT VIC TAS WA QLD	NT TAS WA QLD	
Community service		VIC WA	WA	
Disposition of land		Cth (DDA) TAS WA QLD	TAS SA WA QLD	
Education		Cth (DDA) ACT NT VIC TAS QLD	NT TAS SA WA QLD	
Facilities[5]		Cth (DDA) ACT NT VIC TAS WA	NT TAS WA	
Goods and Services[5]		Cth (DDA) ACT NT VIC TAS WA QLD	NT TAS SA WA QLD	
Insurance		NT VIC TAS WA QLD	NT TAS WA QLD	
Local Government		VIC TAS WA QLD	TAS WA QLD	
Municiple Councils		VIC TAS WA	TAS WA	
Request for information		Cth (DDA) ACT WA	WA	
Sport		Cth (DDA) VIC WA	WA	
Superannuation		NT TAS WA QLD	NT TAS WA QLD	
Work[6]		Cth (DDA) ACT NT VIC TAS WA QLD	NT TAS SA WA QLD	

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Association[7]	Breast-feeding[8]	Compulsory Retirement[9]	Contravene c standa
General Prohibition[3]				Cth (DD
Access to Premises	Cth (RDA) Cth (DDA) ACT TAS WA			
Access to Vehicles	Cth (RDA) TAS WA			
Accommodation	Cth (RDA) Cth (DDA) ACT NT TAS WA QLD	NT		
Administration of laws	Cth (DDA) QLD			
Application forms	WA			
Clubs[4]	Cth (DDA) ACT NT TAS WA QLD	NT		
Community service	WA			
Disposition of land	Cth (RDA) Cth (DDA) TAS WA QLD			
Education	Cth (RDA) ACT NT TAS WA QLD	NT		
Facilities[5]	Cth (RDA) Cth (DDA) ACT NT TAS WA	NT		
Goods and Services[5]	Cth (RDA) Cth (DDA) ACT NT TAS WA QLD	NT QLD		
Insurance	NT TAS WA QLD	NT		
Local Government	TAS WA QLD			
Municiple Councils	TAS WA			
Request for information	Cth (DDA) ACT WA			
Sport	Cth (DDA) WA			
Superannuation	NT TAS WA QLD	NT		
Work[6]	Cth (RDA) Cth (DDA) ACT NT TAS QLD	NT	NSW	

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Criminal Record (Irrelevant)[10]	Employer Association	Failure to accommodate special needs	Failure to n intentio discrimin
General Prohibition[3]			NT TAS	
Access to Premises	TAS			
Access to Vehicles	TAS			
Accommodation	NT TAS	NT		
Administration of laws				
Application forms				
Clubs[4]	NT TAS	NT		
Community service				
Disposition of land	TAS			
Education	NT TAS	NT		
Facilities[5]	NT TAS	NT		
Goods and Services[5]	NT TAS	NT		
Insurance	NT TAS	NT		SA
Local Government	TAS			
Municiple Councils	TAS			
Request for information				
Sport				
Superannuation	NT TAS	NT		SA
Work[6]	NT TAS WA (sca)[12]	NT		

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Family responsibilities[13]	Harassment - disability	Harassment - Racial[14]	Harassment -
General Prohibition[3]				
Access to Premises				
Access to Vehicles				
Accommodation		NT	NT WA	NT
Administration of laws				
Application forms				
Clubs[4]		NT	NT	NT
Community service				
Disposition of land				
Education	WA	Cth (DDA) NT	NT WA	NT TA
Facilities[5]		NT	NT	NT TA
Goods and Services[5]		Cth (DDA) NT	NT	NT TA
Insurance		NT	NT	NT
Local Government				
Municiple Councils				
Request for information				
Sport				
Superannuation		NT	NT	NT
Work[6]	Cth (SDA) - termination of employment only WA	Cth (DDA) NT	NT WA	NT TA

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Harassment - Sexual[15]	Homosexuality[16]	Impairment/disability[17]
General Prohibition[3]	NT TAS QLD		
Access to Premises	ACT VIC	ACT TAS	Cth (DDA) ACT VIC TAS WA
Access to Vehicles	VIC	TAS	VIC TAS WA
Accommodation	Cth (SDA) ACT NT VIC SA WA	ACT NT NSW TAS SA QLD	Cth (DDA) ACT NT NSW VIC TAS SA WA QLD
Administration of laws	Cth (SDA) VIC	QLD	Cth (DDA) VIC QLD
Application forms			WA
Clubs[4]	Cth (SDA) ACT NT	ACT NT NSW TAS QLD	Cth (DDA) ACT NT NSW VIC TAS WA QLD
Community service	VIC		VIC WA
Disposition of land	Cth (SDA)	TAS SA QLD	Cth (DDA) TAS SA QLD
Education	Cth (SDA) ACT NT SA	ACT NT NSW TAS SA QLD	Cth (DDA) ACT NT NSW (not private) VIC TAS SA WA QLD
Facilities[5]	Cth (SDA) ACT NT VIC SA	ACT NT TAS	Cth (DDA) ACT NT VIC TAS WA
Goods and Services[5]	Cth (SDA) ACT NT VIC SA	ACT NT NSW TAS SA QLD	Cth (DDA) ACT NT NSW VIC TAS SA WA QLD
Insurance	NT VIC	NT TAS QLD	NT VIC TAS WA QLD
Local Government	VIC	TAS QLD	VIC TAS WA QLD
Municiple Councils		TAS	VIC TAS WA
Request for information		ACT	Cth (DDA) ACT WA
Sport			Cth (DDA) VIC WA
Superannuation	NT	NT TAS SA QLD	NT TAS SA WA QLD
Work[6]	Cth (SDA) ACT NT VIC SA WA	ACT NT NSW TAS SA QLD	Cth (DDA) ACT NT NSW VIC TAS SA WA QLD

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Incite unlawful acts	Marital Status[18]	Medical Record (Irrelevant)[19]
General Prohibition[3]	Cth (RDA) (DDA) NT VIC TAS WA QLD		
Access to Premises		Cth (SDA) ACT NSW VIC TAS WA	
Access to Vehicles		VIC TAS WA	
Accommodation		Cth (SDA) ACT NT NSW VIC TAS SA WA QLD	NT
Administration of laws		Cth (SDA) VIC QLD	
Application forms		Cth (SDA) WA	
Clubs[4]		Cth (SDA) ACT NT NSW VIC TAS WA QLD	
Community service		VIC WA	
Disposition of land		Cth (SDA) TAS SA WA QLD	
Education		Cth (SDA) ACT NT NSW - (not private) VIC TAS SA WA QLD	NT
Facilities[5]		Cth (SDA) ACT NT VIC TAS WA	NT
Goods and Services[5]		Cth (SDA) ACT NT NSW - (services only) VIC TAS SA WA QLD	NT
Insurance		NT VIC TAS WA QLD	NT
Local Government		VIC TAS WA QLD	
Municiple Councils		VIC TAS WA QLD	
Request for information		Cth (SDA) ACT WA	
Sport		Cth (SDA)	
Superannuation		NT TAS SA QLD	NT
Work[6]		Cth (SDA) ACT NT NSW VIC TAS SA WA QLD	NT

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Parent/ carer/ being childless[20]	Political opinion/ activity	Pregnancy[21]
General Prohibition[3]			
Access to Premises	ACT VIC TAS	ACT VIC TAS	ACT NSW (where liquor is sold) VIC WA
Access to Vehicles	VIC TAS	VIC TAS	WA
Accommodation	ACT NT VIC TAS QLD	ACT NT VIC TAS WA QLD	Cth (SDA) ACT NT NSW SA TAS WA QLD
Administration of laws	VIC QLD	VIC QLD	Cth (SDA) QLD
Application forms		WA	Cth (SDA) WA
Clubs[4]	ACT NT VIC TAS QLD	ACT NT VIC TAS WA QLD	Cth (SDA) ACT NT NSW TAS WA QLD
Community service	VIC	VIC WA	WA
Disposition of land	TAS QLD	TAS QLD	Cth (SDA) SA WA QLD
Education	ACT NT VIC TAS QLD	ACT NT VIC TAS WA QLD	Cth (SDA) ACT NT NSW (not private) TAS SA WA QLD
Facilities[5]	ACT NT VIC TAS	ACT NT VIC TAS WA	Cth (SDA) ACT NT TAS WA
Goods and Services[5]	ACT NT VIC TAS QLD	ACT NT VIC TAS WA QLD	Cth (SDA) ACT NT NSW TAS SA WA QLD
Insurance	NT VIC TAS QLD	NT VIC TAS WA QLD	NT WA QLD
Local Government	VIC TAS QLD	VIC TAS WA QLD	WA QLD
Municiple Councils	VIC TAS	VIC TAS WA	WA
Request for information	ACT	ACT WA	Cth (SDA) ACT WA
Sport			
Superannuation	NT TAS QLD	TAS WA QLD	NT SA WA QLD
Work[6]	ACT NT VIC TAS QLD	ACT NT VIC TAS WA QLD	Cth (SDA) ACT NT NSW TAS SA WA QLD

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Race[22]	Religion/ Religious Belief	Request unnecessary information
General Prohibition[3]			ACT NT QLD
Access to Premises	Cth (RDA) ACT NSW VIC TAS WA	ACT VIC TAS	
Access to Vehicles	Cth (RDA) NSW VIC TAS WA	VIC TAS	
Accommodation	Cth (RDA) ACT NT NSW VIC TAS SA WA QLD	ACT NT VIC TAS WA QLD	
Administration of laws	Cth (RDA)[23] VIC QLD	VIC QLD	
Application forms	Cth (RDA) WA	WA	
Clubs[4]	Cth (RDA) ACT NT NSW VIC TAS WA QLD	ACT NT VIC TAS WA QLD	
Community service	Cth (RDA)[23] VIC WA	VIC WA	
Disposition of land	Cth (RDA) TAS SA WA QLD	TAS QLD	
Education	Cth (RDA)[23] ACT NT NSW (not private) VIC TAS SA WA QLD	ACT NT VIC TAS WA QLD	
Facilities[5]	Cth (RDA) ACT NT VIC TAS WA	ACT NT VIC TAS WA	
Goods and Services[5]	Cth (RDA) ACT NT NSW VIC TAS SA WA QLD	ACT NT VIC TAS WA QLD	
Insurance	NT VIC TAS WA QLD	NT VIC TAS WA QLD	
Local Government	Cth (RDA)[23] VIC TAS WA QLD	VIC TAS WA	
Municiple Councils	Cth (RDA)[23] VIC TAS WA	VIC TAS WA	
Request for information	ACT	ACT WA	
Sport	Cth (RDA)[23]	WA	
Superannuation	NT TAS SA WA QLD	NT TAS SA WA QLD	

Work[6]	Cth (RDA) ACT NT NSW VIC TAS SA WA QLD	ACT NT VIC TAS WA QLD

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Separating Blind/ Deaf persons from guide dogs[24]	Sex/ Gender	Sexuality[25]
General Prohibition[3]	NT SA		
Access to Premises		ACT NSW (where liquor is sold) VIC TAS WA	ACT TAS
Access to Vehicles		VIC TAS WA	TAS
Accommodation		Cth (SDA) ACT NT NSW VIC TAS SA WA QLD	ACT NT TAS SA QLD
Administration of laws		Cth (SDA) QLD	QLD
Application forms		Cth (SDA) WA	
Clubs[4]		Cth (SDA) ACT NT NSW VIC TAS WA QLD	ACT NT TAS QLD
Community service		VIC WA	
Disposition of land		Cth (SDA) TAS SA WA QLD	TAS SA QLD
Education		Cth (SDA) ACT NT NSW (not private) VIC TAS SA WA QLD	ACT NT TAS SA QLD
Facilities[5]		Cth (SDA) ACT NT VIC TAS WA	ACT NT TAS
Goods and Services[5]		Cth (SDA) ACT NT NSW VIC TAS SA WA QLD	ACT NT TAS SA QLD
Insurance		NT VIC TAS WA QLD	NT TAS QLD
Local Government		VIC TAS WA QLD	NT TAS
Municiple Councils		VIC TAS WA	TAS
Request for information		Cth (SDA) ACT WA	ACT
Sport		Cth (SDA)[26]	
Superannuation		NT TAS SA QLD	NT TAS SA QLD
Work[6]		Cth (SDA) ACT NT NSW VIC TAS SA WA QLD	ACT NT TAS SA QLD

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Social Status[27]	Trade Union activity	Transexuality[28]	Victimisa
General Prohibition[3]				Cth (RDA) C Cth (DDA) A NSW TAS QLD
Access to Premises	TAS	TAS	ACT TAS	
Access to Vehicles	TAS	TAS	TAS	
Accommodation	TAS	NT TAS QLD	ACT NT TAS SA	
Administration of laws		QLD		
Application forms				
Clubs[4]	TAS	NT TAS QLD	ACT NT TAS	
Community service				
Disposition of land	TAS	TAS QLD	TAS SA	
Education	TAS	NT TAS QLD	ACT NT TAS SA	
Facilities[5]	TAS	NT TAS	ACT NT TAS	
Goods and Services[5]	TAS	NT TAS QLD	ACT NT TAS SA	
Insurance	TAS	NT TAS QLD	NT TAS	
Local Government	TAS	TAS QLD	TAS	
Municiple Councils	TAS	TAS	TAS	
Request for information			ACT	
Sport				
Superannuation	TAS	NT TAS QLD	NT TAS SA	
Work[6]	TAS	NT TAS QLD	ACT NT TAS SA	

UNLAWFUL ACTS/PROHIBITED CONDUCT AND GROUNDS OF DISCRIMINATION[1]

AREAS OF OPERATION	Vilification - racial[29]	Vilification - serious racial	Vilification - religious
General Prohibition[3]	ACT NSW TAS WA (CC) QLD	ACT NSW	QLD
Access to Premises			
Access to Vehicles			
Accommodation			
Administration of laws			
Application forms			
Clubs[4]			
Community service			
Disposition of land			
Education			
Facilities[5]			
Goods and Services[5]			
Insurance			
Local Government			
Municiple Councils			
Request for information			
Sport			
Superannuation			
Work[6]			

FOOTNOTES

1. This table includes grounds of discrimination that are prohibited in specific areas of operation as well as unlawful acts that are generally prohibited in all areas of operation (see

note 3). Some unlawful acts are expressly treated as criminal offfences in certain jurisdictions. The unlawful acts/offences included in the Table are those that relate specifically to discrimination. Unlawful acts in relation to the Act's enforcement mechanisms and exceptions to the prohibited discriminatory conduct have not been included in the Table.

2. Although discrimination on the grounds of AIDS/HIV status is not specifically prohibited in any jurisdiction, the definition of disability/impairment in some jurisdictions is wide enough to include such discrimination. In the Cth (DDA) "disability" is defined to include "the presence in the body of organisms causing disease or illness". The "impairment" provisions in the ACT, VIC, QLD and NT Acts and the TAS Bill are substantially the same. In WA, complaints from persons who are HIV antibody positive can be made under the ground of impairment, as held in the case of *Hoddy v Corrective Services* (1992) EOC 92-397. In SA and NSW, although AIDS related complaints are accepted under the ground of impairment, the adequacy of the respective definitions to do so is in doubt, but has not been tested to date. See also note 17 below.

3. The prohibition operates generally in *all* areas and is not restricted to specific areas of operation only. However, some prohibitions operate generally as well as in specific areas.

4. Although most discrimination legislation contains provisions covering "clubs", the type of club covered (ie for instance, whether registered, sporting or social) varies ineach jurisdiction, based on the definition provided in the particular Act. For instance, only registered clubs are covered in NSW; in the ACT only clubs that hold a licence under the *Liquor Act* 1975 are covered.

5. The meaning of "goods and services" and "facilities" in most discrimination legislation is very broad. Most Acts define the scope of the terms in their interpretation section to include access to premises and vehicles, insurance, local government and municipal councils. See for instance, the definition of "services" in VIC and WA and in the TAS Bill. However, some jurisdictions deal with these areas independently of "goods and services".

6. In most jurisdictions "work" includes discrimination against applicants and employees, commission agents, contract workers, certain partnerships, employment agencies and trade unions.

7. Discrimination of the ground of association generally means association with a person who has one or more of the attributes for which discrimination is prohibited. However, in WA, discrimination on the basis of association is prohibited only in relation to the following grounds

- impairment - in all the areas nominated

- race in all areas except sport, and

- age only in the areas of access to places and vehicles, goods and services, facilities and accommodation.

8. Although not specifically prohibited as in the NT, and prohibited only to a limited extent in QLD, it is arguable that discrimination on the ground of breast feeding is prohibited in all jurisdictions where sex discrimination is prohibited on the basis of being a characteristic appertaining to sex and/or where discrimination on the ground of parental status is prohibited as a characteristic of being a parent (mother).

9. In SA, QLD and WA similar provisions have been passed, but are not yet in operation. In SA, the provision will come into effect on 1 June 1993; in QLD, 30 June 1994; and in WA, 9 January 1995.

10. In the TAS Bill, the prohibition is against discrimination on the ground of "criminal record".

11. In SA a person who discriminates (legally) on the basis of actuarial or statistical data must notify the person who has been discriminated against of this fact.

12. In WA, discrimination on the ground of a spent conviction (that is, a criminal conviction which has been declared spent by a Supreme Court judge or Commissioner of Police after a certain period of time) is unlawful in the area of employment under the *Spent Convictions Act* 1988 (WA).

13. The ground of "family responsibilities" envisages a wider range of responisbilities, such as those associated with caring for aparent, than the ground of parental status which is limited to responsibilities arising out of parental status only. See also the ground of "Parent/Carer/being childless" in the Table.

14. Racial harassment was recently included in WA. See also note 29.

15. In VIC sexual harassment will amount to discrimination. In NT harassment will amount to discrimination for all prohibited grounds of discrimination. The NSW Act does not deal specifically with sexual harassment. However, in the case of *O'Callaghan v Loder* (1984) EOC 92-023, the Equal Oppportunity Tribunal held that sexual harassment amounts to unfavourable treatment within the meaning of the Act. That is, sexual harassment amounts to discrimination on the ground of sex which is prohibited under the Act. SA makes the failure to prevent sexual harassment an unlawful act in some circumstances.

16. In QLD, homosexuality is included within the ground of "lawful sexual activity". In the ACT, NT and SA it is included within the ground of "sexuality". In the TAS Bill it is included within the ground of "sexual orientation". See also note 25 below.

17. The definition and scope of impairment/disability varies from Act to Act. The Cth (DDA) defines "disability" to include physical and intellectual disability and mental illness. See also note 2 above. NSW and SA make provision for both physical and intellectual impairment, while the other jurisdictions have a general impairment provision. In the TAS Bill, discrimination on the ground of mental or phychiatric disability is specifically prohibited. See also note 19 and 24 below.

18. In the Cth (SDA), ACT, NT, QLD, NSW, SA and WA Acts and the TAS Bill, discrimination against de facto spouses is included within the ground of marital status. In VIC, marital status and the status of being a de facto spouse are include in the definition of "status".

19. Some Acts, such the Cth (DDA) and VIC include past and imputed disability/impairment within the definition of disability/impairment. In such jurisdictions, it may be argued that, although discrimination on the basis of medical record is not expressly prohibited, it is covered by the prohibition of past or imputed impairment/disability.

20. In the ACT, the status of "being childless" is not specifically included as a ground. See also note 13 above.

21. In NSW pregnancy is not a separate ground but is specifically included in the Act as a characteristic appertaining to discrimination on the ground of sex. In VIC it is not specifically included as a characteristic appertaining to sex in the Act; however, the Victorian Equal Opportunity Board has followed other jurisdictions in holding that pregnancy is a characteristic relating to the female sex: see *Smith v Frankl* (1991) EOC 92-362.

22. The term "race" is not comprehensively defined in any legislation. All the Acts define race to include colour, nationality and ethnic and national origin. QLD, the ACT and WA include descent, while QLD and the TAS Bill also include ancestry. The Cth (RDA) includes immigration in most cases.

23. The Cth (RDA) does not have a specific provision prohibiting discrimination in relation to administration of lawsm community service, education, local government, municple councils or sport. However, a general provision exists (s 9) which prohibits any act of racial discrimination "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human rights and fundamental freedoms" referred to in Article 5 of the *Internation Convention of the Elimination of All Forms of Racial Discrimination.* One of the relevant rights is the right to education and training. A board protection against racial discrimination is thereby provided in the area of education. The same applies to the other areas included on the basis of s 9.

24. Most Acts cover discrimination on the basis of being accompanied by a guide dog within the ground of disability/impairment discrimination, rather than as separate ground. In SA, separating a blind/deaf person from his/her guide dog is also a criminal offence.

25. Sexuality is worded differently in the various Acts. The ACT and NT refer to "sexuality" while the TAS Bill referred to "sexualorientation". QLD refers to "lawful sexual activity". The SA and NT Acts define "sexuality" (and in Tasmania, "sexual orientation") to mean heterosexuality, homosexuality, bisexuality or transexuality. In the ACT, "sexuality" refers to heterosexuality, honosexuality and bisexuality. In NSW only discrimination on the ground of homosexuality is prohibited. See also note 16 above.

26. The prohibition of discrimination on the ground of sex in sport in the Cth (SDA) only applies to children under 12 years of age and in relation to referees and umpires. It applies to persons over 12 years of age only if "strength and stamina" are not relevant considerations in competitive sporting activities. Similar limitations exist in other jurisdictions are dealt with by way of exceptions.

27. "Social status" is defined in the TAS Bill to include "the class or level of society to which a person belongs and the person's occupation, source of income, level of education, social origin and residential locality".

28. Transsexuality is not a separate ground in NT, SA and the TAS Bill but is expressly included under sexuality.

29. In WA the offences relating to racist harassment and incitement to racial hatred are contained in the Western Australian *Criminal Code.* On 8 January 1993 the *Equal Opportunity Act* 1984 (WA) was amended to prohibit racist harassment in certain areas of operation. See "Harassment - Racial" in the Table.

Appendix 2

SUBMISSIONS RECEIVED

The Commission received the following submissions in response to its preliminary request for comments on the terms of reference. The Commission also received many other submissions from persons who wish to remain anonymous. The submissions were made in writing as well as orally by telephone and at meetings. Where a submission was made by an organisation, the name of the person writing or speaking on behalf of the organisation is noted in brackets. All submissions made to the Commission have been taken into account in the formulation of the issues for consideration in this Discussion Paper. The Commission also consulted with various government departments, both in New South Wales and interstate, in the preparation of this Discussion Paper.

Written submissions

ACT Community Law Reform (J J A Kelly QC)

AIDS Council of NSW Inc (ACON) (D Baxter)

The Accommodation Rights Service Inc (W Fisher)

The After Care Association of NSW (J Said AM)

Ahmediyya Muslim Association of Australia (M Ahmad)

Attorney General's Department, Cth, Civil Law Division (J Broome)

Attorney General's Department, Qld (P Mooradian)

Attorney General's Department, Vic (J Szwarc)

Australian Catholics Pro Life Association (B McDougall)

Australian Government Solicitor (G Turnbull)

Australian Industrial Registry (Justice B Maddern)

Australian International Cabin Crew Association (L Webb)

Australian Law Reform Commission (Justice E Evatt, AO)

Australian Teachers' Christian Fellowship (J S Shellard)

Mr John Basten QC, Barrister

Ms Christine Bird

Catholic Education Commission, NSW (J A Taylor)

Citizens' Commission on Human Rights (Psychiatric Violations) Inc

(J Eastgate)

Civil Rehabilitation Committee of NSW (K Heggie)

Commonwealth Secretariat, London (R C Nzerem)

Complaints Unit, NSW Department of Health (M Walton)

Department of Justice, Legislation and Policy Division, Tasmania(J O Green,

R Hopcroft)

Diocesan Catholic Education Commission, Wagga Wagga (G M Gaskin)

Disability Services Complaints Unit, Department of Health, Housing and

Community Services, Cth (A Barczynski)

The Employers' Federation of NSW (G Brack)

Epilepsy Association of NSW (G K Banks)

Equal Opportunity Commission, SA (J M Tiddy)

Equal Opportunity Tribunal, NSW (S Hearnden)

Mrs Ruth Fairman

Family Resource and Network Support Inc (P Coller)

Flight Attendants' Association of Australia (L Webb)

Mr Carlos Felix

Professor David Flint, Faculty of Law, University of Technology, Sydney

Ms Beth Gaze, Senior Lecturer in Law, Monash University

Gay and Lesbian Rights Lobby Inc (D Taylor, P Costello)

Mr Michael G Hains

HIV / AIDS Services Department, Central Sydney Health Service (L Painter)

Home Office, London (M K Bramwell)

Indo China Refugee Association NSW Inc (A Hurni)

Islamic Council of NSW Inc (A Roude)

Ms D Jeffrey

Mr Craig Johnston

Judicial Commission of NSW (I Potas)

Kingsford Legal Centre (S Rice)

Justice Michael Kirby, President of the NSW Court of Appeal

Law Commission of New Zealand (A Quentin-Baxter, Sir Kenneth Keith)

Law Commission, Trinidad and Tobago (Secretary)

Law Development Commission, Zimbabwe (A R McMillan)

Law Reform Commission, British Columbia (A L Close QC)

Law Reform Commission, Hong Kong (J Glen)

Law Reform Commission, Kenya (J F H Hamilton)

Law Reform Commission, Nigeria (W O Anaekwe)

Law Reform Commission, Ontario (M Lasica)

Law Reform Commission, Tasmania (J A Connolly)

Law Reform Commission, Western Australia (W Briscoe)

Law Reform Committee, South Australia (Justice Zelling)

Law Society of the Northern Territory (M F Horton)

Legal Aid Commission, NSW (M Richardson)

Associate Professor Greg McCarry, University of Sydney

The Manitoba Human Rights Commission (P St Loe)

Mr J R Marsden

MediaSwitch

Mental Health Review Tribunal (T Ovadia)

Ministry of Citizenship, Ontario, Canada (S K Lal)

Ministry of Justice, State of Israel (J Karp)

Ms P Nelson

The NSW Independent Teachers Association (L Wright)

NSW Women's Advisory Council (J Stackpool)

Office of the Director Of Equal Opportunity in Public Employment, NSW
(Dr C Burton)

Office of Equal Opportunity, Northern Territory (M Bull)

Owls (C Haybarger)

Mr Harry Pepper-Clayton

Public Interest Advocacy Centre (M Hogan)

Public Sector Management Commission (M Kennedy)

Redfern Legal Centre, Intellectual Disability Rights Service (M Scannell)

Mr David Robertson, Barrister

Royal Prince Alfred Hospital (E Mackinnon)

Mr Gerard C Rowe, Senior Lecturer in Law, University of NSW

The Salvation Army, Australia Eastern and Papua New Guinea Territory (L G Middleton)

Dr Marion Sawer, Faculty of Management, University of Canberra

Seventh Day Adventist Church (R L Coombe)

Shalindra Singh

Sisters-in-Law (J Earle)

Ms Megan Slinning

Ms Marie Smith

Socialist Party of Australia (P D Symon)

State Rail Authority of NSW (T Rosenbaum)

Mr Peter Trebilco

Tribunal Working Group on Homosexuals and Discrimination (P de Waal)

Victims Compensation Tribunal (C R Brahe)

J Walker

Wesley Mission (Rev Dr G Moyes)

Western Sydney Area Health Service (O G Curteis)

Mr Michael J Winter

Rev Father Wayne Wright

Mr A Youngman

Youth Advisory Council, NSW (J Skinner)

Oral submissions

AIDS/HIV Policy and Programs Branch, Department of Health, Housing and Community Services, Cth (H Watchirs)

Anti-Discrimination Board of NSW (S Mark, N Hennessy, J Sheen)

Dr Hilary Astor, Senior Lecturer in Law, University of Sydney

Disability Council of NSW (F Druett and other Council members)

Mr K Dover

Equal Opportunity Tribunal, NSW (H Conway)

Guide Dog Association of NSW and the ACT (R Cappie)

Mr V James

Muslim Women's Association, Lakemba (I Cosar and other members of the Association)

Office of the Director of Equal Opportunity in Public Employment, NSW (Dr C Burton and other members of staff)

Public Interest Advocacy Centre (L Beacroft)

Mr Allen Quirk

Spastic Centre of NSW, Consumer Group

Spastic Centre of NSW, Job Club