

# NSW Law Reform Commission

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

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## **REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)**

### **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.

**REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)**

**Participants**

**New South Wales  
Law Reform Commission**

To the Honourable Jeff Shaw QC MLC

Attorney General for New South Wales

Dear Attorney

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

We make this final Report pursuant to the reference to this Commission dated 17 December 1991.

The Hon Justice Michael Adams

Chairperson

Mr John Basten QC

Commissioner

The Hon Jerrold Cripps QC

Commissioner

His Honour Judge Goldring

Commissioner

Professor Neil Rees

Commissioner

November 1999

## **Participants**

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams

Mr John Basten QC\*

The Hon Jerrold Cripps QC

His Honour Judge Goldring

Professor Neil Rees

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## Acknowledgment

The Commission would also like to acknowledge Ms Nancy Hennessy for her invaluable contribution.

## **REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)**

### **List of abbreviations**

#### **Federal anti-discrimination legislation**

**DDA:** Disability Discrimination Act 1992 (Cth)

**HREOC Act:** Human Rights and Equal Opportunity Commission Act 1986 (Cth)

**RDA:** Racial Discrimination Act 1975 (Cth)

**SDA:** Sex Discrimination Act 1984 (Cth)

#### **Other federal legislation**

**SIS:** Superannuation Industry Supervision Act 1993 (Cth)

**WRA:** Workplace Relations Act 1996 (Cth)

#### **NSW legislation**

**ADA:** Anti-Discrimination Act 1977 (NSW)

**Adoption Act:** Adoption of Children Act 1965 (NSW)

**BDMR Act:** Births, Deaths and Marriage Registration Act 1995 (NSW)

**FOI Act:** Freedom of Information Act 1989 (NSW)

**IRA:** Industrial Relations Legislation 1996 (NSW)

**OH&SA:** Occupational Health and Safety Act 1983 (NSW)

#### **State anti-discrimination legislation**

**ADA (NT):** Anti-Discrimination Act 1992 (NT)

**ADA (Qld):** Anti-Discrimination Act 1991 (Qld)

**DA (ACT):** Discrimination Act 1991 (ACT)

**EOA (SA):** Equal Opportunity Act 1984 (SA)

**EOA (Vic):** Equal Opportunity Act 1995 (Vic)

**EOA (WA):** Equal Opportunity Act 1984 (WA)

**SDA (Tas):** Sex Discrimination Act 1994 (Tas)

## **International Conventions**

**UDHR:** Universal Declaration of Human Rights

**ICCPR:** International Covenant on Civil and Political Rights

**ICESCR:** International Covenant on Economic, Social and Cultural Rights

**CERD:** Convention on the Elimination of All Forms of Racial Discrimination 1965

**CEDAW:** Convention of the Elimination of All Forms of Discrimination Against Women 1979

**CROC:** Convention on the Rights of the Child 1989

**ILO Convention 111:** Discrimination (Employment and Occupation) Convention 1958

## **Publications**

**DP 30:** New South Wales Law Reform Commission, Review of the Anti-Discrimination Act 1977 (NSW) (Discussion Paper 30, February 1993)

**RR 8:** New South Wales Law Reform Commission, Discrimination Complaint-Handling: a study (Research Report 8, June 1997)

## **Agencies and Tribunals**

**ADB:** Anti-Discrimination Board

**ADT:** Administrative Decisions Tribunal

**AIRC:** Australian Industrial Relations Commission

**ALRC:** Australian Law Reform Commission

**DPP:** Director of Public Prosecutions

**EO Division:** Equal Opportunity Division of the ADT

**EOT:** Equal Opportunity Tribunal

**HREOC:** Human Rights and Equal Opportunity Commission

**IRC:** NSW Industrial Relations Commission

**Tribunal:** The tribunal dealing with equal opportunity matters – ie non-specific reference to EOT or EO division of ADT

## **International Agencies**

**CRE:** Commission for Racial Equality (UK)



**EEOC:** Equal Employment Opportunities Commission (USA)

**EOC:** Equal Opportunity Commission (UK)

**ILO:** International Labour Organisation

**UN:** United Nations

## **Other**

**CEP:** (Commonwealth) Community Employment Program

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### Executive Summary

In 1977, when the *Anti-Discrimination Act 1977* (NSW) ("ADA") was enacted, it was considered an innovative measure that put New South Wales ahead of other Australian states in dealing with major areas of discrimination. It was a time when community attitudes towards racism, sexism, homophobia and prejudice towards those with disabilities and other social problems were very different from those that currently prevail.

Between then and now much has happened both generally in the area of social welfare legislation and in discrimination law.

Today, there is federal legislation covering aspects of discrimination law and all Australian states and territories have enacted discrimination legislation. The ADA itself has been amended many times to improve its coverage and application so as to reflect social changes. There have been many individual success stories and some landmark cases. However, the ADA has not had the benefit of a comprehensive review to ascertain its effectiveness. Given the changes in community attitudes since its enactment over the last twenty years, it became apparent that the ADA needed to be reviewed in the context of modern Australian society. Accordingly, the Commission was required to undertake a comprehensive review as spelt out in the terms of reference.

This two volume Report is the result of many years of consultation and detailed research into the adequacy of the ADA in its current form to combat discrimination. In the course of this review, the Commission released a Discussion Paper which raised issues for public deliberation and a Research Report on complaint handling. This report contains 161 recommendations based on responses to the Discussion Paper and information elicited from other community consultations, an analysis of current research and a consideration of judicial and legislative developments in Australia and overseas. In order to show how the recommendations should be given legislative effect, the Commission instructed Parliamentary Counsel to draft a new Anti-Discrimination Bill (see Appendix A). The Bill adopts a new structure in keeping with more recent Australian equal opportunity legislation and sets out a clearer conceptual framework. The recommendations listed in the following pages have been cross referenced to the Bill provisions for easy access.

The report is in three parts with each part considering major issues:

Part 1 entitled "Preliminary and Definitional Issues" deals with Commonwealth human rights and industrial relations laws and their impact on and interaction with the ADA, the definition of discrimination, the problems associated with the current comparability model and options for reform;

Part 2 entitled "Substantive Issues" deals with the areas of operation in the context of the public/private dichotomy, the current coverage and the need for an extension of that coverage, the current exceptions and how they could be streamlined to deliver a more practically effective set of prohibitions as well as other unlawful conduct and related concepts such as vilification and harassment; and

Part 3 entitled "Enforcement Issues" deals with procedures available to prevent or remedy unlawful discrimination such as the complaints process at the Anti-Discrimination Board, the role of the Equal Opportunity Division of the Administrative Decisions Tribunal (formerly the Equal Opportunity Tribunal) and the remedies available.

The major recommendations are that:

religious belief, political opinion and carer responsibilities (in the area of employment only) should be included as new grounds of discrimination;

the concept of direct discrimination should be based on and focussed at covering conduct causing detriment or disadvantage on the ground of an irrelevant characteristic;

an obligation to provide reasonable accommodation should be imposed in relation to the grounds of disability, pregnancy, breast feeding and carer responsibilities (in employment) subject to a defence of unjustifiable hardship;

in relation to the concept of indirect discrimination, the burden of establishing reasonableness should specifically rest with the respondent;

some exceptions that apply to specific grounds in specific areas of operation, such as those that excluded small business and partnerships of fewer than five persons from the ambit of the ADA, be repealed and others, such as those that applied to exclude private educational authorities in the area of employment from the ambit of the ADA, be limited;

the general exceptions should be streamlined by repealing the statutory authorities exception and modifying or repealing others and including a new special measures exception;

the current areas of operation should be widened to include the new areas of discrimination in the disposition of land and local government and the ambit of the existing area of registered clubs be widened under the new heading of "clubs";

the offence of "serious vilification" should be relocated in the *Crimes Act 1900* (NSW);

current representative complaint provisions should be amended;

the President of the ADB should be given powers of self initiation;

all procedural provisions in the ADA should be transferred to the *Administrative Decisions Tribunal Act 1997* (NSW).

Despite the changes recommended in this Report and incorporated in the new Bill, the Commission's view is that legislative reform alone cannot realise the Bill's objects. Community education is essential and must be accompanied by the Government's commitment to provide resources for implementation.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### List of recommendations

For ease of reference, the recommendations in the following list are identified by chapter and cross referenced to the page number at which each recommendation appears in the text of this report. The discussion of and reasoning for the recommendations is contained in the paragraphs preceding each recommendation.

The recommendations are also cross referenced to the relevant clauses in the draft Bill. For obvious reasons, recommendations to repeal provisions have not been cross referenced. Also, there are no cross references to recommendations regarding Tribunal procedure as they require amendments to the *Administrative Decisions Tribunal Act 1997* (NSW).

### Part One

#### *Chapter 2: Interaction with Commonwealth laws*

##### Recommendation 1

Seek to formalise co-operative arrangements between the ADB and HREOC, whereby the ADB is appointed as an agent for HREOC and provides a common reception point for complainants, similar to the arrangement which existed until 1991.

Draft Anti-Discrimination Bill 1999: cl 128(3)

##### Recommendation 2

The ADA should expressly state that it binds the Crown in right of the State and in all other capacities so far as the legislative authority of the State Parliament permits.

Draft Anti-Discrimination Bill 1999: cl 6

#### *Chapter 3: Concept of discrimination*

##### Recommendation 3

The concept of direct discrimination should be redefined:

to cover conduct causing detriment or disadvantage on the ground of an irrelevant characteristic [Draft Anti-Discrimination Bill 1999: cl 9, 12];

to include in conduct, a refusal or omission to act [Draft Anti-Discrimination Bill 1999: cl 11]; and

to clarify what attributes may constitute a "characteristic" [Draft Anti-Discrimination Bill 1999: cl 16, 17, 18].

##### Recommendation 4

Relief should be available, in appropriate circumstances, in relation to threats to contravene the ADA.

Draft Anti-Discrimination Bill 1999: cl 93, 119(5)

##### Recommendation 5

The ADA should impose an obligation to provide reasonable accommodation in relation to the grounds of disability, pregnancy, breastfeeding and carer responsibilities (only in employment) subject to a defence of unjustifiable hardship.

**Draft Anti-Discrimination Bill 1999: cl 14**

#### **Recommendation 6**

The concept of indirect discrimination should be redefined:

- to be consistent with the new definition of “direct discrimination”;
- to identify how the element of “reasonableness” is to be addressed; and
- to specify that the burden of establishing reasonableness rests with the respondent.

**Draft Anti-Discrimination Bill 1999: cl 10**

#### **Recommendation 7**

The ADA should include a Preamble which refers to a right to substantive, as distinct from formal, equality. It should identify the relevant international human rights instruments adopted by Australia and provide a brief statement of the principles contained therein.

**Draft Anti-Discrimination Bill 1999: Preamble**

#### **Recommendation 8**

The ADA should include a statement of objects. The statement should provide that the objects of the Act are:

- to promote recognition of equality of opportunity for all people;
- to eliminate discrimination by recognising that irrelevant characteristics not be taken into account;
- to implement strategies aimed at achieving substantive equality in public life, including provisions requiring the “reasonable accommodation” of certain attributes and permitting special measures to promote the opportunities of disadvantaged groups;
- to provide a mechanism for conciliation of disputes involving discrimination;
- to provide redress for people who have been unlawfully discriminated against; and
- to educate the community about the prohibitions against unlawful discrimination and to promote the social and economic benefits of applying non-discriminatory principles and practices.

**Draft Anti-Discrimination Bill 1999: cl 3, 128, 129**

## **Part Two**

### ***Chapter 4: Areas of operation***

#### **Recommendation 9**

Include work done by volunteers, trainees or unpaid workers within the definition of work.

**Draft Anti-Discrimination Bill 1999: cl 26**

#### **Recommendation 10**

Provide that the Crown should be liable for conduct of members of Parliament and Ministers involving discrimination under the ADA.

**Draft Anti-Discrimination Bill 1999: cl 6**

#### **Recommendation 11**

In relation to the terms of the present s 95A, provide expressly that it should be a condition of granting leave under that section that any relief received previously is not duplicated and that granting the relief sought under the ADA would not cause undue prejudice to the respondent.

#### **Recommendation 12**

In relation to the exception for employment in a private household, re-define to refer to employment, or an application for employment, which requires work to be done in a dwelling occupied by the employer or by a relative of the employer.

**Draft Anti-Discrimination Bill 1999: cl 27**

#### **Recommendation 13**

Exclude sexual harassment from the exception for discrimination in employment in a private household.

#### **Recommendation 14**

Repeal the small business exception.

#### **Recommendation 15**

Repeal the exception applicable to partnerships of fewer than six persons.

#### **Recommendation 16**

For religious educational authorities, substitute for the current exception for employment in a private educational authority, an exception based on a genuine occupational qualification. The exception should provide that:

it only applies to the grounds of sex, pregnancy, domestic status, sexuality and transgender status [**Draft Anti-Discrimination Bill 1999: cl 28(5)(b)**];

the educational institution must be conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed [**Draft Anti-Discrimination Bill 1999: cl 28(5)(c)**];

the employer must act on a bona fide belief that the discrimination was required in order to comply with the tenets of the particular religion or creed [**Draft Anti-Discrimination Bill 1999: cl 28(6)**];  
and

if the existence or operation of the tenet of the particular religion or creed is disputed by some adherents of that religion or creed, it is sufficient if the view is one which is treated as a reasonable view by the adherents of that religion or creed [**Draft Anti-Discrimination Bill 1999: cl 18(2)**].

#### **Recommendation 17**

In the area of provision of goods and services, include the manner in which the goods and services are provided.

Draft Anti-Discrimination Bill 1999: cl 35(1)(c)

**Recommendation 18**

Include in “services” a specific reference to superannuation.

Draft Anti-Discrimination Bill 1999: cl 36(1)(c)

**Recommendation 19**

Include in the definition of “goods” a chose in action and money.

Draft Anti-Discrimination Bill 1999: cl 36(1)

**Recommendation 20**

Repeal the exception for private educational authorities in relation to education on all grounds.

**Recommendation 21**

Repeal the exception for prescribed educational authorities from the prohibition on race discrimination in education.

**Recommendation 22**

Provide a limited exception for educational institutions which operate in accordance with religious tenets for the grounds of sex, domestic status, sexuality, transgender status and religion.

Draft Anti-Discrimination Bill 1999: cl 44

**Recommendation 23**

Include in the area of goods and services:

access to any place, vehicle or facility which members of the public are entitled to use;

the terms on which such access is allowed;

the provision of means of access; and

the requirement to leave or cease the use of any such place, vehicle or facility.

Draft Anti-Discrimination Bill 1999: cl 35, 36

**Recommendation 24**

Insert a definition of accommodation in the ADA in the terms of that contained in the *Residential Tenancies Act 1987* (NSW).

Draft Anti-Discrimination Bill 1999: cl 49

**Recommendation 25**

Amend the provisions relating to discrimination in accommodation on the ground of disability to prohibit a refusal to permit a person to make reasonable alterations to a premises occupied by that person.

Draft Anti-Discrimination Bill 1999: cl 47

### **Recommendation 26**

Retain the exception for accommodation in a private household but specify that the accommodation must be in the main home.

**Draft Anti-Discrimination Bill 1999: cl 50**

### **Recommendation 27**

The area currently identified as “registered clubs” should be renamed “clubs and associations” and extended to cover all associations of persons which are incorporated or registered as corporations in Australia.

**Draft Anti-Discrimination Bill 1999: cl 53**

### **Recommendation 28**

Include “disposal of interests in land” as an area of discrimination.

**Draft Anti-Discrimination Bill 1999: cl 59, 60, 61**

### **Recommendation 29**

Include the exercise of functions and powers of local government and the administration of State and local government laws and programs as a new area.

**Draft Anti-Discrimination Bill 1999: cl 62**

## ***Chapter 5: Grounds of discrimination***

### **Recommendation 30**

Remove the term “ethno-religious origin” from the definition of race.

**Draft Anti-Discrimination Bill 1999: cl 18(1)**

### **Recommendation 31**

Pregnancy (including potential pregnancy) and breastfeeding should form separate grounds of discrimination.

**Draft Anti-Discrimination Bill 1999: cl 16(2)**

### **Recommendation 32**

“Marital status” should be re-named “domestic status”.

**Draft Anti-Discrimination Bill 1999: cl 16(1)(c)**

### **Recommendation 33**

Define “domestic status” as being:

(a) single;

(b) married (including Indigenous Australian customary marriages);



(c) married but living separately and apart from one's spouse;

(d) divorced;

(e) widowed; or

(f) in cohabitation with another person in a domestic relationship other than marriage.

**Draft Anti-Discrimination Bill 1999: cl 18(1)**

**Recommendation 34**

Extend the defence of "unjustifiable hardship" to all areas currently covered by s 49D(1) and 49D(2).

**Draft Anti-Discrimination Bill 1999: cl 14, 25**

**Recommendation 35**

Provide that there is no contravention of the ADA where, in order to accommodate the disability of a person:

- reasonable adjustments are made to the terms or conditions of employment; and
- the person consents to the adjustments.

**Draft Anti-Discrimination Bill 1999: cl 14, 25**

**Recommendation 36**

Include "sexuality" as a ground of discrimination to be defined as heterosexuality, homosexuality, lesbianism and bisexuality.

**Draft Anti-Discrimination Bill 1999: cl 16(1)(e), 18(1)**

**Recommendation 37**

Repeal the compulsory retirement provisions and integrate them with the provisions relating to age discrimination.

**Draft Anti-Discrimination Bill 1999: cl 31, 33**

**Recommendation 38**

Include religion as a ground of discrimination and define it as follows:

"Religion" includes both religious beliefs and practices which do not contravene the criminal law.

"Religious practice" means a practice related to the holding of a religious belief. This may include communal practices such as membership or association with a particular religious institution or church, or a ritual, custom or observance related to the holding of a religious belief.

"Religion" includes the traditional spiritual beliefs and practices of Indigenous Australians and Indigenous people from other countries.

**Draft Anti-Discrimination Bill 1999: cl 16(1)(h), 18(1)**

**Recommendation 39**

Include political opinion as a ground of discrimination and define it as follows:

“political opinion” means a belief or opinion concerning:

- (a) the nature and purpose of the state, or
- (b) the distribution and use of state power, or
- (c) interactions between the state and individuals, bodies or groups in the community.

**Draft Anti-Discrimination Bill 1999: cl 16(1)(g), 18(1)**

#### **Recommendation 40**

Include carer responsibilities as a ground of discrimination in the area of employment.

**Draft Anti-Discrimination Bill 1999: cl 16(1)(j), 19**

#### **Recommendation 41**

Carer responsibilities should be defined as responsibilities to care for or support another person in a significant relationship involving dependency, commitment, care or support.

**Draft Anti-Discrimination Bill 1999: cl 18(1)**

#### **Recommendation 42**

“Dependency” includes financial, physical or emotional reliance.

**Draft Anti-Discrimination Bill 1999: cl 18(1)**

### ***Chapter 6: Exceptions and exemptions***

#### **Recommendation 43**

Repeal s 54 (general exception for acts done under statutory authority) with effect from 12 months after the commencement of the new Act.

**Draft Anti-Discrimination Bill 1999: cl 63**

#### **Recommendation 44**

All new legislation should be scrutinised to ensure compliance with the ADA.

#### **Recommendation 45**

Replace s 55 (general exception for charities) with an exception covering the provision of goods or disposal of property by inter vivos gift or by will to a specific recipient or recipients.

**Draft Anti-Discrimination Bill 1999: cl 61**

#### **Recommendation 46**

Amend s 56 (general exception for religious bodies) to:

refer to the religious personnel of all faiths;

provide that the exception only covers positions requiring a commitment to the tenets of the particular religion concerned; and

repeal s 56(d).

**Draft Anti-Discrimination Bill 1999: cl 66**

**Recommendation 47**

Repeal s 57 (general exception for voluntary bodies).

**Recommendation 48**

Repeal s 59 (general exception for establishments providing housing accommodation for aged persons).

**Recommendation 49**

Insert a general exception for special measures.

**Draft Anti-Discrimination Bill 1999: cl 68**

**Recommendation 50**

Retain power to grant exemptions but amend to provide that:

the power to grant an exemption be vested in President of the ADB;

the President be required to consider specified criteria listed in exercising such power;

the public be notified in a specified manner of the existence of an exemption;

the granting of the exemption and any conditions which may apply should be subject to review by the ADT at the request of any person having sufficient interest in the existence or absence of the exemption.

**Draft Anti-Discrimination Bill 1999: cl 69, 70**

**Recommendation 51**

Repeal s 126A (exemption for special needs programs and activities).

**Recommendation 52**

Repeal s 20A(3) and (4), but permit a club which operates principally to prevent or reduce disadvantage suffered by people of a particular cultural identity or to preserve a minority culture, to exclude applicants for membership who are not members of that cultural identity.

**Draft Anti-Discrimination Bill 1999: cl 55**

**Recommendation 53**

Repeal s 22 (exception for sport in relation to the ground of race).

**Recommendation 54**

Repeal s 15 (exception for employment intended to provide training in skills to be exercised outside New South Wales) and s 16 (exception for employment on ship or aircraft).

**Recommendation 55**

Include in the genuine occupational qualification exception in respect of employment a requirement that the employer act in good faith.

**Draft Anti-Discrimination Bill 1999: cl 28(6)**

**Recommendation 56**

In relation to the genuine occupational qualification exception, repeal s 31(2)(h) and (i).

**Recommendation 57**

In relation to the genuine occupational qualification exception, repeal s 31(3) and 31(4).

**Recommendation 58**

Limit the exception in relation to education on the ground of sex in s 31A(3)(b) to primary schools (including pre-schools, but not child care centres) and secondary schools in relation to admission.

**Draft Anti-Discrimination Bill 1999: cl 43**

Continue to provide a general exception at all levels for residential accommodation which is segregated on the basis of sex.

**Draft Anti-Discrimination Bill 1999: cl 51(1)**

**Recommendation 59**

Repeal s 34A(3) in relation to single sex clubs.

**Recommendation 60**

Limit the exception for sport in relation to sex discrimination consistently with the SDA criteria of strength, stamina and physique of competitors.

**Draft Anti-Discrimination Bill 1999: cl 56(3)**

**Recommendation 61**

Replace s 36 in relation to the exception for superannuation on the ground of sex with an exception in relation to existing funds in the same terms as the SDA.

**Draft Anti-Discrimination Bill 1999: cl 39**

**Recommendation 62**

Replace s 37 in relation to the exception for insurance on the ground of sex with an exception in similar terms to s 41 of the SDA and which requires the insurer to justify discriminatory terms.

**Draft Anti-Discrimination Bill 1999: cl 37**

**Recommendation 63**

Amend s 46 regarding the employment of a married couple to provide that the exception only applies where there is a reasonably grounded need and to substitute the requirement that the couple be a married couple to that the couple be in "a bona fide domestic relationship".

**Draft Anti-Discrimination Bill 1999: cl 29**

**Recommendation 64**

Repeal s 49 in relation to the exception for superannuation on the ground of marital status.

**Recommendation 65**

Insert a saving provision allowing existing funds to retain provisions which discriminate on the ground of domestic status provided the scheme is closed and existing members have been offered an option to transfer to a non-discriminatory scheme.

**Draft Anti-Discrimination Bill 1999: cl 39, 40**

**Recommendation 66**

Provide a public health exception for an act where:

the disability of a person concerned involves a condition which is transmissible in the circumstances which may arise if the act is not done;

the act is done on the basis of medical or other expert opinion on which it is reasonable to rely in the circumstances; and

the measures taken are not disproportionate to the risks involved.

Provide an exception for acts done for the purpose of giving effect to a requirement of, or made under, the *Public Health Act 1991* (NSW) or the *Mental Health Act 1990* (NSW).

**Draft Anti-Discrimination Bill 1999: cl 67**

**Recommendation 67**

Repeal s 49L(3)(b) in relation to the exception applicable to educational institutions conducted solely for students with a particular disability.

**Recommendation 68**

Repeal s 49R (exception for sport on the ground of disability).

**Recommendation 69**

Extend the unjustifiable hardship exception in s 49O(5) in relation to the provision of benefits by a club to apply to all aspects of the prohibition in s 49O(2).

**Draft Anti-Discrimination Bill 1999: cl 14, 52**

**Recommendation 70**

Provide a general exception to the ground of age where an act is necessary to comply with another Act, regulation or other statutory instrument.

**Draft Anti-Discrimination Bill 1999: cl 65**

**Recommendation 71**

Extend the exception in s 49ZYG(2) to allow qualifying bodies to require groups identified by age to undergo differential requirements for renewal or extension of the relevant authority or qualification.

**Draft Anti-Discrimination Bill 1999: cl 34**

**Recommendation 72**

Amend s 49ZYI(3) in relation to junior employees by stating that the section ceases to operate in December 2000.

**Draft Anti-Discrimination Bill 1999: cl 32**

**Recommendation 73**

Repeal the regulation making power regarding the genuine occupational qualification exception on the ground of age in s 49ZYJ(3) and 49ZYJ(4).

**Recommendation 74**

Provide an exception in relation to age discrimination in relation to:

the provision of educational services up to and including secondary schooling; [Draft Anti-Discrimination Bill 1999: cl 45(a)]

the provision of goods or services at concessional rates based on age; [Draft Anti-Discrimination Bill 1999: cl 38]

the imposition of a minimum age requirement on a particular educational program and quotas in relation to students of different ages. [Draft Anti-Discrimination Bill 1999: cl 45(c)]

In relation to the imposition of a maximum age requirement, an educational authority should be required to seek an exemption from the President of the ADB.

**Draft Anti-Discrimination Bill 1999: cl 69**

**Recommendation 75**

Repeal s 49ZYN(2) and 49ZYN(3) in relation to the provision of goods and services on the ground of age.

**Recommendation 76**

Repeal s 49ZYO(3) in relation to the exception for age based accommodation.

**Recommendation 77**

Repeal s 49ZYR in relation to the exception for age specific special needs programs and activities.

**Recommendation 78**

Repeal s 49ZYV in relation to the exception for age based safety procedures.

**Recommendation 79**

Amend s 49ZYW in relation to the exception for age based sport to provide that it applies only to competitive sporting activities, where the strength, stamina or physique of the competitors is relevant.

**Draft Anti-Discrimination Bill 1999: cl 54(3)**

**Recommendation 80**

Repeal s 38Q in relation to the exception for superannuation on the ground of transgender status.

**Recommendation 81**

The exception applicable to transgender persons for participation in sporting activities in s 38P should be consistent with the exception permitted in relation to sex generally.

**Draft Anti-Discrimination Bill 1999: cl 56**

**Recommendation 82**

Provide an exception to discrimination on the ground of political opinion in relation to political and local government employment.

**Draft Anti-Discrimination Bill 1999: cl 30**

**Recommendation 83**

Provide an exception to discrimination on the ground of political opinion in relation to clubs established for persons of a particular political persuasion.

**Draft Anti-Discrimination Bill 1999: cl 57**

**Recommendation 84**

Provide an exception to discrimination on the ground of religion on the basis of a genuine occupational qualification.

**Draft Anti-Discrimination Bill 1999: cl 28(5)**

**Recommendation 85**

Provide an exception to discrimination on the ground of religion in relation to admission to educational institutions established for particular religious groups.

**Draft Anti-Discrimination Bill 1999: cl 44**

**Recommendation 86**

Provide an exception to discrimination on the ground of religion in relation to clubs established for persons of a particular religion or belief.

**Draft Anti-Discrimination Bill 1999: cl 58**

**Recommendation 87**

Provide an exception to discrimination on the ground of religion in relation to accommodation established for religious purposes, similar to that contained in the Victorian and Queensland legislation.

**Draft Anti-Discrimination Bill 1999: cl 51(2)**

**Recommendation 88**

An exception to discrimination on the ground of religion in relation to access to sites of religious significance is supported but is covered by the special measures exception.

**Draft Anti-Discrimination Bill 1999: cl 68**

## **Chapter 7: Other unlawful conduct**

### **Recommendation 89**

Amend the current definition of sexual harassment to make specific reference to the need to take account of the pertinent characteristics of the victim.

**Draft Anti-Discrimination Bill 1999: cl 71**

### **Recommendation 90**

The prohibition of sexual harassment should extend to all areas of discrimination, including the new areas proposed in Chapter Four.

**Draft Anti-Discrimination Bill 1999: cl 72-81**

### **Recommendation 91**

The exception currently applicable to sexual harassment in relation to accommodation in a private household should be repealed.

### **Recommendation 92**

The prohibition on vilification in the ADA should not be limited by reference to “the public” but by reference to a “public communication”.

**Draft Anti-Discrimination Bill 1999: cl 91**

### **Recommendation 93**

Provide expressly that proof of specific intention to incite is not required for establishing vilification.

**Draft Anti-Discrimination Bill 1999: cl 91(3)**

### **Recommendation 94**

Provide that the capacity to incite should be assessed in the circumstances of the particular case and without assuming that the audience is either malevolently inclined or free from susceptibility to prejudice.

**Draft Anti-Discrimination Bill 1999: cl 91(4)**

### **Recommendation 95**

The ADB should have express power to formulate guidelines including guidelines as to what constitutes a “fair report” under the exception to the vilification provisions.

**Draft Anti-Discrimination Bill 1999: cl 128(1)(c), 129(1)(c)**

### **Recommendation 96**

Remove s 20D from the ADA and relocate the offence of serious vilification in the *Crimes Act 1900* (NSW).

**Draft Anti-Discrimination Bill 1999: cl 92(2) and Crimes Amendment (Serious Vilification) Bill 1999**

### **Recommendation 97**



Provide the President with the power to refer a matter to the Director of Public Prosecutions where he or she is of the view that it may constitute the offence of “serious” vilification.

**Draft Anti-Discrimination Bill 1999: cl 92 (1)**

**Recommendation 98**

Extend the victimisation provision in the ADA to cover the situation where the respondent “threatens” to subject the complainant to any detriment.

**Draft Anti-Discrimination Bill 1999: cl 83(1)**

**Recommendation 99**

Provide that where an act of victimisation is done for two or more reasons, it is sufficient if one of those reasons is a significant reason.

**Draft Anti-Discrimination Bill 1999: cl 83(3)**

**Recommendation 100**

In relation to vicarious liability under the ADA, the only available defence should be where the employer took all “reasonable steps” to prevent the relevant conduct.

**Draft Anti-Discrimination Bill 1999: cl 85(2)**

**Part Three**

***Chapter 8: The complaint process***

**Recommendation 101**

A complaint may be lodged by a legal practitioner on behalf of a complainant.

**Draft Anti-Discrimination Bill 1999: cl 94(4)**

**Recommendation 102**

A person who is a member of a class affected (or likely to be affected) by the conduct of the respondent should be able to lodge a representative complaint.

**Draft Anti-Discrimination Bill 1999: cl 95**

In relation to such a representative complaint, any settlement or resolution should only be binding upon the class members if the matter has been approved by the Tribunal.

**Draft Anti-Discrimination Bill 1999: cl 117(2)**

**Recommendation 103**

A complaint may be lodged by a parent or guardian on behalf of a child or other person who lacks the capacity to give informed consent. Consent of the child or disabled person is not to be required.

**Draft Anti-Discrimination Bill 1999: cl 94(5),(7)**

**Recommendation 104**

In the case of a disabled person who does have the capacity to give informed consent, a complaint may be lodged on behalf of that person, by an agent who may be, but need not be a lawyer.

**Draft Anti-Discrimination Bill 1999: cl 94(6)**

**Recommendation 105**

The President (or an officer of the ADB) should be required, if requested, to assist a complainant in formulating his or her complaint.

**Draft Anti-Discrimination Bill 1999: cl 96**

**Recommendation 106**

A complainant need not establish a prima facie case in his or her original letter of complaint.

**Draft Anti-Discrimination Bill 1999: cl 93**

A complaint as referred to the Tribunal should be defined as the original letter of complaint and any supporting documentation referred by the President to the Tribunal.

**Draft Anti-Discrimination Bill 1999: cl 116(10)**

**Recommendation 107**

Subject to a discretion to extend the time limit where good cause is shown, a complaint should be lodged within 12 months of the relevant conduct. Where there has been a course of conduct, the limitation period should run from the time of the termination of the conduct.

**Draft Anti-Discrimination Bill 1999: cl 98(3)**

**Recommendation 108**

When deciding whether to accept a complaint outside the 12 month limitation period, the President should only consider the explanation for the delay and whether prejudice has been created and not the merits of the complaint.

**Draft Anti-Discrimination Bill 1999: cl 98(4)**

**Recommendation 109**

The President is required to determine whether a complaint is accepted or not.

**Draft Anti-Discrimination Bill 1999: cl 98(1)**

**Recommendation 110**

The President should be given power to:

order a party or non-party to produce documents where they may be relevant to the investigation of the complaint; and

order a party to supply information relevant to the carrying out of the functions of the President in investigating the complaint.

**Draft Anti-Discrimination Bill 1999: cl 105**

**Recommendation 111**

Non-compliance with a direction of the President should constitute an offence under the ADA and the President should have the power to refer the matter directly to the Tribunal where the non-compliance is by a party and the other party so requests.

**Draft Anti-Discrimination Bill 1999: cl 105**

**Recommendation 112**

Where the President dismisses or declines to entertain a complaint for any reason, the complainant should be able to require the President to refer the complaint to the Tribunal.

**Draft Anti-Discrimination Bill 1999: cl 111(6)**

**Recommendation 113**

In relation to the investigation of a complaint:

The President should be required to determine within 28 days of lodgement whether a complaint is to be accepted or not and should notify parties of such acceptance within a further 28 days from the date of acceptance.

**Draft Anti-Discrimination Bill 1999: cl 99, 100**

The President should notify the parties at periods not exceeding 60 days of the steps taken for the purpose of the investigation if no contact is otherwise made during that period.

**Draft Anti-Discrimination Bill 1999: cl 103**

The President should be empowered to terminate the investigation or conciliation of a complaint where one or other of the parties is unco-operative and when the complainant appears to have abandoned the complaint.

**Draft Anti-Discrimination Bill 1999: cl 111**

**Recommendation 114**

The President should be able to delegate powers of conciliation but only to an officer who has not been responsible for the investigation of the complaint, except with the consent of the parties.

**Draft Anti-Discrimination Bill 1999: cl 107**

**Recommendation 115**

It should be an offence for an employee or agent of the ADB or the Tribunal to produce, disclose or communicate to any other person, including a court or tribunal, any information or document about the affairs of a person which is acquired by the employee or agent in the course of duty unless it is necessary to do so for the purposes of performing a function of, or prosecuting an offence arising out of, the ADA.

**Draft Anti-Discrimination Bill 1999: cl 139**

**Recommendation 116**

The ADB should be listed as an exempt body under the FOI Act in relation to its complaint handling functions.

**Recommendation 117**

An agreement reached pursuant to conciliation should be enforceable by the President.

**Draft Anti-Discrimination Bill 1999: cl 115**

**Recommendation 118**

The President may decide not to proceed with a complaint where:

the dispute has been settled or resolved by agreement between the parties;

**Draft Anti-Discrimination Bill 1999: cl 111(1)(f)**

the complainant, or person on whose behalf the complaint was made, does not wish to proceed with the complaint; or

**Draft Anti-Discrimination Bill 1999: cl 109**

the complainant has allowed the complaint to remain inactive for an extended period of time or abandoned the complaint.

**Draft Anti-Discrimination Bill 1999: cl 110(1), 111(1)(b)**

**Recommendation 119**

A complaint which has been withdrawn or has lapsed under s 90A should be able to be pursued afresh provided the complainant shows good cause for the complaint to be newly pursued and the pursuit takes place within a reasonable period of the withdrawal or lapsing of the complaint.

**Draft Anti-Discrimination Bill 1999: cl 110(2)**

**Recommendation 120**

In relation to the resolution of complaints:

Where a complaint remains unresolved 12 months after the date of lodgement of the complaint, either party to the complaint should be able to make a request in writing to the President to refer the matter to the Tribunal.

The President should be required to refer the complaint to the Tribunal within 28 days of such a request unless the President believes the complaint can be conciliated.

Where the complainant objects to the referral of the complaint and the President is satisfied that the complaint cannot be conciliated, the complaint should lapse.

**Draft Anti-Discrimination Bill 1999: cl 116**

**Recommendation 121**

In relation to the referral of complaints by the President:

The President should have the discretion to refer the complaint to the Tribunal at any stage, whether or not investigation and conciliation have taken place.

The President should be required to notify both parties of an intention to refer the complaint and should not refer a complaint without the consent of the complainant except in exceptional circumstances.

**Draft Anti-Discrimination Bill 1999: cl 116**

### **Recommendation 122**

The President should have the power to permit the amendment of the complaint at any stage.

#### **Draft Anti-Discrimination Bill 1999: cl 108(1)**

The President should notify both parties of any amendment in writing.

#### **Draft Anti-Discrimination Bill 1999: cl 108(3)**

Where an amendment is made to a complaint it should be identified in the President's referral.

#### **Draft Anti-Discrimination Bill 1999: cl 116(10)**

The President should be empowered to deal with more than one complaint in a single investigation.

#### **Draft Anti-Discrimination Bill 1999: cl 102**

### **Recommendation 123**

The referral should be limited to the written complaint, including any amendments and additional material identifying the issues in dispute.

#### **Draft Anti-Discrimination Bill 1999: cl 116(10)**

### **Recommendation 124**

Amend s 123 to allow a party in proceedings in another jurisdiction to rely on a contravention of the Act where:

the claim is relied upon by way of defence or set off to proceedings brought by another; or

the claim is associated with a bona fide claim not based on the ADA and which can only be brought in another court or tribunal.

#### **Draft Anti-Discrimination Bill 1999: cl 119(2),(3)**

### **Recommendation 125**

Section 95 should be amended to provide that the Minister may refer a matter to the President for investigation.

The President should be given the power to make recommendations to the Minister that a particular matter be referred for investigation.

#### **Draft Anti-Discrimination Bill 1999: cl 97(1),(2)**

### **Recommendation 126**

Factors which the President should be able to consider when deciding whether to initiate such an inquiry are:

the seriousness of the suspected discrimination;

the number of persons who may be affected;

whether the conduct is likely to be continuing and if not, the period which may have elapsed since the conduct occurred;

the likelihood of a complaint being made;

if a complaint has been made, the ability of the complainant to conduct the matter effectively; and

the public interest in the investigation of the matter.

**Draft Anti-Discrimination Bill 1999: cl 97(4)**

**Recommendation 127**

The ADB should be given the power to formulate non-binding Codes of Practice across all areas covered by the ADA. Such Codes could be developed in conjunction with relevant industries and interested parties.

**Draft Anti-Discrimination Bill 1999: cl 130**

***Chapter 9: Tribunal proceedings***

**Recommendation 128**

All procedural provisions in the ADA should be transferred to the ADT Act.

**Recommendation 129**

Section 96 of the ADA, regarding inquiries into complaints by the Tribunal, should be repealed.

**Recommendation 130**

The ADT Act should specify that, upon referral to the Tribunal, the complainant and respondent to the complaint are parties to the proceedings.

**Recommendation 131**

Section 106 of the ADA, regarding the Tribunal's resolution of a complaint by conciliation, should be repealed.

**Recommendation 132**

The ADT Act should contain a provision similar to s 110A of the ADA in relation to matters brought under the ADA and s 126 of the ADT Act should not apply.

**Recommendation 133**

The ADT Act should provide that, in the EO Division, the Tribunal has a discretion whether to allow representation by an agent.

In exercising this discretion the Tribunal should consider:

whether both parties intend, or are able, to obtain legal representation;

the complexity and importance of the proceedings to each party and in the public interest;

the likelihood that a case will be short and turn on issues of fact;

the likely cost of legal representation as compared with the financial benefit of the relief sought; and

where the Tribunal is inclined not to grant leave, the possible consequences of appointing an “officer assisting the Tribunal”.

**Recommendation 134**

The prohibition in s 101(2) of the ADA should be transferred to the ADT Act and should only apply to a fee provided on behalf of a party for the purpose of representing that party.

**Recommendation 135**

The ADT Act should provide that where the Tribunal appoints an agent to represent an incapacitated person, the consent of that person is required (where that person is capable of giving consent).

**Recommendation 136**

The ADT Act should provide that the Tribunal may dismiss a complaint, or remove the name of a particular complainant, if satisfied that the complainant does not wish to proceed with the matter.

**Recommendation 137**

The ADT Act should provide that nothing in the Act enables the Tribunal to compel a witness to answer a question or produce a document if the witness:

would not be compellable under the provisions of the *Evidence Act 1995* (NSW); or

would be entitled to claim privilege under Part 3.10 of the *Evidence Act 1995* (NSW).

**Recommendation 138**

The ADT Act should provide that the EO Division has the power to make interim orders to preserve the rights of the parties, on the application of either the President of the ADB or a party to an inquiry.

**Recommendation 139**

The ADT Act should provide that the Tribunal must give reasons for its decision, within 28 days of handing down the decision.

**Recommendation 140**

The ADT Act should provide for representative complaints (in accordance with the Federal Court model) where:

the complaints of all group members are against the same person;

the complaints arise out of the same, similar or related circumstances; and

the complaints give rise to a substantial common issue of law or fact.

**Recommendation 141**

The ADT Act should adopt a comprehensive set of procedural and machinery provisions to deal with the conduct of representative complaints (similar to the Federal Court model) including provisions in relation to:

notice requirements;

settlement by a representative complaint;

substitution of the representative complaint;

discontinuance of the action;

amendment of the class; and

the assessment and distribution of damages to class members.

#### **Recommendation 142**

The Tribunal should have the power to make cy-pres orders in relation to representative actions, in accordance with the following principles:

An order may only be made where the amount is not fully distributed or the cost of distribution would reduce the amount below a reasonable level for each member of the class.

The payment must be made to the ADB for distribution to organisations for the purpose of public education and enforcement of the ADA.

#### **Recommendation 143**

The ADT Act should provide that in the EO Division each party shall pay his or her own costs, unless the Tribunal is of the opinion that the circumstances of the case justify the making of a costs order.

In determining whether the circumstances of the case justify the making of a costs order, the EO Division should consider:

whether the proceedings determine or clarify an important question of law;

whether any important public policy considerations were raised;

the behaviour of the parties during the inquiry process;

whether the complaint was pursued in a genuine belief that it had merit;

whether the matter was dismissed on the basis that it was frivolous or vexatious;

whether the matter is brought to enforce a previous order of the Tribunal; and

the filing of any written offers of settlement.

#### **Recommendation 144**

Where a contravention of the ADA is litigated in a court or other tribunal the costs rules generally applicable in that court or tribunal will apply.

#### **Recommendation 145**

Appeals from decisions of the EO Division should be made directly to the Supreme Court but should only be available on questions of law.

#### **Recommendation 146**

The Tribunal should have the power to grant the President of the ADB leave to intervene on behalf of a complainant, where considered appropriate, in proceedings before the Tribunal.

#### **Recommendation 147**



The ADT Act should make provision that where any conduct is proved to be unlawful under the ADA, the burden of proving a relevant exception lies upon the respondent.

## **10. Remedies**

### **Recommendation 148**

The statutory limit on damages in the Tribunal should be increased to \$150,000, except in cases where the panel has a District Court judge as its presidential member where the limit should reflect the jurisdiction of the District Court;

otherwise, the powers of the Tribunal with respect to orders should be those available under the *District Court Act 1973* (NSW).

### **Recommendation 149**

The Tribunal should have the power to grant an injunction which extends to conduct affecting persons other than the individual complainant in the following circumstances:

where the complaint has been lodged in a representative capacity;

where the President of the ADB has been notified and given the opportunity to make submissions;  
or

in any other case, where the Tribunal believes that the particular circumstances warrant such action.

### **Recommendation 150**

That the Tribunal be given express power to make mandatory orders in accordance with the following:

where the order is not by consent and the cost of compliance would exceed the statutory maximum, the respondent should have a right of appeal in relation to the appropriateness of the order; and

the Tribunal should have the power to make mandatory orders and appoint the President of the ADB to monitor compliance with the order.

### **Recommendation 151**

The Tribunal should be empowered to make a declaration that certain conduct is unlawful under the ADA.

### **Recommendation 152**

That the Tribunal be given express power to order a respondent to publish an apology or retraction in relation to all forms of unlawful conduct under the ADA.

### **Recommendation 153**

In relation to the power of the Tribunal to make a variation to the terms of a contract of employment, that the Tribunal be required to allow the respondent to take the matter to the industrial relations jurisdiction within a reasonable time.

### **Recommendation 154**

The Tribunal should have power to order a respondent to implement a program or policy aimed at eliminating unlawful vilification. A similar power should be available in relation to all forms of unlawful conduct under the ADA.

**Recommendation 155**

In relation to representative actions, the relief available in representative proceedings under the *Federal Court of Australia Act 1976* (Cth) should be available in the Tribunal.

**Recommendation 156**

The President of the ADB should have the express power to act in a representative capacity when appearing before the Tribunal and should have standing to seek relief on behalf of members of the represented group.

**Recommendation 157**

The Supreme and District Courts should have conferred on them the power to grant any relief available if the proceedings had been in the Tribunal, in addition to any other powers available to them.

**Recommendation 158**

Unpaid monetary awards should bear interest at the rate applicable to District Court judgments and the Tribunal should be permitted to award pre-judgment interest.

**Recommendation 159**

Any order of the Tribunal should be able to be registered with a court of competent jurisdiction and enforced as an order of that court.

**Recommendation 160**

The President of the ADB should have power:

in the case of an individual complaint, to take steps to enforce an order on behalf of a complainant with their consent; and

in the case of a representative complaint (or in any other case where the President believes that the public interest demands), to take steps to enforce an order on his or her own motion.

**Draft Anti-Discrimination Bill 1999: cl 118**

**Recommendation 161**

Maximum penalties for offences under the ADA should be increased to 50 penalty units for individual offenders and 250 penalty units for corporate offenders.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 1. Introduction

#### THE TERMS OF REFERENCE

1.1 In a letter dated 17 December 1991, the Commission received a reference from the then 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) ("ADA") 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

##### Rationale for enactment

1.2 The ADA commenced on 1 June 1977.<sup>1</sup> Introducing the legislation in Parliament, the then Premier the Hon Neville Wran QC, stated 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"<sup>2</sup> and that "the [Anti-Discrimination] Bill is an attempt, as far as legislation can, to end intolerance, prejudice and discrimination in our community".<sup>3</sup> The ADA's preamble describes it 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".

##### Legislative development

1.3 When the Bill was first introduced, it proposed that discrimination should be unlawful on the grounds of race, sex or marital status, age, religious or political conviction, physical handicap or condition, mental disability, and homosexuality. In its final form, the ADA prohibited only race and sex discrimination in the areas of employment, the provision of goods and services and accommodation, and race discrimination in education. This was the result of amendments imposed by the Legislative Council following unfavourable responses from sections of the community. The ADA also established the Counsellor for Equal Opportunity and the Anti-Discrimination Board ("ADB").

1.4 Since 1977 the ADA has been amended many times in response to recommendations of the ADB and to accommodate decisions of the Supreme Court and the Equal Opportunity Tribunal ("EOT"). These amendments have introduced new grounds of discrimination, altered the administrative and regulatory regime and widened the overall scope and operation of the ADA. Many of the amendments effected through the years, and even some of those currently contemplated, were proposed in the original 1976 Bill.

#### THE CONTINUING NEED FOR ANTI-DISCRIMINATION LEGISLATION

1.5 An examination of the position of disadvantaged groups over the past twenty years since anti-discrimination legislation was first introduced in Australia reveals some positive changes in reducing discriminatory attitudes and practices. However, major disadvantages still exist. There is still a significant discrepancy between discrimination in theory and practice, as indicated by available figures. This phenomenon has rekindled debate and raised doubts about the effectiveness of anti-discrimination legislation in achieving its stated aims and the continuing need for such legislation.

1.6 One school of thought maintains that the legislation is no more than a symbolic focus for emerging ideological and political conflicts about the place of minorities and disadvantaged groups in

our society. Others have countered that the aim of anti-discrimination legislation is not simply to produce a symbolic document which would placate the victims of discrimination, but rather to educate against discrimination and give support to those wishing to resist discriminatory conduct. It is also suggested that it is unrealistic to expect community attitudes to be changed by legislation and that what is required is vigorous community education. However, the publicity and media coverage that surrounds legal proceedings in discrimination law itself provides a valuable educative function.

1.7 An important area of operation of the ADA is that of employment practices. There is a body of law and economics scholarship which argues for the repeal of all employment discrimination legislation on the basis that it is unnecessary and inefficient within a free market. This argument works from the proposition that some people simply do not like to associate with members of particular groups and are prepared to suffer pecuniary loss in order to “indulge their taste” and so avoid what are, for them, the “non-pecuniary” costs of associating with people from those groups.<sup>4</sup> It is argued that those traders in the market place who are least prejudiced will be able to increase their market share and so, ultimately, dominate the market.<sup>5</sup> In this way unfettered market competition is said to drive out discrimination.<sup>6</sup>

1.8 Despite the education versus legislation, and law and economics arguments referred to above, the Commission believes that the continuing need for anti-discrimination legislation is beyond question. First, a monetary value cannot be placed on the social benefits that emanate from laws that prohibit discrimination, nor can a value be placed on the social costs that flow from an absence of anti-discrimination laws. On the contrary, anti-discrimination laws can increase productivity and the net welfare of society as the self esteem of discriminated groups is elevated and people reach their full potential.<sup>7</sup> Secondly, while education does play a very important part in combating discriminatory practices, there is sufficient evidence that it cannot deal with the problem of discrimination on its own. Law is one of the instruments of change in our society. It is a useful educational tool even if it has only a limited direct role in social change and reform. At the very least, it can guide legal inquiry in the right direction and can help to reveal and alter assumptions and practices that need correction. There is, therefore, no doubt that there is a continuing need for anti-discrimination legislation. This view was supported in submissions to the Commission.<sup>8</sup>

## **THE NEED FOR A REVIEW**

1.9 The legislation as it currently exists tends to reflect the political and social climate at the time of its enactment. Although the ADA has been amended several times to reflect changing community values, these amendments have been piecemeal. The ADA has never been the subject of a comprehensive review and much of what was laid down as basic principle in the 1970s has never been questioned in terms of its applicability to the present. Taking into account the length of time that has elapsed since the introduction of the ADA, and the law’s inability to deal once and for all with constantly evolving social, political and legal conditions, it is appropriate that there be a comprehensive review of the legislation.

## **THE CONDUCT OF THE REFERENCE**

### **Discussion Paper 30**

1.10 In acknowledgment of the breadth of the reference and the need to consult with so many organisations and individuals, the Commission initially sought responses to the terms of reference from approximately 700 interested and relevant organisations and individuals in Australia and overseas. The issues raised, and comments made, in response to the Commission’s invitation were incorporated in Discussion Paper 30 (“DP 30”) which was published in 1993.<sup>9</sup> DP 30 did not make any proposals for change. It aimed to promote discussion of, and invite submissions on, a wide range of issues. The issues were presented in the form of specific and general questions prefaced by a general comment to place them in context. The Discussion Paper was sent to more than 1,000 individuals and organisations and copies were made available on audio tape for those with sight or reading difficulties. The Commission received over 100 submissions.<sup>10</sup>

## **Other community consultation**

1.11 In May 1993, the Commission conducted a public phone-in to encourage further community involvement in the review and received over 200 phone calls. Most of the callers had been personally affected by discrimination of some kind, and the majority of complaints dealt with race and sex discrimination in the workplace. While most callers were aware of the existence of the ADA, a significant number of people were not aware that there was any form of redress available to them.

1.12 Commission staff have also spoken at several seminars and conferences relevant to the review, in order to acquaint the public with the review and invite feedback. Over the course of the reference, the Commission has been in contact with many individuals and organisations which have an interest in the area and has received formal and informal submissions on various issues relevant to the review from them.

## **Specialist consultants**

1.13 The Commission has, from time to time, been assisted with suggestions and ideas by a group of honorary consultants who have interest and expertise in the area of anti-discrimination law and practice.<sup>11</sup>

## **The Survey Report**

1.14 In recognition of the need to undertake empirical research in order to monitor and evaluate the ADA's current effectiveness in dealing with discrimination and to provide the basis for further legislative development, the Commission contracted with Keys Young to design and carry out a survey of the perceptions of people with direct experience of the processes of the ADB and the EOT. The Survey Report entitled *Discrimination Complaints-Handling: A Study* was released in June 1997 and is the first comprehensive qualitative study into how discrimination complaints are handled by the ADB and the EOT.<sup>12</sup> The report describes the conduct and findings of research into the complainants and respondents who contacted the ADB by phone over a specified period and the results of a postal questionnaire sent out to all respondents and complainants over a 12 month period whose files had been "closed". The questions sought the views of participants on the entire complaints-handling procedure from initial contact, through investigation and conciliation, to the final hearing at the EOT. Not all participants had been through the entire process. However, the survey elicited information about why a participant withdrew at a particular stage and how satisfied or otherwise the person was with the process. This information has provided the Commission with data which has informed the final recommendations.

## **OVERVIEW OF THIS REPORT**

1.15 This Report represents the culmination of the Commission's review of the ADA. It contains final recommendations for reform of the ADA based on:

an analysis of current research;

an analysis of obligations imposed by international human rights conventions;

a consideration of legislation, policy and anti-discrimination law reviews from other jurisdictions (international, Federal and State);

a consideration of developments in Australian and overseas case law in the area of anti-discrimination;

responses to DP 30 from individuals, interest groups and other organisations in Australia and overseas;

responses and information elicited from other community consultation; and

statistics provided by individuals and organisations.

1.16 The recommendations made are reflected in the draft Bill at Appendix A.

### **The structure of this Report**

1.17 The Report consists of 10 chapters. For ease of reference as well as in recognition of the fact that readers may be more interested in some aspects of the review than in others, the Report has been divided into three parts.

Part 1 “Preliminary and Definitional Issues” consists of three chapters:

Chapter 1 contains the background to the reference and an overview of the scope of the Report.

Chapter 2 considers the interaction between the ADA and Commonwealth anti-discrimination and industrial relations laws within the context of international human rights laws.

Chapter 3 examines the current definition of discrimination in New South Wales and recommends the need for a change in focus from a comparability model to a detriment-focussed model.

Part 2 “Substantive Issues” consists of chapters 4-7:

Chapter 4 identifies the areas in which discrimination law should operate.

Chapter 5 addresses both the scope of the current grounds of discrimination and justifications advanced for including new grounds.

Chapter 6 evaluates the current general and special exceptions to the prohibition of discrimination.

Chapter 7 considers the ambit of other related conduct which is unlawful under the ADA. This includes harassment, vilification, victimisation and unlawful advertising. This chapter also considers issues relating to vicarious liability and liability imposed upon those who aid or abet discriminatory conduct.

Part 3 “Enforcement Issues” consists of chapters 8-10:

Chapter 8 examines the various stages of the complaint resolution process at the ADB and considers the need for additional mechanisms to be set in place to deal with systemic discrimination.

Chapter 9 considers the proceedings in the EOT as it was, prior to the merger of the EOT into the new Administrative Decisions Tribunal (“ADT”), and the impact of the merger, and suggests reforms to increase the accessibility and general efficiency of Tribunal proceedings.

Chapter 10 focuses on the remedies available under the ADA and considers their adequacy and effectiveness in combating discrimination.

### **Recommendations in the Report**

1.18 The Commission’s recommendations are listed at the commencement of this Report and have been cross-referenced to the relevant Bill provisions.<sup>13</sup> In addition, they are included at the end of relevant parts of particular chapters for ease of reference in identifying the reasoning which leads to the specific recommendation. Although recommendations are not generally identified by reference to specific sections of the current ADA, it is, nevertheless, clear from the text which sections are being considered in relation to each recommendation. The detailed consequences of the recommendations must, however, be identified by reference to the draft Bill.

## The draft Bill

1.19 It may be noted that the draft Bill adopts a new structure for the ADA which is in keeping with more recent equal opportunity legislation in other Australian States and Territories and hopefully will provide a more readable Act with a clearer conceptual framework.

1.20 If the new Bill is accepted, it will be necessary to ensure that appropriate transitional and savings provisions have effect. In general, s 30 of the *Interpretation Act 1987* (NSW) is likely to be sufficient to cater for any changes in the substantive and procedural law. It should be noted that other transitional matters, relating to the procedures of the Equal Opportunity Division of the ADT, are presently dealt with in the *Administrative Decisions Tribunal Act 1997* (NSW).

## Matters not addressed in the Report: institutional arrangements

1.21 The ADA currently provides for four separate statutory bodies or positions. First, there is the ADB established by Part 8 of the Act. The ADB is said to consist of one full-time member and four part-time members appointed by the Governor. The full-time member is the President who has specific statutory functions and will be considered separately. The functions of the ADB are dealt with in Part 9, Division 4. It has a general function of carrying out investigations, research and inquiries in relation to discrimination, including particular discrimination against one or more persons, together with broad functions relating to the promotion of equality and opportunity for all people.<sup>14</sup> However, resolutions of the ADB requiring particular action are implemented by the President.<sup>15</sup> The ADB is required to prepare and present an annual report to the Minister, which shall include an account by the President of his or her administration of the Act, and the report is to be laid before both Houses of Parliament.<sup>16</sup>

1.22 As already noted, the President is the full-time member of the ADB and presides at meetings of the ADB.<sup>17</sup> However, the complaint handling powers provided for under the ADA are all found within Part 9, Division 2, which defines the functions of the President. For example, all complaints are lodged with the President<sup>18</sup> and it is the President who is required to investigate complaints<sup>19</sup> and determine what shall happen to a complaint.<sup>20</sup> Clearly these functions require extensive powers of delegation and the existence of a significant number of officers and employees. The ADA provides for the appointment of such officers and employees pursuant to the *Public Sector Management Act 1988* (NSW) and designates them as officers of the ADB.<sup>21</sup> The President is given a power of delegation, which allows particular functions to be delegated to such officers.<sup>22</sup> Neither the ADB nor the President is a statutory corporation.

1.23 The third body established by the ADA was the EOT. The quasi judicial functions vested in the EOT were not initially separated from the position of Councillor for Equal Opportunity. The EOT was, however, established as a separate body by the insertion of Part 7A in 1992.<sup>23</sup> For reasons which will appear more fully in Chapter Nine below, there is no need to give detailed consideration to the structure and functions of the EOT as its powers have been transferred to the Equal Opportunity Division of the ADT.

1.24 The fourth body established by the ADA is the Director of Equal Opportunity in Public Employment.<sup>24</sup> Part 9A, which provided a new set of provisions with respect to equal opportunity in public employment, was inserted in 1980.<sup>25</sup> The main objects of the Part are to ensure the absence of discrimination in relation to government departments and authorities and to promote equal employment opportunity with respect to those departments and authorities.<sup>26</sup> For reasons which are not entirely clear, the grounds of discrimination set out in the objects of the Part have not kept pace with the amendments to the grounds included in the ADA.

1.25 The review of the scope and operation of the ADA, as set out in the various chapters of this Report, led to specific recommendations which affect the powers of the President and the operation of the Equal Opportunity Division of the ADT. However, the Commission has formed no views, nor made recommendations, about the administrative arrangements with respect to the ADB and the Director of Equal Opportunity in Public Employment. In relation to the ADB, the Commission is not able to assess

whether it plays a useful role and has made no specific inquiries in that regard. The Commission does recommend that the ADA be amended so that its objects are clearly stated at the outset. However, those objects will inevitably be pursued through specific procedural mechanisms, all of which centre on the functions and powers of the President.

1.26 Further, the Commission is aware, informally, of various proposals for the establishment of a Board or Commission which will incorporate in one body the important public functions relating to anti-discrimination and equal opportunity and privacy. Accordingly, the Commission has not sought to make any specific recommendations concerning the continued operation or structure of the ADB. In the draft Bill which accompanies this Report, there is no specific reference to that body, although such a reference could readily be included without requiring consequential amendments to other parts of the proposals.

1.27 In relation to the Director of Equal Opportunity and Public Employment, the Commission has also made no recommendations. The Director and her staff operate as a separate entity and, while their objects are in part referable to the general grounds of discrimination, the Director does not receive or investigate complaints nor take any other action similar to that of the President in the administration of the ADA.

1.28 The Commission is of the view that the whole of Part 9A should be removed from the ADA and, if the office of Director is to be maintained, the legislative provisions should be transferred to some other legislation governing public employment, which may either be a separate Act or a part within the *Public Sector Management Act*.

1.29 Again, the inclusion or omission of Part 9A in the ADA (and it is excluded from the draft Bill attached to this Report) has no consequential effects in relation to other proposals.

1.30 As with the ADB, the Commission has undertaken no detailed inquiries to establish the effectiveness of the Office of the Director and therefore makes no recommendation as to whether the office should be preserved.

#### **Other matters**

1.31 Before concluding these general remarks in relation to the reference and the structure of the Report and its recommendations, the Commission acknowledges that the gestation period of the Report has been lengthy. One result has been that some matters to which the Commission gave careful consideration were overtaken by statutory amendments made before the Report was completed. Whilst the Commission has taken note of all these matters, it is conscious that the extensive consultation process, which in part delayed the completion of this Report, did not cover a number of the changes which have since been made to the ADA. However, the Commission is satisfied that the very extensive submissions received from many individuals and community groups covered all relevant matters of principle. Accordingly, it is satisfied that there is no need to delay completion of this exercise to allow for further consultations.

#### **CONCLUSION**

1.32 The recommendations contained in this Report are largely a "package". Each recommendation, while not necessarily dependent on the implementation of other recommendations, complements and facilitates others. They are designed to ensure that the ADA as a whole recognises the changes of the past and is relevant for the future as an effective tool in combating discrimination. Piecemeal adoption or legislative implementation without the provision of necessary training, information and resources will do little to mitigate the difficulties the recommendations are designed to overcome. Accordingly, the success of the recommendations in this Report will depend on the Government's commitment to provide the necessary resources for their implementation.

1.33 The Commission is appreciative of the continuing support from different Governments during the process of review and is encouraged in making its recommendations in the belief that all Governments of this State, since the time of the original reference, have been anxious to ensure that the ADA remains



an up-to-date and effective legislative mechanism for the protection of human rights in New South Wales.

## Footnotes

1. At the time, New South Wales was the second Australian State to enact anti-discrimination legislation. The first was South Australia with the *Prohibition of Discrimination Act 1966* (SA). Today, 21 years later, all States and Territories around Australia have some form of discrimination legislation: EOA (Vic); ADA (Qld); EOA (SA); EOA (WA); DA (ACT); ADA (NT); and *ADA* (Tas). Federal anti-discrimination legislation also operates concurrently with the State Acts: the RDA; SDA; DDA; HREOC Act; *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth).
2. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 November 1976 at 3337.
3. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 November 1976 at 3337.
4. R A Posner, *Economic Analysis of Law* (3rd edition, Little, Brown & Co, Boston, 1986) at 615.
5. Monopoly situations, it is suggested, have the capacity to weaken this tendency.
6. Posner at 616. See also G Becker, *The Economics of Discrimination* (2nd edition, University of Chicago Press, 1971). See also R P Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press, Cambridge, 1992). The crux of Epstein's argument is that employment discrimination laws, in particular, do more harm than good. The basis for this argument is that the market provides adequate incentives to drive out inefficient discrimination and any remaining discrimination which he calls "voluntary segregation" is economically efficient and should not be prohibited. According to Epstein, every employer has the right to discriminate among job applicants. He argues that victims of discrimination have not been defrauded in any way as they are free to search for the best available job offer unlike victims of force or fraud. Thus, the crucial aim, according to Epstein, is not to eliminate all discrimination, but only "inefficient" discrimination and the optimal means to achieve this end is the market. See also DP 30 at para 7.1-7.6.
7. M Chen, "Law and Economics and the Case for Discrimination Law" (unpublished manuscript, 5 November 1993). See also O M Fiss, "A Theory of Fair Employment laws" (1971) 38 *University of Chicago Law Review* 235; J J Donohue, "Prohibiting Sex Discrimination in the Workplace: An Economic Perspective" (1989) 56 *University of Chicago Law Review* 1337; C Sunstein, *After the Rights Revolution* (Harvard University Press, Cambridge, 1990).
8. Anti-Discrimination Board, *Submission 1* at 223-224; Gay and Lesbian Rights Lobby, *Submission*; NSW Ministry for the Status and Advancement of Women, *Submission*; NSW Women's Advisory Council, *Submission* at 1.
9. New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Discussion Paper 30, February 1993).
10. For the list of written submissions see Appendix C.
11. For the list of honorary consultants see Appendix D.

12. RR 8.
13. At p xxvi.
14. ADA s 119.
15. ADA s 121A.
16. ADA s 122.
17. ADA s 80 and 85.
18. ADA s 88(1).
19. ADA s 89.
20. See for example, ADA s 90, 90A, 91 and 94.
21. ADA s 86.
22. ADA s 94A.
23. See *Anti-Discrimination (Amendment) Act 1982* (NSW).
24. ADA s 122E.
25. See *Anti-Discrimination (Amendment) Act 1980* (NSW).
26. ADA s 122C and 122B.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 2. Interaction with Commonwealth Laws

#### INTRODUCTION

2.1 The *Anti-Discrimination Act 1977* (NSW) ("ADA") does not exist in isolation. Its scope is both limited and enhanced by the wider State and Commonwealth legal and constitutional framework within which it operates.

2.2 This chapter considers the coverage of and relationship between the ADA and Commonwealth anti-discrimination and industrial relations laws within the context of international human rights laws.

2.3 The Australian *Constitution* recognises two levels of government, Federal and State, both having powers to make laws. Section 51(xxix) of the Constitution gives Parliament the power to make laws "for the peace, order and good government of the Commonwealth with respect to" various enumerated matters. One such matter is "external affairs" under which Commonwealth legislation has been enacted in the field of equal opportunity and anti-discrimination to ensure that international obligations assumed by Australia are given effect throughout the country.<sup>1</sup> Section 51 (xxxv) gives the Commonwealth Parliament the power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." Under the power given by this provision and s 51(xxix) the Commonwealth Parliament has enacted extensive legislation governing the conditions of employment of many Australian employees. State Parliaments have also made laws covering workplace relations.

2.4 A person who claims to have been discriminated against on a prohibited ground may in the area of employment have rights under one or more of the following:

Commonwealth anti-discrimination laws;

State anti-discrimination laws;

Commonwealth industrial relations laws; and

State industrial relations laws.

2.5 The dual coverage of human rights at State and Commonwealth levels may give rise to constitutional, procedural and administrative problems.

2.6 Australian constitutional law has developed a series of tests for resolving problems that arise where both Commonwealth and State laws may apply to the same situation – with inconsistent outcomes. This chapter considers the way in which these problems may be dealt with in relation to the scope and application of the ADA and their potential relevance to the content of the ADA.

2.7 Relevant Commonwealth laws may fall into one of three categories:

laws relating particularly to discrimination;

laws dealing primarily with other topics but containing express anti-discrimination provisions – and, in particular, industrial relations laws; or

laws of general application.

2.8 Each of these categories will be considered in turn. The chapter then deals with the potential impact of Commonwealth laws on the ADA.

## COMMONWEALTH HUMAN RIGHTS LAWS

2.9 The Commonwealth discrimination statutes currently in force are the:

*Racial Discrimination Act 1975 (Cth)*;

*Sex Discrimination Act 1984 (Cth)*;

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

*Human Rights and Equal Opportunity Commission Act 1986 (Cth)*; and

*Disability Discrimination Act 1992 (Cth)*.

2.10 The *Workplace Relations Act 1996 (Cth)* ("WRA"), Commonwealth industrial relations legislation which prohibits discrimination in employment, is also relevant. It will be considered in more detail below.

### International context

2.11 A number of international instruments codify international human rights norms and establish international standards for working conditions. Australia is a signatory to a number of these and the Commonwealth anti-discrimination and industrial relations legislation embodies the Commonwealth Parliament's attempt to incorporate these international obligations into domestic law. The main sources of standards relevant to equality and discrimination are the Conventions of the United Nations ("UN") and the International Labour Organisation ("ILO").

2.12 Since the Second World War, large numbers of such international instruments have been formulated. This process was fostered by the adoption of the *Charter of the United Nations* in 1945 and the *Universal Declaration of Human Rights* ("UDHR") in 1948. The UDHR contains approximately 40 "rights", which are the common standards of human rights to be attained by nations. A number of international treaties, many of which have been ratified by Australia and incorporated as schedules to the Commonwealth human rights legislation, contain binding obligations to implement these rights.<sup>2</sup>

2.13 A further development in the area of human rights is Australia's accession to the First Optional Protocol to the *International Covenant on Civil and Political Rights* ("ICCPR") in December 1991. This Protocol allows Australian residents to complain to the United Nations Human Rights Committee about a breach of fundamental human rights standards.<sup>3</sup>

2.14 The States are not entities that have international legal personality: only the Commonwealth has this, so only the Commonwealth is involved in the negotiation and adoption of international instruments. Nevertheless, States may wish, or accept an obligation (not of course legally enforceable), to enact laws that reflect international norms.

### Race

2.15 The *Racial Discrimination Act 1975 (Cth)* ("RDA") ratifies the international *Convention on the Elimination of All Forms of Racial Discrimination 1965* ("CERD") which entered into force on 2 January 1969.

2.16 Under the RDA it is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social or any other field of public life.<sup>4</sup> Both direct and indirect forms of discrimination are prohibited.<sup>5</sup>

2.17 In addition to the broad prohibition contained in s 9, the RDA also contains specific prohibitions against discrimination in certain areas. Persons of a particular race, colour or national or ethnic origin have the right to be free from discrimination on the basis of that attribute in:

access to places and facilities,<sup>6</sup> land, housing and other accommodation;<sup>7</sup>

provision of goods and services;<sup>8</sup>

the right to join trade unions;<sup>9</sup> and

in employment.<sup>10</sup>

2.18 It is also unlawful for a person to publish or display, or cause or permit to be published or displayed, an advertisement or notice that could reasonably be understood as indicating an intention to contravene the RDA.<sup>11</sup> Part IIA of the RDA prohibits offensive behaviour based on racial hatred in a public place.

2.19 Exceptions in the RDA are limited to matters such as providing a “special measure”,<sup>12</sup> charitable benefits,<sup>13</sup> employment in certain circumstances on a ship or aircraft,<sup>14</sup> shared accommodation<sup>15</sup> and offers of employment in a private home.<sup>16</sup>

2.20 The RDA binds the Crown in right of the Commonwealth and of each of the States and Territories.<sup>17</sup> The RDA states that it is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with the RDA.<sup>18</sup>

## **Sex**

2.21 A principal object of the *Sex Discrimination Act 1984* (Cth) (“SDA”) is to give effect to certain provisions of the *Convention of the Elimination of All Forms of Discrimination Against Women 1979* (“CEDAW”) which entered into force on 3 September 1981.

2.22 The SDA prohibits direct and indirect discrimination on the grounds of sex,<sup>19</sup> marital status,<sup>20</sup> family responsibilities<sup>21</sup> and pregnancy and potential pregnancy.<sup>22</sup> Sexual harassment is also expressly prohibited.<sup>23</sup> It is an offence to publish or display or cause or permit publication or display of an advertisement that could reasonably be understood as indicating an intention to breach the SDA.<sup>24</sup> Discriminatory requests for information are also prohibited.<sup>25</sup>

2.23 Where the Sex Discrimination Commissioner receives a complaint alleging that a person has done a discriminatory act and that act occurred in the course of conduct covered under an award or certified agreement, within the meaning given to those expressions by the WRA, and it appears to the Commissioner that the act is discriminatory, the Commissioner must refer the award or agreement to the Australian Industrial Relations Commission (“AIRC”). However, it should be noted that this provision appears to have been used extremely rarely, so its value must be questioned. Furthermore, the WRA (and, indeed, the State industrial relations legislation) generally applies only to those workers who are governed by awards and it appears that the number of employees covered by awards is currently in decline.<sup>26</sup>

2.24 Discrimination on the basis of sex, marital status, pregnancy or potential pregnancy is prohibited in the areas of work,<sup>27</sup> education,<sup>28</sup> provision of goods, services and facilities,<sup>29</sup> accommodation,<sup>30</sup> land,<sup>31</sup> clubs<sup>32</sup> and in the administration of Commonwealth laws and programs.<sup>33</sup> It is unlawful for an employer to discriminate against an employee on the ground of the employee’s family responsibilities by dismissing the employee.<sup>34</sup>

2.25 A number of exceptions to the prohibitions reflect the public/private dichotomy of discrimination law.<sup>35</sup> Other exceptions attempt to further the objectives of the SDA in recognising the need for special measures.<sup>36</sup>

2.26 The SDA is limited in its application to the States because it relies primarily on powers such as the external affairs and trade and commerce powers in the Constitution for its validity,<sup>37</sup> for example, to give effect to certain provisions of the CEDAW.<sup>38</sup> As this convention only applies to women, the SDA only applies to men where another “head” of constitutional power is relied upon. For example, a man who is employed in interstate trade and commerce, and is discriminated against on the basis of sex, may have access to rights under the SDA.<sup>39</sup>

## **Disability**

2.27 The objects of the *Disability Discrimination Act 1992* (Cth) (“DDA”) are to eliminate, as far as possible, discrimination against persons on the ground of disability in certain areas of public life, to ensure equality before the law and to promote recognition and acceptance within the community of the universal application of fundamental human rights.<sup>40</sup>

2.28 The DDA prohibits direct and indirect discrimination on the basis of disability, broadly defined.<sup>41</sup> Discrimination is also prohibited on the grounds that a person with a disability possesses a palliative or therapeutic device or an auxiliary aid, or is accompanied by an interpreter, reader, assistant or carer, guide dog etc.<sup>42</sup> For reasons that are discussed in the next chapter, a limited obligation is imposed on, for example, employers and service providers to accommodate disabilities.

2.29 Disability discrimination is prohibited in the areas of work,<sup>43</sup> education,<sup>44</sup> access to premises,<sup>45</sup> provision of goods, services and facilities,<sup>46</sup> accommodation,<sup>47</sup> land,<sup>48</sup> clubs and incorporated associations,<sup>49</sup> sport,<sup>50</sup> and administration of Commonwealth laws and programs.<sup>51</sup> Discrimination involving harassment is prohibited in employment, education and the provision of goods and services.<sup>52</sup> Discriminatory requests for information<sup>53</sup> and discriminatory advertisements<sup>54</sup> are also prohibited.

2.30 A number of exceptions in the DDA attempt to ensure that people with disabilities are afforded equal opportunity. However, this limited duty to accommodate disabilities does not apply if to do so would cause the other party “unjustifiable hardship”.<sup>55</sup> Exceptions based on the public/private dichotomy are also present in the DDA.<sup>56</sup>

2.31 The DDA binds the Crown in right of the Commonwealth and of each of the States.<sup>57</sup> The DDA states that it is not intended to exclude or limit the operation of a law of a State or Territory which is capable of operating concurrently with the Act.<sup>58</sup> The DDA also provides that where a person has made a complaint under a State or Territory law in relation to an act of disability discrimination, they are not entitled to make a claim under the Federal law in respect of the same act or omission.

## **COMMONWEALTH INDUSTRIAL RELATIONS LAWS**

2.32 The second category of Commonwealth laws requiring consideration are those dealing with industrial relations. These are important at both a practical and a theoretical level. At the practical level, the Anti-Discrimination Board (“the ADB”) has consistently reported that between one half and two thirds of all inquiries and complaints received by it over the years relate to the area of employment.<sup>59</sup>

2.33 The principal Commonwealth legislation is the WRA. It includes among its principal objectives the achievement of anti-discrimination principles as well as assisting employees to balance their work and other responsibilities effectively through the development of mutually beneficial work practices. The Act is intended to encourage employers to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.<sup>60</sup>

2.34 In addition, the AIRC established under the WRA is required, in the performance of its functions, to take account of the principles embodied in the RDA, the SDA and the DDA, insofar as such principles relate to discrimination in relation to employment.<sup>61</sup> Those principles are, therefore, at the very least relevant considerations to be taken into account by the AIRC in carrying out its general functions of preventing and settling industrial disputes.

2.35 At a third level of specificity, the WRA makes detailed provision in relation to both substantive grounds and procedural matters relating to the termination of employment.<sup>62</sup> In this context, specific reference is made to particular grounds upon which employment must not be terminated. The objective of the unlawful termination of employment provisions is to assist in giving effect to the *Discrimination (Employment and Occupation) Convention* ("ILO Convention 111") and the *Family Responsibilities Convention*.<sup>63</sup>

### **Termination of employment on discriminatory grounds**

2.36 The WRA specifically prohibits termination of employment on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.<sup>64</sup> Other grounds include membership or non-membership of a trade union and filing a complaint against an employer involving an alleged violation of law.<sup>65</sup>

2.37 These grounds are clearly more extensive than those contained in the Commonwealth human rights laws referred to above. Further, the grounds of sexual preference, age and physical or mental disability are not expressly referred to in the ILO Convention 111. These grounds were specifically referred to in the previous *Industrial Relations Act 1988* (Cth),<sup>66</sup> as were certain other Conventions and recommendations which were identified as falling within those to which the 1988 Act was said to give effect. The WRA now relies upon other bases of constitutional power, perhaps indicating some nervousness on the part of the Commonwealth as to the constitutional basis for some of the grounds.<sup>67</sup>

### **Exceptions to unlawful termination on discriminatory grounds**

2.38 It is not unlawful for a matter listed in s 170CK(2)(f) ("discriminatory grounds") to be a reason for terminating employment if the reason is based on the inherent requirements of the particular position concerned.<sup>68</sup> Nor is it unlawful to terminate upon discriminatory grounds the employment of a member of staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the employer terminates the employment in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.<sup>69</sup>

2.39 Excluded by regulation from both unlawful and unfair termination provisions are:

employees engaged under a contract of employment for a specified period of time;

employees engaged under a contract of employment for a specified task;

an employee serving a pre-determined period of probation or a qualifying period of employment of not more than three months unless a longer period is reasonable having regard to the nature and circumstances of the employment;

a casual employee engaged for a short period;

trainees; and

non-award employees who earned more than \$64,000 (as indexed) in the previous year.<sup>70</sup>

## IMPACT OF COMMONWEALTH LAW ON THE ADA

2.40 Whilst concerns about the extent of Commonwealth legislative power may limit the coverage of anti-discrimination laws which operate nationally, similar problems do not arise with the ADA because of the broad law-making power which the New South Wales *Constitution* gives to the State parliament. The ADA prohibits discrimination on the grounds of race, sex, marital status, disability, homosexuality, age, and also prohibits vilification on the grounds of race, homosexuality and HIV/AIDS. It applies in the area of employment, but also in other areas, such as the provision of accommodation, goods and services and education.

2.41 Problems may arise where the ADA applies to circumstances also covered by Commonwealth laws, such as discrimination on the grounds of sex, race and disability. Other considerations relate to procedural and administrative arrangements.

### Inconsistency in general

2.42 Inconsistency between Commonwealth and State laws inevitably occurs in any federal system. This problem is resolved by s 109 of the Commonwealth *Constitution* which provides that, in the event of inconsistency between otherwise valid Commonwealth and State laws on a given subject matter, the Commonwealth law prevails. Despite the seemingly practical nature of the section, the High Court has frequently had to consider the question of when laws are inconsistent, that is, where concurrent operation of Commonwealth and State laws was not possible.<sup>71</sup>

2.43 In general terms, Commonwealth and State laws will be inconsistent if:

it is not possible for a person to obey both laws at the one time;<sup>72</sup> or

the courts find that the Commonwealth Parliament intended to “cover the field”, that is, to provide a body of law which would operate to the exclusion of State laws.<sup>73</sup>

2.44 One way of dealing with this problem, in the anti-discrimination arena, has been for the Commonwealth anti-discrimination legislation to specifically provide that the Parliament does not intend to cover the field to exclude State laws that are capable of operating concurrently with the Commonwealth laws.<sup>74</sup>

2.45 Inconsistency can arise where State law extends Commonwealth law. State legislation may go further than the Commonwealth legislation by taking a provision beyond the scope of the Convention on which the relevant Commonwealth enactments are based or may go beyond the Commonwealth Act but not beyond the Convention. There will be no inconsistency in the former case, but there is a possibility of inconsistency in the latter. For instance, s 44 of the SDA allows the Sex Discrimination Commissioner to grant an exemption of up to five years from a specified provision of the SDA. The purpose of that section is to enable conduct which would otherwise be unlawful, to be engaged in lawfully, upon conditions if necessary. A provision of a State law which would render the exemption nugatory is directly inconsistent with the Commonwealth provision and would also not be capable of operating concurrently.

2.46 Inconsistency may also arise where State law is less extensive than the Commonwealth law. In certain instances, the State law does not define as unlawful that which is unlawful discrimination under Commonwealth legislation. For instance, the ADA does not apply to discrimination in employment where the number of persons employed does not exceed five (except on the ground of race, age or sexual harassment) or where employment is in a private educational authority. There is no “small business” exception under the Commonwealth Acts. Section 38 of the SDA does provide a partial exemption in relation to private educational authorities but it is limited to religious educational institutions. The ADA makes no distinction between religious and non-religious private schools and there is no requirement that the discriminatory act be justified by reference to doctrine, philosophy or creed as is the case under the SDA. Thus, discrimination by a private English College may be unlawful under the SDA but not under the ADA.



## **Commonwealth human rights laws**

2.47 Inconsistency between State and Commonwealth human rights legislation has arisen in two cases.<sup>75</sup> The first, *Viskauskas v Niland*,<sup>76</sup> concerned the possibility of parallel complaint and investigation under the RDA and the ADA in relation to an allegation of racial discrimination in the provision of goods and services. The High Court held that there was clearly an inconsistency in respect of that subject matter as “the two legislatures have legislated upon the same subject, and have prescribed what the rules of conduct will be and (if it matters) the sanctions imposed are diverse”.<sup>77</sup> That being so, the State law was invalid to the extent of the inconsistency.

2.48 In response to that decision of the High Court, the RDA was amended to provide that it “is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or territory”.<sup>78</sup> That provision, by itself, was held to be ineffective to overcome the invalidity which had arisen as a result of the operation of s 109 of the *Constitution*.

### **Lack of equal operation**

2.49 When legislating under the external affairs power, the Commonwealth must ensure that laws giving effect to treaty obligations are uniform in their operation within the States. The majority judgment of the High Court in *Viskauskas* stated that:

[t]he Commonwealth Parliament has chosen the course of itself legislating to prohibit racial discrimination and having done so it can only fulfil the obligation cast upon it by the Convention if its enactment operates equally and without discrimination in all the States of the Commonwealth. It could not, for example, admit the possibility that a State law might allow exceptions to the prohibition or might otherwise detract from the efficacy of the Commonwealth law.<sup>79</sup>

2.50 It has been argued that, by attempting to preserve the operation of State anti-discrimination legislation, the Commonwealth is thereby providing Commonwealth laws which do not necessarily have equal operation. Such a law might therefore be invalid.<sup>80</sup>

2.51 If this argument were thought to be correct, the only consequence for the State would be to provide an additional reason to ensure that State laws were available to fill any gap which might arise in Commonwealth laws. The Commission is not, however, inclined to place much weight upon this aspect of the matter as it does not consider the argument in favour of invalidity of the Commonwealth law to be persuasive. The views expressed by the High Court in *Viskauskas* appear to flow from the fact that the head of Commonwealth power relied upon to support the RDA was external affairs: that power would not allow the Commonwealth to make laws generally with respect to racial discrimination, but only laws dealing with that subject matter for the purpose of giving effect to an international Convention. It would be inconsistent with that purpose to allow for differential operation of a statute within Australia. On the other hand, where the Convention imposes an obligation upon signatories to protect human rights within their boundaries, there is no reason why the existence of Commonwealth legislation to give effect to that Convention should preclude State laws operating to similar effect or in a manner which would extend the protection provided by Commonwealth law.

### **Procedural issues**

2.52 All inquiries under the RDA, the SDA and the DDA are conducted by the Human Rights and Equal Opportunity Commission (“HREOC”). At present the HREOC’s determinations are not binding on the parties other than the Commonwealth. An amendment made in 1992 provided a procedure which allowed a determination to take effect as an order of the Federal Court but, in the *Brandy* case,<sup>81</sup> the High Court held that the HREOC, because it is not a judicial body, lacks the constitutional power to determine disputes finally. As the new procedure involved the exercise of Commonwealth judicial power by a body which was not a court, in contravention of the *Constitution*, the 1992 amendments were declared invalid and the former arrangements still apply. If a party does not comply with a determination, proceedings must be instituted in the Federal Court, involving a re-hearing of the matter. The ADA has

an obvious procedural advantage in this area because the Equal Opportunity Tribunal<sup>82</sup> can make binding orders.

2.53 Legislation has been introduced into the Commonwealth Parliament which will reform the functions and structure of HREOC in response to the *Brandy* decision. The hearing functions of HREOC will be dealt with by a Human Rights Registry within the Federal Court of Australia. Under the scheme, complaints will continue to be lodged, investigated and conciliated by HREOC. Matters which cannot be conciliated will be heard and determined by the Federal Court.

#### **Administrative issues**

2.54 In many cases a complainant must choose to proceed under State or Commonwealth anti-discrimination legislation where disability, race or sex discrimination is alleged. Sometimes, there may be distinct advantages in bringing an action under Commonwealth legislation.<sup>83</sup> A complainant who pursues a claim under the ADA is not entitled to lodge a subsequent claim under the Commonwealth legislation in respect of the same subject matter,<sup>84</sup> but the legislation does not expressly preclude unsuccessful claimants under the Commonwealth legislation from subsequently pursuing their claims under the ADA.

2.55 Where a choice of jurisdiction must be made, officers of HREOC or the ADB can do no more than outline the relevant provisions of the respective Acts leaving the complainant with what may be a difficult choice. The Commission received submissions from advocacy and interest groups who also mentioned the difficulties they faced when their constituents ask for advice as to which jurisdiction is preferable.<sup>85</sup> In practice, the most frequent problems with choice of jurisdiction to date have arisen in the sex discrimination area with employees in private enterprise.

2.56 Choice of jurisdiction is particularly problematic because of the lack of any co-operative arrangements between the two administering agencies, namely HREOC and the ADB. Until 1991, an agreement between the President of the ADB and the Commonwealth Attorney General appointed the President as agent of HREOC to receive and investigate complaints under the Commonwealth legislation. This arrangement was designed to achieve "one-stop shopping". The objectives of the arrangement were to:

provide the public with one point of contact for advice and for the handling of complaints, and thus relieve the complainant of having to decide which agency or law is more appropriate;

facilitate the efficient handling of complaints and avoid the duplication of existing services in the State;

avoid demarcation disputes between agencies, where a complaint could be made under both Commonwealth and State laws; and

provide administratively effective and economical procedures.

2.57 The co-operative arrangements terminated on 30 June 1991. The reasons given for this were that the HREOC's central office was based in Sydney, the concept of "one stop shopping" did not really exist, and the Commonwealth could achieve considerable cost savings by terminating the agreement.<sup>86</sup>

2.58 The Commission's Discussion Paper<sup>87</sup> raised the issue of whether a form of co-operative Federal arrangements should be adopted in New South Wales, and whether there are other appropriate administrative and legislative arrangements by which the responsibility of protecting human rights can be shared efficiently between State and Commonwealth bodies, overcoming the problems caused by the need to choose between Commonwealth and State legislation.

2.59 Many submissions suggested that a common reception point for complaints is critical for any workable scheme of case management and co-operation between the State and Commonwealth agencies handling anti-discrimination law.<sup>88</sup> At such a reception point, a complainant may be advised

about procedural differences between the laws and factors likely to exclude the application of either State or Commonwealth law, such as jurisdictional problems or the extent of particular exceptions. The ADB articulated its preferred position as a co-operative arrangement with the Commonwealth, with the ADB being appointed as an agent for HREOC.<sup>89</sup> Once the Human Rights Registry of the Federal Court of Australia is established, there may also be advantages in linking that registry to any co-operative arrangements.

2.60 The Commission considers that the arguments for regular, consistent interaction between the State and Commonwealth agencies to alleviate the problems of choice of jurisdiction faced by complainants are compelling. This would involve re-establishing co-operative arrangements between the ADB and HREOC. An alternative option may be to establish a source of advice and assistance for complainants that is independent of both Commonwealth and State agencies.

#### **Recommendation 1**

**Seek to formalise co-operative arrangements between the ADB and HREOC, whereby the ADB is appointed as an agent for HREOC and provides a common reception point for complainants, similar to the arrangement which existed until 1991.**

**Draft Anti-Discrimination Bill 1999: cl 128(3)**

#### **Other Commonwealth laws**

2.61 There are many areas in which the ADA currently operates which are also the subject of Commonwealth regulation by statutes which do not expressly refer to equal opportunity or anti-discrimination principles. Again, provisions in the ADA may be inoperative as a result of inconsistency with the Commonwealth law either because of a direct collision between the two laws or because the Commonwealth law was intended to cover the field within which it operated to the exclusion of all State laws.

2.62 Where the Commonwealth law covers a specific field of activity, it is less likely that an intention will be found to exclude the operation of State laws not specifically directed to the same area of activity. Thus a specific Commonwealth law relating to business activities is likely to be regulated against the general background of contract law and will not be inconsistent with, nor preclude the operation of, State laws governing contracts, unless there is a direct inconsistency.

2.63 In respect of the ADA, this problem has arisen in the context of life insurance. Thus, in the mid 1980s, a person was refused a premium waiver benefit by the AMP Society on the ground of his blindness. He complained under the ADA alleging disability discrimination. The AMP Society challenged the validity of the State law, asserting that the *Life Insurance Act 1945* (Cth) expressed legislative intention to permit life insurance companies to determine the risks they would cover and the conditions on which they would cover those risks on the basis of actuarial advice and in a manner which would allow them to adopt such prudential practices as they thought fit. The High Court upheld the argument of the Society and found the prohibition on discrimination based on physical impairment in the ADA to be invalid.<sup>90</sup>

2.64 It is neither necessary nor possible for the purposes of this chapter to consider all Commonwealth laws which might potentially conflict with the ADA.

#### ***Inconsistency: human rights law***

2.65 The amendments introduced in 1983 into the RDA to permit the operation of State and Territory laws which were consistent with the Federal law was in the following form:

6A(1) This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.

2.66 Similar provisions have since been included in the SDA and the DDA.<sup>91</sup> Since that amendment was made to the RDA, there has been no further challenge in the High Court to the operation of the ADA, nor of other State and Territory anti-discrimination laws. It may be assumed, therefore, that in so far as the ADA reflects the objects and terms of the relevant Conventions on which the Federal laws are based, the ADA will continue to have valid concurrent operation. The issues requiring attention are whether the ADA is effective to the extent that it provides more limited protection on the one hand and to the extent that it provides greater protection on the other hand.

2.67 Limitations can occur in a number of ways. For example, the ADA does not prohibit sex discrimination in relation to employment, where the employer has less than five employees.<sup>92</sup> There is no such limitation in the SDA. A somewhat different limitation arises in relation to relief available for contravention of the State and Commonwealth laws. Thus, where damages are claimed, a complainant under the ADA is not entitled to recover damages exceeding \$40,000.<sup>93</sup> There is no such limitation under the SDA.

2.68 There are two ways of viewing such limitations in the ADA. First, it may be argued that the limitations are inconsistent with the Commonwealth law and an area of invalidity therefore arises. Whether the invalidity would be limited to the provision itself, or would infect other parts of the ADA, would depend upon questions of severability. The alternative approach is to view the ADA not as inconsistent with the SDA, but as providing partial relief which, to the extent that such relief is provided, is consistent with the objects of the Convention.

2.69 The Commission considers the latter approach to be more likely to be accepted by the courts. Although the former approach might provide greater protection under State laws in relation to unlawful discrimination, serious levels of uncertainty would arise depending upon whether the inconsistent provision were severable or not. Thus, in relation to damages awards, a court might have difficulty in striking down the limitation on awards by itself, as the limitation in part reflects the nature of the Tribunal in which jurisdiction is vested. The court might well not be satisfied that Parliament would have been happy to provide an unlimited jurisdiction to a Tribunal whose status and expertise fell short of the only body with such jurisdiction in New South Wales, namely the Supreme Court. Further, there appears to be no reason to find that exceptions in a State law which do not appear in a Commonwealth law are invalid. Whilst it would be relatively simple to rule that the exception was inoperative, there are other forms of inconsistency which could not be so readily dealt with. For example, the New South Wales Parliament might decide that the ADA should deal with sex discrimination, but not in the important area of employment. So long as the provisions in other areas were consistent with the SDA, there would be little reasons for striking down those provisions simply because the SDA provided protection in an additional area.

2.70 Accordingly, the Commission is of the view that the State law can validly operate concurrently with Commonwealth law except to the extent that there is a direct collision between a permission and a prohibition. There would be direct inconsistency if, for example, the ADA expressly provided that discrimination on the ground of sex was lawful in workplaces with less than five employees. The Commonwealth laws should therefore be given careful consideration to ensure that such direct inconsistency does not arise.

### ***Duplication***

2.71 Whilst the ADA may validly overlap with Commonwealth law in the area of human rights, there is a separate question as to whether such duplication is desirable. If in truth there were total uniformity between State and Federal laws, that would tend to raise legitimate questions as to the desirability of maintaining a dual system. That is not in fact the case, however, for a number of reasons. First, the ADA applies in relation to numerous grounds of discrimination which are not available under Commonwealth law. To remove particular grounds, including the central or core grounds of race and sex would make

the ADA piecemeal and would not give a clear message to the community as to the unacceptability of discrimination on these important grounds which would violate human rights principles.

2.72 Secondly, in key respects, the ADA predated Commonwealth laws. To remove important areas simply because the Commonwealth has now legislated would also tend to lead to confusion in the public mind as to the commitment of the State legislature to protecting citizens against violations in key areas of human rights. The practical difficulties would not end there: to be consistent, the State legislature would have to withdraw protection in any area in which Commonwealth protection became available and would also have to remain vigilant to reinstate protection in areas where Commonwealth laws were declared invalid or were repealed. As repeal can occur by implication as well as by express provision in a statute, this task would give rise to considerable administrative, as well as legislative, inefficiency.

2.73 Thirdly, at an administrative level, there are pragmatic reasons for ensuring that State bodies and tribunals can continue to monitor violations in key areas of race, sex and disability discrimination. In addition, there are procedural benefits to the public in having State tribunals available, particularly since the High Court held that HREOC is not able to make binding decisions in relation to complaints.<sup>94</sup> There is no guarantee that Commonwealth agencies, burdened with a greatly increased case load, would be able to cope effectively with complaints in key areas.

2.74 As the Commonwealth legislation is clearly intended to co-exist with State laws, the proper goal for the State is to ensure that its laws provide comprehensive and effective protection to its citizens, whilst ensuring that confusion arising from inconsistency between Commonwealth and State laws and administrative difficulties arising from the dual system are both minimised. These principles will inform the recommendations which appear in subsequent chapters.

### ***Industrial relations laws***

2.75 Because the area of employment is a critical area for the operation of discrimination laws, questions of inconsistency between industrial law and discrimination law arose soon after the commencement of the anti-discrimination legislation. The leading case involved a complaint by a woman that she was refused employment by Ansett Transport Industries as a pilot on the ground of her sex. Ansett argued that decisions by it as to who it would employ as pilots were made under a Commonwealth industrial award and that the provisions of the award (which said nothing about equal opportunity or discrimination) were inconsistent with the prohibition of sex discrimination contained in the *Equal Opportunity Act 1977 (Vic)*. The High Court held that there was no inconsistency between the award and the State law because the provisions of the award, which were in quite general terms, should be read subject to the general laws, including relevant State laws.<sup>95</sup>

2.76 Whilst the State law survived the challenge in that case, warnings were sounded by two members of the Court (Justices Mason and Wilson) each of whom was concerned that the grievance procedures in relation to dismissals might give rise to inconsistency, although no such question arose in the particular circumstances then before the Court. Since that time, it has become common for Commonwealth awards to contain specific provisions relating to discrimination in relation to employment, terms and conditions of employment and dismissal. This process significantly increased the danger that State laws would cease to have effect in areas covered by Commonwealth industrial awards. In its original form, the ADA excepted from its prohibitions things done in compliance with, amongst other things, industrial awards. Accordingly, the potential for a Commonwealth award to override a State Act was consistent with the ADA's own exception in relation to State awards.<sup>96</sup> However, that exception was removed in 1994<sup>97</sup> and there have been continuing extensions of anti-discrimination principles now found not merely in awards, but in industrial relations laws themselves.

### ***Commonwealth industrial relations law***

2.77 Federal awards are not themselves Federal laws, but they obtain their force and effect for the purposes of s 109 of the *Constitution* from the legislation under which they are created. Thus, the *Conciliation and Arbitration Act 1904 (Cth)* contained a specific provision providing that awards made under it prevailed over State law.<sup>98</sup> That provision has been continued in more recent legislation,

although there is now a qualification which will limit the invalidity of the State law to inconsistency arising from a direct collision and will prevent invalidity where there may have been an intention to cover the field.

2.78 Section 152 of the WRA states:

- (1) Subject to this section, if a State law or a State award is inconsistent with, or deals with a matter dealt with in, an award the latter prevails and the former, to the extent of the inconsistency or in relation to the matter dealt with, is invalid.
- (1A) If a State law provides protection for an employee against harsh, unjust or unreasonable termination of employment (however described in the law), subsection (1) is not intended to affect the provisions of that law that provide that protection, so far as those provisions are able to operate concurrently with the award.

2.79 Section 152(1A) was not present in the former *Industrial Relations Act 1988* (Cth). The section has already been amended since its enactment in 1996.<sup>99</sup> The Explanatory Memorandum to the original *Workplace Relations and Other Legislation Amendment Bill 1996*, which introduced the section, states that the provision was included:

because some Federal system employees have been denied access to State unfair dismissal remedies on the basis that award clauses dealing with termination, change and redundancy “cover the field” to the exclusion of a State remedy. This amendment allows these Federal system employees to utilise any access to State remedies provided for them by a State law or award.

2.80 The Explanatory Memorandum to the amending legislation states that:

This provision was intended to ensure that an employee covered by a Federal award ... would not be prevented from applying for an unfair dismissal remedy under a State law, solely because of the existence of a termination of employment provision in their federal award or agreement. However, it is considered that this provision might have the unintended consequence of rendering employers covered by federal awards subject to other State provisions on termination of employment, for example in relation to severance pay or redundancy consultation.

2.81 Whilst the original Explanatory Memorandum refers to an employee’s ability to “utilise any access to State remedies”<sup>100</sup> it may be argued that s 152 is directed at the concurrent operation of State industrial relations legislation and does not contemplate anti-discrimination legislation.

2.82 The Commission considers that there is little force in that argument because the legislation is beneficial and is therefore likely to be given a broad, rather than a restrictive interpretation. However, the possibility that the scope of any State legislation, including the ADA, may be limited by the operation of s 109 of the *Constitution* must always be a relevant consideration.

2.83 Further, whether s 152 will allow the ADA to operate in respect of these complaints may also depend upon whether it can be said that the ADA “provides protection for an employee against harsh, unjust or unreasonable termination of employment (however described in the law)”.<sup>101</sup> It is arguable that the breadth of this provision means that it would cover anti-discrimination legislation.

2.84 Even if s 152(1A) does contemplate the concurrent operation of State anti-discrimination legislation, however, it might still be arguable that the State law is directly inconsistent with the WRA. While it was not necessary for the final decision, the Full Bench of the Industrial Relations Commission of NSW observed in relation to the question of inconsistency between State and Commonwealth industrial relations law, in the context of s 152 of the WRA:

[g]iven that, generally speaking, two tests of inconsistency between Commonwealth and State laws have developed – “cover the field” ... and “direct” inconsistency ... sub-s (1A), as the parties and interveners have accepted, removes any possibility of conflict according to the “cover the field” approach; and that was so even though, certainly on one view, the Commonwealth Act in respect of termination of employment and remedies in relation thereto is wide and comprehensive in its scope ...

Nevertheless, a conflict arising between particular aspects of the relevant Commonwealth and State laws may still occur in terms of direct inconsistency or collision.<sup>102</sup>

2.85 The Industrial Relations Commission concluded that direct inconsistency between Commonwealth and State laws cannot be eliminated by a Commonwealth statute asserting an intention not to be inconsistent with a State law. In deciding whether there is direct inconsistency, detailed attention to the respective provisions in a comparative sense is required.<sup>103</sup>

#### **Awards and other anti-discrimination provisions**

2.86 The WRA provides that in the performance of its functions, the AIRC must take account of anti-discrimination principles embodied in Commonwealth law.<sup>104</sup> The AIRC must also take account of the *Family Responsibilities Convention*<sup>105</sup> and must convene a hearing in relation to an award or agreement upon referral by the Sex Discrimination Commissioner.<sup>106</sup> If discrimination is found, the AIRC must remove the discrimination by setting aside the terms of, or varying, the award or agreement.<sup>107</sup> In certain circumstances, upon application by the Sex Discrimination Commissioner, an employee or a trade union, the AIRC may make orders to ensure that there will be equal pay for work of equal value.<sup>108</sup>

2.87 Australian Workplace Agreements (“AWAs”) between an employer and an employee must include provisions relating to discrimination. In their absence, such provisions will be implied.<sup>109</sup> Any dispute concerning the discrimination provisions in the AWA must be processed initially under the dispute resolution procedure in the AWA. In addition, the provisions state that they do not allow any treatment that would otherwise be prohibited by anti-discrimination provisions in applicable Commonwealth, State or Territory legislation.<sup>110</sup>

2.88 Certified agreements must satisfy a “no disadvantage test” which asks whether the approval or certification would result, on balance, in a reduction in the overall terms and conditions or employment of employees under a relevant award or any other relevant law.<sup>111</sup> The AIRC must refuse to certify an agreement if it thinks a provision discriminates against an employee on discriminatory grounds, subject to exceptions.<sup>112</sup>

2.89 The freedom of association provisions of the WRA prohibit discrimination between union members and non-union members. Thus, discrimination on the ground of trade union activity is introduced into New South Wales in the absence of such a ground in the ADA. Where, on application from a person bound by a Commonwealth industrial agreement or award, the AIRC is satisfied that the agreement or award contravenes the freedom of association provisions of the WRA, the AIRC must make appropriate variations so as to remove the objectionable provisions.<sup>113</sup>

#### **APPLICATION TO THE COMMONWEALTH**

2.90 There is a further question which arises in this context, namely the application of the ADA to the Commonwealth itself and its authorities and instrumentalities. Where these bodies operate or conduct business in New South Wales, they will be subject to New South Wales laws of general application, in the absence of any inconsistency between those laws and a relevant Commonwealth law, such as that establishing the Commonwealth body.<sup>114</sup> Such a result may be achieved either by an express statement in the State Act indicating that it binds the Crown in right of the State and in all other capacities, within the limits of the power of the State Parliament, or it may be achieved by the operation of s 64 of the *Judiciary Act 1903* (Cth).<sup>115</sup>

2.91 Two matters have relevance in relation to the operation of a State law such as the ADA. First, there is a question whether, as a matter of statutory construction, the law does apply to the Commonwealth and Commonwealth bodies. It used to be the case that a relatively inflexible presumption applied that, in the absence of express words or necessary implication, the Crown was not bound by the State Act in any capacity.<sup>116</sup> That presumption was held to apply both in relation to the Crown in right of the legislating polity and in relation to the Crown in respect of any other polity. More recently, that inflexible rule has been abandoned in favour of an approach which takes into account a range of matters, including the subject matter of the statute, its terms, its general purpose and effect and the activities of the executive government which would be affected were it to have application.<sup>117</sup> The uncertainty of these approaches is, however, overcome by express words indicating that the Act intends to bind the Crown in all aspects.

2.92 The second question is whether that is a proper coverage for the ADA. The arguments in favour of such a result are themselves arguments which appeal to basic human rights, namely that so far as possible all individuals should be treated equally before the law. The protections available to individuals for example, in areas of employment, should not depend upon the identity of the employer. Further, the underlying concerns of the ADA are to provide protection in relation to fundamental human rights, a concern which is reflected in equivalent Commonwealth legislation to the extent that Commonwealth Constitutional power permits. Accordingly, there is consistency with that common purpose in seeking to ensure that the Commonwealth and its bodies and authorities are subject to the ADA. Finally, in areas where the Commonwealth has legislative power, it may exclude the operation of a State Act, if it considers that appropriate: the Commonwealth need not be subject to a State Act in any area where it deems such coverage inappropriate.

2.93 Accordingly, the Commission is satisfied that the ADA should be expressed to bind the Crown, not only in the right of the State, but in all other respects so far as the legislative authority of the State Parliament permits.

## **Recommendation 2**

**The ADA should expressly state that it binds the Crown in right of the State and in all other capacities so far as the legislative authority of the State Parliament permits.**

**Draft Anti-Discrimination Bill 1999: cl 6**

## **CONCLUSIONS**

2.94 Any changes to the ADA should take account of relevant principles contained in international Conventions and other instruments to which Australia is a party and to similar principles contained in Commonwealth laws. Such provisions have legal consequences, whether directly or indirectly, for all people living in New South Wales. In the course of considering possible reform of the ADA, the Commission has also paid attention to analogous legislation in other States and Territories of Australia and in overseas jurisdictions which embrace or reflect the historical tradition of the common law.

2.95 The direct legal significance of Commonwealth laws arises from the operation of s 109 of the *Constitution* which provides that Commonwealth laws prevail over State laws in areas where both have legislative power and in circumstances where there is inconsistency between the laws. There being Commonwealth laws which address issues of discrimination, it is necessary to ensure, so far as possible, that the ADA will not intrude into areas in which it would not be effective. However, the Commission is satisfied that the present form of Commonwealth laws effectively permits the concurrent operation of State laws. Further, the Commission is satisfied that it is neither necessary nor appropriate for the State to withdraw from areas where Commonwealth legislation operates. No other State or Territory in Australia appears to have taken a contrary view on this matter.



2.96 While the Commission is mindful of the need to maintain both legislative consistency and administrative co-operation to ensure that the benefits of the dual system are not outweighed by the disadvantages which can arise from it, the Commission's recommendations must be restricted to the former area, namely legislative consistency. Accordingly, this principle will inform the specific recommendations made in the ensuing chapters.

2.97 In this chapter it has been noted that inconsistency may arise in relation to Commonwealth laws which do not themselves expressly address discrimination as an issue. It is neither necessary nor practicable to consider all potential areas of inconsistency. However, where there are particular laws which are likely to give rise to potential inconsistency, these are dealt with in appropriate sections of the following chapters. For example, Commonwealth regulation of superannuation and insurance will be considered in the discussion which relates to those particular areas of operation of the ADA.

2.98 Consideration has been given in this chapter to the operation of the WRA, but not to the operation of the *Industrial Relations Act 1996* (NSW) ("IRA"), despite the fact that both State and Commonwealth Acts have provisions which recognise and give effect to principles of anti-discrimination. Consideration of the IRA falls outside the purpose of this chapter: however, the IRA contains important provisions which result in overlap between it and the ADA in the area of employment and detailed consideration will need to be given to the scope of the IRA and those areas of overlap when considering the specific area of employment in Chapter Four.

## Footnotes

1. Other heads of legislative power may be relied on: for instance, s 5 of the RDA draws on the power in s 51 (xxvii) of the *Constitution* (Cth) with respect to immigration and emigration; similarly s 9 of the SDA draws on a variety of heads of power such as the trade and commerce power and the corporations power.
2. CERD, incorporated in the Sch to the RDA; CEDAW, incorporated in the Sch to the SDA; CROC; ILO Convention 111, incorporated in Sch 1 of the HREOC Act; ICCPR, incorporated in Sch 2 of the HREOC Act; UN *Declaration on the Rights of the Child 1959*, incorporated in Sch 3 of the HREOC Act; UN *Declaration on the Rights of Mentally Retarded Persons 1971*, incorporated in Sch 4 of the HREOC Act; UN *Declaration on the Rights of Disabled Persons 1975*, incorporated in Sch 5 of the HREOC Act; *ILO Convention 156 Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities 1981*.
3. This is an important mechanism for the advancement of human rights as the Human Rights Committee may require ratifying States to account for alleged violations. Thus, the decision of the Human Rights Committee in relation to the first complaint under the Protocol, lodged by Mr Nicholas Toonen about certain sections of the Tasmanian Criminal Code which violated Australia's obligations under the ICCPR, prompted the enactment of the *Human Rights (Sexual Conduct) Act 1994* (Cth).
4. RDA s 9.
5. RDA s 9(1A). For a detailed discussion of the definitions of "direct" and "indirect" discrimination see Chapter 3.
6. RDA s 11.
7. RDA s 12.
8. RDA s 13.
9. RDA s 14.

10. RDA s 15.
11. RDA s 16.
12. RDA s 8(1).
13. RDA s 8(2).
14. RDA s 9(3) and 15(4).
15. RDA s 12(3).
16. RDA s 15(5).
17. RDA s 6.
18. RDA s 6A.
19. SDA s 5.
20. SDA s 6.
21. SDA s 7A.
22. SDA s 7.
23. SDA Pt 2 Div 3. Harassment may also be a form of discrimination on the ground of sex. For a detailed discussion of harassment see Chapter 7.
24. SDA s 86.
25. SDA s 27.
26. According to a 1997 publication of the Commonwealth Department of Workplace Relations, *Changes at Work*, in 1995 the proportion of workplaces covered by awards was 96%, compared to 98% in 1990. The proportion seems to be declining. Many people from the groups most likely, on past experience, to suffer unlawful discrimination (women, people of non-English speaking background, workers aged between 18 and 30) are not covered by awards because they are casual or temporary employees especially if they are part-time. As such, their only recourse, if they suffer unlawful discrimination in the course of their employment, is under anti-discrimination legislation. See A Morehead, M Steele, M Alexander, K Stephen and L Duffin, *Changes at Work – The 1995 Australian Workplace Industrial Relations Survey* (Longman, Melbourne, 1997) at 207.
27. SDA Pt 2 Div 1.
28. SDA s 21.
29. SDA s 22.
30. SDA s 23.
31. SDA s 24.
32. SDA s 25.
33. SDA s 26.

34. SDA s 7A.
35. For example, although discrimination on the basis of sex is prohibited in the area of employment, an exception is provided where a person is employed to perform “domestic duties” in the home of the discriminator: SDA s 14(3). See also SDA s 23(3): provision of accommodation for no more than three persons. For a detailed discussion of exceptions under the ADA, see Chapters 4 and 6.
36. SDA s 7D and s 25(3).
37. SDA s 9.
38. SDA s 3(a).
39. SDA s 9(17).
40. DDA s 3.
41. See DDA s 5 and 6 as defined in s 4. For a detailed discussion of discrimination on the ground of disability see Chapters 3 and 5.
42. See DDA s 7, 8 and 9.
43. DDA Pt 2 Div 1.
44. DDA s 22.
45. DDA s 23.
46. DDA s 24.
47. DDA s 25.
48. DDA s 26.
49. DDA s 27.
50. DDA s 28.
51. DDA s 29.
52. DDA Pt 2 Div 3.
53. DDA s 30.
54. DDA s 44.
55. See, for example, DDA s 15(4) and 24(2). For example, an employer would not be required to hire a person who was blind for a position as an airline pilot, even if the person could perform the inherent requirements of the job if expensive audio equipment were installed by the employer.
56. For example, although discrimination on the ground of disability is prohibited in the area of accommodation, an exception is provided where the accommodation is for no more than three persons and is provided in the residence of the discriminator (or a near relative of the discriminator): DDA s 25(3). See also Chapters 4 and 6 for a detailed discussion of exceptions.
57. DDA s 14.

58. DDA s 13.
59. At a theoretical level, laws primarily relating to industrial relations now contain express provision in relation to equal opportunity and prohibitions on discrimination. Accordingly, and relevantly for the purposes of s 109 of the *Constitution* (Cth), they fall between the human rights legislation and laws of general application.
60. WRA s 3 (a), (j) and (k).
61. WRA s 93.
62. WRA Pt 6A Div 3.
63. WRA s 170CK(1).
64. WRA s 170CK(2)(f).
65. WRA s 170CK(2)(b), (c) and (e).
66. The title of this Act was changed to the *Workplace Relations Act 1996* (Cth) by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) s 3 and Sch 19, effective 25 November 1996.
67. WRA s 170CB.
68. WRA s 170CK(3).
69. WRA s 170CK(4).
70. *Workplace Relations Regulations 1989* (Cth) reg 30B-30BB.
71. See *Viskauskas v Niland* (1983) 153 CLR 280 and DP 30 para 2.20-2.27.
72. *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23.
73. *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 and *Ex parte McLean* (1930) 43 CLR 472 were cases in which the Court held that the operation of State law was excluded even though it was possible to obey both at the same time. For example, if a State law provided that the maximum working week was 44 hours, but a Commonwealth law provided that it was 48 hours, compliance with the State law would also constitute compliance with the Commonwealth law. Nevertheless, in *Clyde Engineering* it was held that a State law which fixed wages on a 44 hour week had no operation, because the Court decided that the Commonwealth law (which fixed wages on a 48 hour week) was intended to "cover the field" of working hours.
74. See RDA s 6A(1); SDA s 10(3); and DDA s 13(3). In effect this means that the relevant Commonwealth enactment is not intended to exclude or limit the operation of a State law if the latter furthers the objects of the Convention and is capable of operating concurrently with the Commonwealth Act. While this reduces possible inconsistencies it does not remove the possibility of direct inconsistency which may still arise where a particular provision of a Commonwealth law is impinged upon or derogated from by a State law.
75. *Viskauskas v Niland* (1983) 153 CLR 280; and *Dao v Australian Postal Commission* (1987) 162 CLR 317.
76. (1983) 153 CLR 280.
77. *Viskauskas v Niland* at 293.

78. *Racial Discrimination Amendment Act 1983* (Cth), s 3 inserting new s 6A in the RDA.
79. *Viskauskas v Niland* (1983) 153 CLR 280 at 292 per Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ.
80. J Macken, G McCarry and C Sappideen, *The Law of Employment* (3rd edition, Law Book Company, Sydney, 1990) at 529.
81. *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
82. Soon to become the Equal Opportunity Division of the NSW Administrative Decisions Tribunal: See *Administrative Decisions Tribunal Act 1997* (NSW) and *Administrative Decisions Legislation Amendment Act 1997* (NSW).
83. Particularly if a wider range of situations is covered: as under RDA s 9.
84. RDA s 6A(2); SDA s 10(4); and DDA s 13(4).
85. The Australian Quadriplegic Association outlined these difficulties, and questioned whether the State needs to be involved in disability legislation at all when there is adequate Commonwealth legislation: Australian Quadriplegic Association, *Submission*. A number of other submissions also noted the problems relating to dual coverage and expressed their support for uniformity of State and Commonwealth legislation. See The Association of Superannuation Funds of Australia Ltd, *Submission* at 1; Catholic Education Commission NSW, *Submission* at 7; NSW Department of Health, *Submission* at 2; Disability Discrimination Legal Centre, *Submission* at 6; Eastern Sydney Area Health Service, *Submission* at 1; Gay and Lesbian Rights Lobby, *Submission* at 2; Law Society of NSW, *Submission* at 2; NSW Ministry for the Status and Advancement of Women, *Submission* at 7; NSW Independent Teachers Association, *Submission* at 3; NSW Women's Advisory Council, *Submission* at 3; Public Service Association NSW, *Submission* at 1; D Robertson, *Submission* at 3.
86. Australia, HREOC, *Annual Report 1990-1991*. However, the Commission understands that it is proposed to re-negotiate the arrangements.
87. DP 30.
88. NSW Department of Health, *Submission* at 2; Law Society of NSW, *Submission* at 2; NSW Ministry for the Status and Advancement of Women, *Submission* at 7; NSW Department of Industrial Relations, Employment, Training and Further Education, *Submission* at 11; Public Service Association NSW, *Submission* at 1; D Robertson, *Submission* at 3.
89. Anti-Discrimination Board, *Submission 1* at 14.
90. See *AMP Society v Goulden* (1986) 160 CLR 330. Since that case was decided the *Life Insurance Act 1945* (Cth) has been repealed and it is not clear whether the same conclusion would result from the current *Life Insurance Act 1995* (Cth).
91. SDA s 10(3) and DDA s 13(3).
92. ADA s 25(3)(b).
93. ADA s 113(1)(b).
94. See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
95. See *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.
96. See ADA s 54.

97. See *Anti-Discrimination (Amendment) Act 1994* (NSW) Sch 4(23).
98. Section 165.
99. See *Workplace Relations and Other Legislation Amendment Act 1997* (Cth) Sch 5(1).
100. Emphasis added.
101. In its original form, the provision referred to a State law or State award which “makes provisions in respect of the termination of an employee’s employment”.
102. *Moore v Newcastle City Council: Re Civic Theatre Newcastle* (1997) 43 NSWLR 614 at 622.
103. See *Metal Trades Industry Association of Australia v The Amalgamated Metal Workers’ and Shipwrights’ Union* (1983) 152 CLR 632.
104. WRA s 93. These principles include: freedom from racial discrimination (RDA s 15), freedom from discrimination on the basis of sex, marital status, pregnancy or potential pregnancy (SDA Pt 2 Div 1), freedom from sexual harassment (SDA s 28B), freedom from discrimination on the basis of family responsibilities in the area of termination of employment (SDA s 14(3)) and freedom from disability discrimination (DDA s 15).
105. WRA s 93A.
106. WRA s 111A. However, this provision has rarely been used.
107. WRA s 113(2A). Note that the award review mechanism in s 150A, to remove discriminatory provisions, has been repealed.
108. WRA Pt 6A Div 2. Note that no order may be made where there is an adequate alternate remedy.
109. WRA s 170VG; *Workplace Relations Regulations 1989* (Cth) reg 30ZI and Sch 8.
110. *Workplace Relations Regulations 1989* (Cth) Sch 8(c).
111. WRA s 170LT and 170XA.
112. WRA s 170LU(5). See also WRA s 170LV.
113. WRA s 298Z, Pt 10A. The freedom of association provisions specifically provide that an employer must not dismiss or discriminate against an employee by reason of their association, or lack of association, with an industrial organisation. See WRA s 298K.
114. *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399, applied in *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 337; cf *Re Residential Tenancies Tribunal of NSW; ex parte Defence Housing Authority* (1997) 190 CLR 410.
115. *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.
116. See *Bradken Consolidated Ltd v Broken Hill Pty Ltd* (1979) 145 CLR 107.
117. *Bropho v Western Australia* (1990) 171 CLR 1 at 23 and 28.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 3. Concept of Discrimination

#### INTRODUCTION

3.1 It has long been recognised that a fundamental principle of democratic societies is that all citizens are equal legally and politically and should be treated equally before the law. However, in a world where human beings differ because of physical, cultural, social and innumerable other factors, discrimination, including exclusion and subordination, has been the historical response to encounters with the "other". Thus, in its pejorative sense, discrimination is basically the act of making prejudicial distinctions among individuals or groups by taking irrelevant matters into consideration resulting in unequal treatment. Such discrimination found early expression in Plato's *Republic* and throughout the centuries that followed.

3.2 Laws prohibiting discrimination are designed to give effect to one facet of the basic philosophical principle, first expressed in the *Universal Declaration of Human Rights* ("UDHR") and passed by the United Nations General Assembly in 1948, that "all humans are born free and equal in dignity and rights".<sup>1</sup> That principle is also reflected in the *International Covenant on Civil and Political Rights* ("ICCPR") which declares that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law".<sup>2</sup> In both the UDHR and the ICCPR the prohibited distinctions are defined as including "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".<sup>3</sup>

3.3 These broad principles were given specific application in relation to the *Convention on the Elimination of all forms of Racial Discrimination* ("CERD")<sup>4</sup> and in relation to the *Convention on the Elimination on all forms of Discrimination Against Women* ("CEDAW").<sup>5</sup> The area in which CERD operates is defined as that of "human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". In CEDAW, the area is defined as "human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".<sup>6</sup> Other conventions, such as the *Discrimination (Employment and Occupation) Convention 1958* ("International Labour Convention 111") concerning discrimination in respect of employment and occupation, are applicable only in particular areas, in that case the area of "employment or occupation".

#### General features of anti-discrimination legislation

##### *Discrimination defined as direct or indirect*

3.4 The general features of anti-discrimination laws are similar to the *Anti-Discrimination Act 1977* (NSW) ("ADA") and prohibit direct and indirect discrimination.<sup>7</sup> Under the ADA, direct discrimination results from less favourable treatment in comparison with a real or hypothetical comparator from the mainstream group in the same or similar circumstances on a prohibited ground. Indirect discrimination results where there is a requirement that appears to be neutral and fair, but which actually impacts disproportionately on one individual or group as compared with another (and the requirement or condition is not reasonable in the circumstances). The two tests have significantly different criteria.<sup>8</sup> As one writer noted, the distinction between the two is in "how the practice or policy is identified as being discriminatory. Does it treat someone less favourably directly by reference to their status or indirectly by its impact on persons of that status?".<sup>9</sup> The main object of

this chapter is to review and evaluate the current definition of discrimination and its capacity to fulfil the objects of the legislation.

### ***Discrimination identified by grounds, areas and exceptions***

3.5 In Australia, all anti-discrimination legislation is structured so as to prohibit such discrimination on the basis of nominated grounds, in specific areas subject to particular exceptions, although the *Racial Discrimination Act 1975* (Cth) (“RDA”) does contain a broad general prohibition against discrimination. The operation of anti-discrimination principles, as introduced into Australian law, has been described by Justice Gaudron of the High Court in the following terms:

Where protection is given by anti-discrimination legislation, the legislation usually proceeds by reference to an unexpressed declaration that certain characteristics are irrelevant within the areas in which discrimination is proscribed. Even so, the legislation frequently allows for an exception in cases where the characteristic has a relevant bearing on the matter in issue. Thus, for example, the *Anti-Discrimination Act 1977* (NSW), whilst proscribing discrimination in employment on the grounds of race and sex, allows in s 14 and 31 that discrimination is not unlawful if sex or race is a genuine occupational qualification.<sup>10</sup>

3.6 As is apparent from her Honour’s comments, the general statements in the Conventions require attention to the underlying concept of discrimination. Not all distinctions based on prohibited grounds are necessarily unlawful in all circumstances. Accordingly, it is necessary to identify with care, both by reference to the particular ground and the particular area of operation, whether it is always an irrelevant consideration. Her Honour gives by way of example the idea of a “genuine occupational qualification”, but it will be necessary to consider in due course precisely when and how that exception operates.

3.7 In Chapter Four, the Commission identifies the areas in which the prohibition should apply, taking as a basic precept the concept identified in CERD that prohibitions should extend to all fields of “public life”. That is not to assume that people should not be protected from discriminatory treatment in the areas of private life, nor that the distinction is necessarily one which is easily drawn. These ideas will be elucidated in the next chapter.

3.8 Depending upon the precision with which one identifies the area of operation of a particular practice or activity, relevant and irrelevant considerations may be defined with varying levels of particularity. However, for present purposes, the underlying policy of anti-discrimination laws may be satisfied if one identifies what are generally accepted as basic human rights and fundamental freedoms. By analogy with principles which have been developed in relation to refugee law, those may be defined as, in each case, “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>11</sup> The grounds which may properly be said to give rise to irrelevant considerations for the purposes of discrimination law are identified in Chapter Five.

### ***Universal approach: protection not limited to disadvantaged groups***

3.9 The ADA presently provides protection from discrimination in relation to most grounds on the basis of neutrality. In other words, persons of both genders, all races and all forms of marital status are treated equally. The ADA is not limited to protecting particular disadvantaged groups against the dominant or more powerful groups in



society. Were it otherwise, it might be argued that discrimination against women should be prohibited, but not discrimination against men.<sup>12</sup> That argument has some respectability in that there is an international Convention which is designed to protect women but not men. Similarly, one might identify particular racial groups in the community which may deserve protection, and exclude other dominant groups, such as Anglo-Saxons or Anglo-Celts.

3.10 There are two criticisms which may be levelled at the current approach. First, it may be argued that providing universal protection tends to camouflage the extent to which common social values reflect the values of the dominant group. There is a body of feminist literature which sets out to demonstrate this point.<sup>13</sup> Secondly, there are circumstances in which the ADA is directed towards protection of a particular class whose members may require differential treatment in order to be treated equally. This is true in relation to gay men and lesbians, transgender people and people with disabilities.

3.11 More generally, the Commission does not consider it practical or appropriate in modern Australian society to seek to identify other disadvantaged groups and limit the protection of the ADA accordingly. Although it may be readily conceded that Indigenous people generally are a disadvantaged group in modern society, there are an increasing number of Indigenous people who would not fall within that classification and who might find such a legal classification offensive. Indeed, the existence of such a classification might have a socially counter-productive effect. Similarly, many women would find it invidious to be classified as a disadvantaged group. The closer a society comes to an ideal of equality of opportunity, the less appropriate such classifications become.

3.12 It therefore seems appropriate, as a general principle, to maintain the universal approach adopted by the ADA and avoid any general attempt to limit its operation to the protection of identified disadvantaged groups. However, this conclusion should not in itself be treated as an absolute stance. First, although it suggests a formal equality model, it is qualified by recognition of the need to take account of difference, where difference is relevant. In particular areas, there may well be reasonable arguments in favour of maintaining the protection for one group where there is little or no history of the other group being discriminated against. As already noted, these arguments will be considered in relation to the question of sexuality. Secondly, it is important to allow for special measures which may be designed to alleviate the circumstances of disadvantaged groups where the circumstances of one group justify significantly different treatment which benefits that group. This issue is discussed below<sup>14</sup> and in more detail in Chapter Six in relation to the formulation of the special measures provision.<sup>15</sup>

### ***Generalised approach to all grounds of discrimination***

3.13 The ADA presently approaches the concept of discrimination on the basis that the defined concept is applicable to all grounds. In practice, some modification of this principle is necessary in relation to disability, family responsibilities, religion and pregnancy, where characteristics can be relevant to decisions made. For instance, in some circumstances, disability is a totally irrelevant consideration, and the refusal to act appropriately in relation to people with disabilities is a reflection of prejudice rather than a rational response to their disability. Nevertheless, it is obvious that, in some circumstances, a disability can be a relevant consideration. The ADA recognises that fact and seeks to ensure that, so far as possible, the adverse impacts of a disability are minimised. In such instances, it is important that the decision maker does not give inappropriate emphasis to the prescribed characteristic and, in addition, that the decision maker must also appropriately evaluate alterations to its requirements or practices which are reasonable in the circumstances. This approach is commonly

referred to as the “reasonable accommodation” approach which currently applies in relation to the ground of disability. However, the Commission proposes some modification to the current approach and extension to other selected grounds. This is an issue of general importance which is addressed below.<sup>16</sup>

## THE DEFINITION OF DISCRIMINATION

### Formal or substantive equality

3.14 Against this background, it is necessary to return to the concept of discrimination as involving an unexpressed declaration that identified characteristics are irrelevant. Stated in this bald manner, anti-discrimination laws might be said to pursue what is sometimes called “formal equality”. The yardstick of formal equality is based on the Aristotelian notion of equality which uses the comparability model, that is, that all people are equal and must be treated similarly in similar circumstances. It does not recognise any differences between people.

3.15 Substantive equality on the other hand, does not require that all persons be treated identically. It seeks genuine equality and takes account of, and makes allowances for, factors such as social and historical disadvantage and individual and group characteristics which may inhibit complete societal participation. It has the potential to reverse historical disadvantage, whereas formal equality may only achieve the removal of formal barriers. However, its practical implementation may be more difficult.

3.16 To return to the exegesis of Justice Gaudron, it is important to note that the notion that anti-discrimination laws pursue formal equality may be simplistic. Her Honour continued from the passage quoted above in the following terms:

The framework of anti-discrimination legislation has, to a considerable extent, shaped our understanding of what is involved in discrimination. Because most anti-discrimination legislation tends to proceed by reference to an unexpressed declaration that a particular characteristic is irrelevant, it is largely unnecessary to note that discrimination is confined to different treatment that is not appropriate to a relevant difference. It is often equally unnecessary to note that, if there is a relevant difference, a failure to accord different treatment appropriate to that difference, also constitutes discrimination.<sup>17</sup>

3.17 The importance of a relevant difference was noted by Judge Tanaka in the *South West Africa cases (Second Phase)* in these terms:

... the principle of equality before the law ... means ... relative equality, namely the principle to treat equally what are equal and unequally what are unequal ... To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists.<sup>18</sup>

3.18 Similarly, the European Court of Justice said in *Re Electric Refrigerators*:

Material discrimination would consist in treating either similar situations differently or different situations identically.<sup>19</sup>

3.19 In *State of West Bengal v Anwa Ali*, Justice Das said in relation to Article 14 of the Indian Constitution, which guarantees equality before the law and equal protection of the law:

All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment and, therefore, the protecting clause has been construed as a guarantee against discrimination against equals only and not as taking away from the State the power to classify persons for the purpose of legislation.<sup>20</sup>

3.20 His Honour then went on to note that two requirements are necessary to avoid the prohibition against discrimination, namely:

- (1) that the classification must be founded on an intelligible differentia which distinguishes those which are grouped together from others and
- (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them.

3.21 References to the discussion of such principles, both in judgments and in legal commentary, could be multiplied almost indefinitely. The discussion is central to liberal democratic principles of equality under the law, a central tenet of our judicial system.<sup>21</sup> As might be expected, the debate has reached greater levels of sophistication in those countries which have a constitutional guarantee of equality or equal protection. The United States of America has had such a constitutional guarantee since the introduction of the Fourteenth Amendment to the Constitution. That Amendment provides that no State shall deny a person the "equal protection of the laws" without any form of qualification or exception. Nevertheless, judicial consideration has led to a sophisticated jurisprudence based upon this simple (if not simplistic) guarantee. In some degree, the judicial task has been made easier in countries which have adopted constitutional guarantees in more recent times. The Canadian Charter of Rights and Freedoms ("the Charter") is an example, s 15 of which provides as follows:

- 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disabilities.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

3.22 Such a provision establishes constitutional protection against laws which contravene its terms. In that respect, it differs significantly from the ADA which does not impose a limit on the future conduct of the legislature. However, the reference in s 15 to "discrimination" has resulted in a cross-fertilisation between discrimination law, already well developed in Canada, and the constitutional case law which followed the enactment of the predecessor of the Charter, the Canadian Bill of Rights in 1970.<sup>22</sup> Similarly, there is a growing jurisprudence in South Africa following the formal abandonment of apartheid in that country, which was followed by the development of an Interim Constitution and then by the Constitution of the Republic of South Africa, 1996.<sup>23</sup> That Constitution is not dissimilar to the Charter, but adopts a concept of "unfair discrimination".<sup>24</sup>

3.23 In relation to the application of the Charter in circumstances where differential treatment is required, reference should be made to the recent Canadian Supreme Court decision in *Eldridge v British Columbia (Attorney General)*.<sup>25</sup> In that case, the Supreme Court of Canada upheld a complaint brought by three people who were born deaf that the failure to provide hospital services and medical care with interpreters able to communicate in sign language was a contravention of their equal protection rights. It should be noted that, under the Charter, the infringement of a right guaranteed by s 15 is not necessarily an end of the matter: the Government may nevertheless seek to establish that what it has done provides a reasonable limit which can be “demonstrably justified in a free and democratic society”.<sup>26</sup> For present purposes, the case provides a useful illustration of the application of the Charter to the differential circumstances of those without language impairment and those born deaf. The Court, in the judgment of Justice La Forest, commenced with a statement of general principle:

In the case of s 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment – deeply ingrained in our social, political and legal culture – to the equal worth and human dignity of all persons. As McIntyre J remarked in *Andrews*, at p 171, s 15(1) “entails the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration”. Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups “suffering social, political and legal disadvantage in our society” ...<sup>27</sup>

3.24 His Honour analysed the approach to the case before the Court in the following terms. First, he noted that “the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.” The judgment continued:

A person claiming a violation of s 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied “equal protection” or “equal benefit” of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s 15(1) or one analogous thereto. Before concluding that a distinction is discriminatory, some members of this Court have held that it must be shown to be based on an irrelevant personal characteristic ... Under this view, s 15(1) will not be infringed unless the distinguished personal characteristic is irrelevant to the functional values underlying the law, provided that those values are not themselves discriminatory. Others have suggested that relevance is only one factor to be considered in determining whether a distinction based on an enumerated or analogous ground is discriminatory ...

In my view, in the present case the same result is reached regardless of which of these approaches is applied ... There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system. Those values consist of the promotion of health and the prevention and treatment of illness and disease, and the realisation of those values through the vehicle of a publicly funded health care system. There could be no personal characteristic less relevant to these values than an individual’s physical disability.<sup>28</sup>

3.25 The analysis then concluded that “effective communication is an indispensable component of the delivery of medical services”,<sup>29</sup> from which conclusion it followed that the provision of medical services without a means of effective communication by way of sign language involved a failure to provide equal benefits to the deaf.

3.26 A case of physical disability no doubt provides a dramatic example of the circumstances in which differential treatment may be required, but it illustrates an important principle underlying the concept of discrimination.

3.27 The need for differential treatment of those whose circumstances are not identical is undoubtedly sound in jurisprudential terms, but requires care if it is to be expressed in legislative terms with certainty and precision.

## **DIRECT DISCRIMINATION**

3.28 Under the ADA direct discrimination is said to occur where a person:

treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person [not having the relevant characteristic].<sup>30</sup>

3.29 This test has three elements:

- (a) less favourable treatment;
- (b) comparison between the aggrieved person and a real or hypothetical person without the relevant characteristic; and
- (c) circumstances that are the same or not materially different.

3.30 The first question is how the definition operates in relation to the prohibitions which follow it. Thus, in Part 2 of the ADA, dealing with racial discrimination, the primary section in relation to employment provides that it is “unlawful for an employer to discriminate against a person on the ground of race” in various respects concerned with employment.<sup>31</sup> Similar prohibitions exist in relation to other grounds and areas.

## **Problems associated with the definition of direct discrimination**

### ***The need for a comparator***

3.31 The consequence of the above test is that identical treatment is deemed not to result in discrimination. It is also limited to those forms of treatment where the required comparison is made out. Treatment which is detrimental, but not less favourable in a comparative sense, is excluded.

3.32 The interrelationship of the definition of discrimination and the active proscription, albeit in an earlier form of the Act, was discussed in detail by Justice Mahoney in *Boehringer Ingelheim Pty Ltd v Reddrop*.<sup>32</sup> Justice Mahoney set out the issue in the context of marital status discrimination in the following terms:

The formula adopted [in the definition provision] requires that, for discrimination to be found to exist, it must be found that the complainant was treated “less favourably”. These words require that there be two situations or sets of circumstances, the actual and the hypothesised, so that it can be determined by a comparison whether the treatment in the former is “less favourable” than in the latter. In order to provide for such

a comparison, the legislature might have provided simply that there is proscribed discrimination where, on the relevant ground, the complainant is treated less favourably than he would have been treated if that ground had not been present. Such a provision would have required a comparison of treatment, in the actual and the hypothesised case, but it would have been a comparison in which the person discriminated against would be the same in each case (*vis*, the complainant), and the comparison would have been between the two sets of circumstances (*vis*, the circumstances actually existing and such circumstances minus the marital status of the complainant).<sup>33</sup>

3.33 His Honour then noted that the legislature had “adopted the ‘detriment’ concept of discrimination”:

[b]ut the “detriment” concept of discrimination may comprehend different things. It may limit discrimination to treatment involving the imposition of a thing which is of itself detrimental; or it may extend to treatment which is detrimental only in the sense that it is less favourable than the treatment which, in the instant circumstances, is afforded to another person. The legislature ... adopted the latter meaning. But, because it adopted that meaning, it became necessary to spell out the kind of comparison to be made between the two persons. The words “treats him less favourably” required this. And the draftsman did this by the words “than in ... different marital status”. These words, in my opinion, represent merely the draftsman’s necessary drawing out of the meaning of “less favourably”. I do not think that they were intended to limit the circumstances in which less favourable treatment could operate as discrimination.<sup>34</sup>

3.34 The “drawing out” as described by Justice Mahoney does not necessarily lead to clarity. The argument as to the precise meaning of the definition of discrimination arose in that case which involved a choice between two applicants for a position. It might have been thought that the comparative model was of greatest assistance in precisely such a case. The argument raised by the appellant (which was ultimately rejected by Justice Mahoney) was that because the two applicants differed in material respects, the comparison could simply not be made. Where there is no direct comparison available on the evidence, the hypothetical comparison must be made and the test then collapses into that which was identified by Justice Mahoney as applying in the absence of the extended definition, namely, the likely treatment of the applicant with all her characteristics but absent the proscribed ground. Further, where there is no direct comparison, the hypothetical exercise does not readily arise in some cases. For example, a particular organisation may make its services or benefits available only to a particular group, say people with disabilities. If a person with a disability is treated detrimentally because of his or her disability, there may be no discrimination despite an apparent connection between the treatment and the ground. Sometimes it is possible to compare treatment of a person with a particular disability with other people with disabilities, not having that particular disability. However, the question is, in substance, whether the particular disability caused the detrimental treatment.<sup>35</sup>

#### ***The unexpressed declaration***

3.35 The next step in refining the definition is to adopt the principle referred to by Justice Gaudron in *Street v Queensland Bar Association*<sup>36</sup> that “anti-discrimination legislation usually proceeds by reference to an unexpressed declaration that certain characteristics are irrelevant within the areas in which discrimination is proscribed”.

3.36 That analysis is not only accurate, but identifies an underlying flaw in the scheme of the current legislation. That declaration should be made express. In short, unlawful discrimination should be identified as breach of a duty not to treat people on the basis of irrelevant considerations (which in the present context will be defined by the proscribed grounds) where to do so may adversely affect the person concerned.

3.37 This approach is consistent with the established principle that an intention to discriminate is not an essential part of the statutory proscription. As noted by Justices Deane and Gaudron in *Australian Iron and Steel Pty Ltd v Banovic*:

[I]n *Reg v Birmingham City Council; ex parte Equal Opportunities Commission*, Lord Goff stated that “[t]he intention or motive of the defendant to discriminate ... is not a necessary condition to liability”. His Lordship explained that, if it were otherwise, “it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy”.<sup>37</sup>

3.38 It is clear from what follows that their Honours approved the analysis and applied it in relation to both direct and indirect discrimination. They concluded their analysis of the exercise required in relation to determining whether there has been indirect discrimination with the following passage:

That exercise is, in essence, the same as an inquiry whether irrelevant considerations were taken into account or relevant considerations were not taken into account.<sup>38</sup>

In similar vein, the other member of the majority, Justice Dawson, noted that the proper construction of s 24(1) of the ADA is that it not be read “subjectively”.<sup>39</sup>

3.39 Complaint as to the failure to adopt terminology reflective of irrelevant considerations is also to be found in the judgment of Justice Gummow in *I W v City of Perth*.<sup>40</sup> After referring to the passages identified above dealing with discrimination as referable to irrelevant considerations, his Honour stated that: “this passage deals with the species of discrimination which elsewhere have been identified as ‘direct’ and ‘indirect’”.<sup>41</sup>

3.40 The succinct terms by which the fundamental precepts are explained in this passage have been eschewed by legislatures when framing human rights legislation, such as the ADA. Language has been employed which is both complex and obscure and productive of further disputation. The consistency and obvious justification for the criticisms demands a new approach.

### ***Benign discrimination***

3.41 An important aspect of the concept of discrimination is that not every treatment involving a distinction is discrimination. This leads to the question whether that which is sometimes described as “benign discrimination” is rendered unlawful. Benign discrimination is treatment which should not be unlawful where characteristics justify treatment which is different from treatment afforded to the dominant group. For example, appropriate forms of maternity leave must be available to women if they are to enjoy equal levels of job security with men despite their unique characteristic of child bearing. Similarly, ethnic differences may need to be taken into account: thus employment practices may need to cater for the requirements of practising Jews which are different from the norm, so as to allow them to travel home before dark on the day before the Sabbath. Also reflecting cultural differences based on race,

protection may be necessary for property owned by Indigenous people which has a cultural attachment for them and which cannot be treated as an economic resource readily translatable into financial compensation in the way that ordinary title in this country is treated. If differential treatment is required in these cases, it is arguable that there is no discrimination because the characteristics are a reflection of the legitimate circumstances of the individual groups. Alternatively, such laws may be treated as “benign” discrimination, which, although they provide a particular benefit or privilege to a particular group, are legitimate because they have an objective justification based upon a characteristic, albeit a characteristic based on sex or race.

3.42 The Australian Law Reform Commission (“ALRC”) in its report, *The Recognition of Aboriginal Customary Laws*,<sup>42</sup> quotes from an international lawyer, W A McKean, discussing the principle of equality in international law, to the following effect:

The principle does not require absolute equality or identity of treatment but recognises relative equality, ie. different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary, and the onus of showing that particular distinctions are justifiable is on those who make them. Distinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aims sought to be realised and the means employed. These criteria will usually be satisfied if the particular measures can reasonably be interpreted as being in the public interest as a whole and do not arbitrarily single out individuals or groups for invidious treatment.<sup>43</sup>

3.43 The concept of benign discrimination in relation to the RDA was considered by the High Court in *Western Australia v The Commonwealth*:

The Native Title Act was said to discriminate in favour of Aborigines and Torres Strait Islanders and thus to offend the Racial Discrimination Act ... The argument encounters considerable obstacles. In the first place, it is not easy to detect any inconsistency between the Native Title Act and the Racial Discrimination Act. The Native Title Act provides the mechanism for competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of the holders of native title. In regulating those competing rights and obligations, the Native Title Act adopts legal rights and interests of persons holding other forms of title as the benchmarks for the treatment of the holders of native title, but if there were any discrepancy in the operation of the two Acts, the Native Title Act can be regarded either as a special measure under s 8 of the Racial Discrimination Act, or as a law which, although it makes racial distinctions, is not racially discriminatory so as to offend the Racial Discrimination Act or the International Convention on the Elimination of all forms of Discrimination.<sup>44</sup>

3.44 The reference to “special measures” picks up a term which is used both in the RDA and in the CERD. However, special measures may fall into one of two categories. First, they may be seen as temporary measures for the protection of particular groups which will, as the objectives of equality are achieved, be phased out. Alternatively, they may be seen as measures which will continue indefinitely because they are designed to reflect and protect the continuation of fundamental differences among groups and will, therefore, only cease to be needed if their very object fails and



the particular characteristics of one group are lost. As has been noted by the ALRC in relation to the CERD:

But some at least of the special measures which are to be taken under Article 2(2) do not have what could be described as an end result in view, and could properly be maintained indefinitely. For example, special provisions for bilingual education for a minority ethnic group are certainly among the measures envisaged by Article 2(2). Such measures should last as long as the linguistic group survives. In such cases, the termination of the special measure would indicate, not the "achievement" of its objectives, but its failure.<sup>45</sup>

### ***Future discrimination not covered***

3.45 The current definition of direct discrimination does not expressly cover future discrimination. This was also the position in other early anti-discrimination legislation. However, the more recent State legislation namely, the Victorian,<sup>46</sup> ACT<sup>47</sup> and Queensland<sup>48</sup> Acts now expressly cover future discrimination. It is noteworthy that the *Disability Discrimination Act 1992* (Cth) ("DDA")<sup>49</sup> also covers future discrimination in its definition of direct discrimination.

3.46 Cases in NSW and Victoria (under the now repealed 1984 Act) have held that a complaint can only be brought if the particular treatment has occurred even though its occurrence in the future is inevitable.<sup>50</sup> However, in *Waters v Rizkalla*<sup>51</sup> it was stated that although not every decision would fall within the ambit of "treatment", "a decision made by a public corporation which normally has active and effective control over the subject matter of its decision, announced publicly, and made and announced with the intention and will to implement in fact" would constitute relevant "treatment".<sup>52</sup> Commenting on this issue, an academic, R Hunter is of the view that although unresolved there must be an argument on the strength of *Waters v Rizkalla* that future discrimination will be unlawful under the State Acts and the *Sex Discrimination Act 1984* (Cth) ("SDA") where it is not specifically covered.<sup>53</sup>

### ***Characteristics***

3.47 The current definition of direct discrimination in the ADA includes an expanded definition of each ground so as to include treatment, not merely on the ground of race, sex, etc, but also on the ground of a "characteristic which appertains generally" to persons of that sex or race, or a "characteristic which is generally imputed" to such persons. The breadth of this extended definition has given rise to some difficulties in identifying an appropriate dividing line between direct and indirect discrimination. This, of course, is important as indirect discrimination may be justifiable, whereas direct discrimination is not, in the absence of an applicable exception.

3.48 Further, it is not entirely clear what a characteristic may be that "appertains generally" to a particular group. For example, is it correct to say that the ability to bear children is a characteristic appertaining generally to people of the female sex? Whilst the characteristic is unique to that sex, there are many women who, whether for reasons of age or otherwise, are not able to have children. Accordingly, the characteristic may be unique and may apply to many women, but it certainly is not universally applicable. Is a characteristic which may be true of some 90% of females between the ages of 15 and 45 one that appertains generally to females? Alternatively, if a particular woman is within the relevant age group, is one entitled to take the subset of women comprising that age group in considering the pool against which the generality of appertaining must be considered?

3.49 Similar problems arise in relation to characteristics which are “generally imputed” to persons of a particular class. Further, it is not clear why the conduct is unlawful only if the employer has selected a characteristic which is generally imputed to people of that class. For example, it seems most unlikely that any court would find that, within the Australian community, women were generally considered to be less intelligent than men, although such an imputation might have been generally made in other communities or at other times. However, the eccentricity of a particular employer who held such a view should not take the conduct outside the prohibition in the Act.

3.50 Despite these theoretical difficulties, the definition of grounds in a manner which includes characteristics appertaining or imputed to a class of people has not given rise to significant difficulties in the case law. In part, this appears to be because appellate courts have acknowledged that the determination of appropriate characteristics is a matter for the Tribunal empowered to make findings of fact and, unless manifestly unreasonable, will be largely unreviewable. However, it is also fair to say that the courts and tribunals have generally adopted approaches to this question which are both practical and based on common sense, rather than being troubled by concerns about the precise meaning of the terminology adopted. While the Commission sees merit in not varying the terminology unnecessarily, some matters would benefit from clarification.

### **The new approach**

#### ***Substitute comparability test with detriment test***

3.51 As canvassed in case law and academic literature referred to above, there is widespread dissatisfaction with the current definition of discrimination in anti-discrimination statutes. The limitations imposed by the need for a comparator give rise to conceptual difficulties as well as problems associated with proof for complainants. The concept of discrimination, properly understood, must go further than a guarantee of formal equality.

3.52 As stated above, the current statutory definition includes both comparability and detriment. However, the focus is on the comparability test. Given the level of artificiality and resulting complexity that is associated with meeting the comparability test, the Commission prefers to adopt a definition of discrimination which is based on and focuses on a concept of detriment or adverse effects. This will also serve the added purpose of excluding benign discrimination from the ambit of the ADA. This, we note, is the preferred approach of the ALRC in its consideration of the international instruments which underlie the SDA and hence indirectly underlie the State legislation.<sup>54</sup>

3.53 In formulating the actual definition, detriment will be articulated separately, somewhat akin to damage in a negligence action. Adopting a negligence style approach, the three elements required will be that:

- (a) in statutorily prescribed circumstances there is a duty to consider people on their merits;
- (b) it is a breach of that duty to take account of irrelevant considerations; and
- (c) there will be liability when there is detriment or damage which flows from that breach of duty.

The duty to consider people on their merits will be encompassed in the objects clause of the legislation.<sup>55</sup> Elements (b) and (c) will be articulated in the definition of direct discrimination.

3.54 Although there is no express declaration, it would appear that the existing law, as exemplified in cases such as *Director General of Education v Breen*,<sup>56</sup> does in effect take an “irrelevant considerations” approach. Also, it appears that members of the High Court support an “irrelevant considerations” approach as being the proper conceptual approach to anti-discrimination law. This is evidenced by Justice Gaudron’s statements about it in *Street* quoted above, which is shared by other High Court justices.<sup>57</sup> If this view is supported by the High Court, then the Commission is doubly satisfied that the irrelevant considerations approach should be expressly provided for in the legislation.

3.55 The converse of taking irrelevant considerations into account is failing to take relevant differences into account. Thus, an employer who treats all employees alike ignoring the fact that some people have disabilities will be discriminating against them. This issue becomes particularly relevant in relation to grounds that require some form of reasonable accommodation before a “level playing field” can be established.

3.56 Subject to the special circumstances attending disability, family responsibilities, pregnancy and religious discrimination, the general approach to defining discrimination is common to all the identified grounds. Accordingly, there is a question as to whether the ADA would be easier to read and apply if there were a single part defining discrimination and identifying the relevant grounds. This is the approach which has been adopted in recent legislation in most other jurisdictions in Australia.<sup>58</sup> Although it is necessary to consider separately the areas in which the prohibition operates, and the relevant exceptions, on a ground by ground basis, the Commission is satisfied that the adoption of a general definition is feasible and will simplify the ADA.

#### ***The “detriment” approach***

3.57 Currently, less favourable treatment based on a prohibited ground amounts to discrimination, provided it is in a prohibited area and not subject to an exception. Focussing on detriment has the advantage of removing benign discrimination from the ambit of the ADA on the basis that it results in a benefit or privilege which is legitimate rather than a detriment which is illegitimate. However, granting a privilege to a disadvantaged group may result in a detriment to others. This situation is remedied by the special measures provision which is designed to permit measures to alleviate the circumstances of disadvantaged and other groups requiring different treatment. Such special measures should not themselves be treated as discriminatory simply because they are not available to other groups. Currently, the ADA does have a special measures exception in relation to most grounds, albeit in a rather convoluted form. The Commission recognises that the role of a special measures provision is to achieve equality between disadvantaged and non-disadvantaged groups and by doing so it is a means of preventing and eliminating discrimination rather than promoting it. Further discussion on special measures is found in Chapter Six of this Report.

#### ***Future discrimination to be covered***

3.58 In some circumstances, the statutory prohibition on discrimination has been held to preclude a complaint where the relevant conduct has not been completed. Thus, in *Woods v Wollongong City Council*,<sup>59</sup> the Equal Opportunity Tribunal (“EOT”) dismissed a complaint in relation to a development approval granted in relation to a development of a retail complex on the basis that there had been no provision of services to the complainant, in circumstances where the relevant discrimination concerned the absence of wheelchair access to the complex, when built. As a result, the complex was constructed as planned (without wheel chair access) and a further complaint was made, which resulted in a judgment upholding the complaint in significant respects.<sup>60</sup> Consequently, a number of orders including limited

reconstruction work, were made by consent.<sup>61</sup> In practical terms, it would have been preferable if the matter could have been determined prior to construction of the complex. In substance, the problem raised by this case is not so much one flowing from a limited definition of unlawful conduct, but rather from the unavailability of relief except in relation to a complaint of an actual contravention of the Act. The difficulty may be avoided by permitting a complaint in relation to an apprehended contravention of the Act and by permitting the Equal Opportunity Division of the Administrative Decisions Tribunal ("EO Division") to grant relief, as appropriate in particular circumstances.

### ***Characteristics redefined***

3.59 First, it is desirable to add to the current definition the situation of a characteristic which is actually imputed to a class rather than an individual, although such a characteristic is not generally imputed.

3.60 Secondly, it is desirable to specify that a characteristic may appertain generally to a particular class if it appertains to a subset of that class. For example, to make a particular drug available for treatment of a condition which is defined as being "post-menopausal" should be seen as discriminatory. Although only a minority of women may fall within that category, no men do. More significantly, if one takes a section of the public who are over, say, 55 years, a very high percentage of women will have that characteristic but men will not.

3.61 Thirdly, it is appropriate to note that the characteristic need not be unique to one particular group. For example, some physiological conditions such as sickle-cell anaemia, are largely found in people of a particular racial grouping; however, the condition is not unique to that group although it is very rare in other people. It should be sufficient that the characteristic appertains or is imputed generally to a particular group or is disproportionately found within, or imputed to, that group.

3.62 Fourthly, the boundary between direct and indirect discrimination should be clarified to the extent that a characteristic which is sufficient for the purposes of direct discrimination must be one which is inherent in the class concerned, rather than being a particular social construct. This may be identified as an "inherent characteristic". This idea is not readily translated into precise terminology applicable across all grounds. For example, one may distinguish between physical characteristics appertaining to a particular class of people and levels of education which may reflect economic or social disadvantage. On the other hand, when one is dealing with racial characteristics, the concept of race must be broadly defined to include customs and culture associated with a particular racial group. Accordingly, the definition of an inherent characteristic will depend, to some extent, upon the nature of the ground. Although this will give rise to some difficulty of application, the Commission considers that it would be of assistance to define relevant characteristics as characteristics which are inherent in the class identified by the particular ground.

### ***Other miscellaneous amendments***

3.63 The first element of discriminatory conduct is that the discriminator must do something. Failing to do something can also result in detriment. This may be implied within the meaning of the term "an act". However, for the sake of clarity, the Commission favours the DDA approach of stating that an act includes the failure to do an act.

3.64 In order for the act causing the detriment to constitute discriminatory conduct, there must be some link with the person's sex, race etc. In relation to direct discrimination, the link is that one of the reasons for doing, or omitting to do, the act

(but not necessarily the main reason) is the other person's sex or race. This link is currently expressed in s 4A of the ADA and should be maintained.

### **Recommendation 3**

**The concept of direct discrimination should be redefined:**

**to cover conduct causing detriment or disadvantage on the ground of an irrelevant characteristic [Draft Anti-Discrimination Bill 1999: cl 9, 12];**

**to include in conduct, a refusal or omission to act [Draft Anti-Discrimination Bill 1999: cl 11]; and**

**to clarify what attributes may constitute a "characteristic" [Draft Anti-Discrimination Bill 1999: cl 16, 17, 18].**

### **Recommendation 4**

**Relief should be available, in appropriate circumstances, in relation to threats to contravene the ADA.**

**Draft Anti-Discrimination Bill 1999: cl 93, 119(5)**

## **REASONABLE ACCOMMODATION**

3.65 As stated above, the grounds of disability, family responsibilities, pregnancy and religion differ from other grounds in that they identify circumstances which are not necessarily irrelevant in all circumstances. They also identify grounds which are recognised as requiring differential treatment in order to ensure the equal protection of the law and the provision of equal benefits under the law.

3.66 The approach adopted in the present ADA is that the employer should be required to take reasonable steps to accommodate a disability, so long as those steps will not cause undue hardship. It is then necessary to spell out, as far as reasonably practicable, the criteria which are relevant to considering the question of what constitutes reasonable accommodation.<sup>62</sup>

3.67 This approach acknowledges that a disability may in certain circumstances be relevant to, for example, the particular work to be done. In accordance with general principles, a disability should not be taken into account where it is irrelevant: further, the particular effects of a given disability should be considered in context and an applicant for employment should not be rejected on the basis of a stereotyped assumption or prejudice which may not be true in the particular case. However, in common with disability discrimination legislation in most jurisdictions, the ADA goes further and requires that positive steps be taken to accommodate disabilities, even where they may be relevant to job performance. The principle was described in 1978 by the Supreme Court of Washington in *Holland v Boeing Co* in the following terms:

Legislation dealing with equality of sex or race was premised on the belief that there were no inherent differences between the general public and those persons in the suspect class. The guarantee of equal employment opportunities for the physically handicapped is far more complex.

The physically disabled employee is clearly different from the non-handicapped employee by virtue of the disability. But the difference is a disadvantage only when the work environment *fails* to take into account the unique characteristics of the handicapped person... Identical treatment may be a source of discrimination in the case of the handicapped, whereas *different* treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.<sup>63</sup>

3.68 The principle has also been discussed more recently by the Canadian Supreme Court in *Eldridge v British Columbia (Attorney General)* in the following terms:

The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics, which is the central purpose of s 15(1) in relation to disability.<sup>64</sup>

3.69 Some barriers to equal employment opportunity are only indirectly related to the work to be undertaken. Thus, a person who is confined to a wheelchair may be a highly competent typist, but be unable to obtain access to an office because it requires negotiation of steps. On the other hand, the disability may cause a barrier to undertaking the particular work. Thus a person required to sit on a high stool to sort mail or electrical components may not be able to undertake the work if confined to a wheelchair. However, a relatively simple change to the work environment may remove the physical barrier.

3.70 The justification for requiring reasonable accommodation is in part based upon the social benefits from allowing people with a disability to lead as full a life as possible. However, it is also based on recognition that we tend to design buildings and equipment upon particular assumptions. For example, it is universally assumed that access to tall buildings requires a lift or elevator. Sometimes, less thought is given to the positioning of the buttons to allow use of the elevator. Similar assumptions are made about physical capabilities to pick up and carry heavy or awkwardly shaped objects. Again, equipment is sometimes designed upon assumptions about physical

capabilities which are not universally true and which are not reasonably necessary. Although this philosophy is now well understood and widely accepted, the principles are not always carefully reflected in the legislation which results.

3.71 The first factor to be considered is whether, with reasonable accommodation, the employee would be able to carry out essential requirements of the position. Most work involves a set of core responsibilities together with some incidental responsibilities which may arise from time to time. The employer should not be required to change those essential core requirements, although it may be reasonable to expect that incidental or less important requirements can be undertaken in a different way or by other persons. This flexibility is generally available in most situations, without questions being raised. For example, staff employed to use computers and photocopiers may need to move the equipment around from time to time. Although that may be part of their work responsibilities, arrangements are invariably made to assist people who do not have the physical strength to undertake those tasks by themselves.

3.72 The second factor which must be addressed is that the accommodation may involve either a variation in the requirements of the position (other than essential core requirements) or the provision of particular services or facilities, or both. These different forms of accommodation should be identified and the restraint of unjustifiable hardship applied to them.

3.73 The third factor concerns the considerations which may be necessary in identifying what constitutes unjustifiable hardship. These are identified in general terms presently in s 49C of the ADA.<sup>65</sup> The Commission accepts the relevance of those matters, but would add a reference to the particular circumstances of the person concerned, including his or her training, qualifications and experience.

3.74 Finally, where it is necessary to accommodate a particular disability, the question of undue hardship may in part be avoided by some variation in the terms and conditions of employment. For example, where particular steps are taken to accommodate the employee, but on a basis which differentiates him or her from other employees in a manner which might be considered detrimental, such variations should be consensual. This principle underlies the general concept of "special measures" which are identified as appropriate exceptions to all grounds of discrimination.<sup>66</sup> Where differential treatment is justified because it is said to be in the interests of the individual concerned, his or her consent should generally be required to the extent that the differential treatment may reasonably be seen as detrimental.

3.75 Other issues concerning disability discrimination in employment and other areas of operation which are relevant to this discussion, but not directly relating to conceptual issues, are dealt with in Chapter Five. For present purposes, it would suffice to note that, as in employment, the obligation to accommodate a disability is implicit in other areas but should be made express.

#### **Relevance to other grounds**

3.76 Once one accepts that disability discrimination requires more than simply identifying the ground as an irrelevant consideration, it is necessary to consider whether other grounds, currently contained within the ADA or recommended for inclusion, give rise to similar considerations. Care must be taken in undertaking this task, so that factors which are truly irrelevant are not given a status which is not justified.

3.77 In relation to disability, the analysis was undertaken on the basis, not that all persons are identical in their physical and intellectual features, but rather that some people depart significantly from the norm which is reflected in the concept of normal and orderly functioning of body and mind. Employers are expected to structure their employment practices to take account of normal bodily needs, for example, by allowing for sleep and sustenance. However, it is common place in employment to specify hours of work and attendance at places of work which interfere with other physical or social activities, including child care arrangements, pregnancy, childbirth and breastfeeding. There is a legitimate debate as to whether employment practices should cater for these eventualities. Whilst such activities tend to be temporary or episodic, it may be argued that they are normal and commonplace, especially in the lives of women.

3.78 The contrary argument is based on pragmatism. It asserts that, whatever might be true in an ideal world, employment practices in our society do not generally accommodate these situations and that to require such accommodation would be to place the law well ahead of social convention and would cause a significant degree of social and industrial disruption. However, pragmatism can be double-edged. One may point to the significant changes in workplace practices which have been made to accommodate the physical needs of smokers, who are now precluded for health reasons from smoking in many places of employment.

3.79 There is no doubt that the law is developing over time. Carer responsibilities are now being accommodated by industrial laws and the failure to accommodate pregnancy and breastfeeding has been addressed from time to time as a form of sex discrimination. The Commission believes that social attitudes will continue to change in favour of requiring accommodation of such characteristics and supports that process. However, it believes that there are dangers in pressing the legal obligations of employers (and those responsible in other areas of public life) too far beyond the limits of what is generally accepted as necessary responsible conduct. Disability is not the only ground to which the foregoing principles apply: family and carer responsibilities provide a further example. Thus, the need to adjust working hours to allow a working parent to collect young children from school or child care may impose a barrier to the performance of a particular job. This should not be prohibited as conduct which is unacceptable in all circumstances. Rather, a similar question will arise as in the case of workers with disabilities, namely whether the manner in which the work is organised is unavoidable or whether it would be reasonably practicable to vary the working hours to accommodate the worker with family responsibilities.

3.80 The real difficulty in this area is to identify the extent of the prohibition. If an employer treats a person detrimentally on the ground of family responsibilities, for example, by refusing to interview for a position where the applicant has dependent children, the scope of the prohibition will be relatively limited. Further, there may need to be an exception for a genuine requirement of the position. For example, if an applicant says that he or she is not available between the hours of 6.00pm and 9.00am, because of the need to care for young children, that person is simply ineligible for a job (for example) at a bakery which, by law, must operate only during those hours, or for milk deliveries which are required early in the morning. However, these are extreme cases. In other situations, flexibility may be available. A principle of equality of treatment alone will not impose an obligation on an employer to improve the flexibility of, or otherwise vary the conditions attaching to, a particular position. Accordingly, this ground will have little effect in practice if it does not include an obligation to make reasonable accommodation, subject to the defence of undue hardship. This is because actual or potential availability for work at particular hours may be a relevant consideration in relation to some employment. Rather than disregard this fact, it is necessary to acknowledge its force and impose reasonable requirements to achieve the underlying social policy.



3.81 One argument against the “reasonable accommodation” approach is that it imposes a burden on employers, and in particular on small business. There are two answers to this objection: first, it is necessary to assess the strength of the objection in general terms. Secondly, if it is seen to have merit, then consideration must be given to limiting unreasonable effects, preferably with a carefully formulated exception.

3.82 In the first place, the objection bears the hallmarks of the objections historically raised in relation to regulation of anti-social conduct in many areas. The suggestion of unacceptable costs if women were provided with equal opportunities, due to the need to make additional toilet facilities available, and the fears accompanying the requirement to accommodate disabilities, provide examples. In those cases, the overriding social policy contained in anti-discrimination principles was given effect and the adverse economic consequences proved to be exaggerated. In relation to workers with family responsibilities, it may be conceded that the proportion of the work force affected by family responsibilities will greatly exceed the proportion subject to significant disabilities, but on the other hand, will be less than the numbers affected by the prohibition on sex discrimination. More importantly, the appropriate balance is achieved through the “undue hardship” defence which provides a degree of flexibility in the application of this principle.

3.83 The second aspect of the objection really focuses upon the uncertainty which is said to flow from the “undue hardship” defence. However, this uncertainty has not proved a significant difficulty in relation to the area of disability discrimination. In practice, it seems that commonsense has prevailed and that relatively few cases have been brought in the marginal areas where outcomes will be difficult to predict.

3.84 To the extent that new situations give rise to novel complaints, the usual course is likely to follow: namely that the Anti-Discrimination Board (“ADB”) and the EO Division will develop principles and guidelines which will give rise to increasing levels of understanding and certainty. Similar considerations will also apply in relation to pregnancy and breastfeeding.

3.85 The Commission is conscious that these grounds give rise to controversy and debate which can easily arouse legitimate sensitivities. Thus, there is resistance, understandably, to identification of pregnant women as people who should be treated as if they had a disability. That concern is not so much an attempt to deny the physical circumstances of pregnancy, but rather, reflects a fear that such an analysis will reinforce stereotypes that were all too common in the past and which linger in our society. On the other hand, if anti-discrimination laws are to be appropriately moulded and accepted by the community, it is essential that where, in the particular circumstances, a physical condition is relevant that fact be identified and, so far as is appropriate, the difference be accepted as relevant.

#### **Recommendation 5**

**The ADA should impose an obligation to provide reasonable accommodation in relation to the grounds of disability, pregnancy, breastfeeding and carer responsibilities (only in employment) subject to a defence of unjustifiable hardship.**

## INDIRECT DISCRIMINATION

3.86 It has long been recognised that differential treatment which is specifically related to a prohibited ground, such as race or sex, is generally unacceptable. However, disadvantage can also result from the application of tests which, though facially neutral, have an unreasonable and disproportionate impact on a particular group of people. The resulting discrimination is commonly called indirect or disparate impact discrimination.

3.87 The origin of the notion of indirect discrimination dates back to the US case of *Griggs v Duke Power Company*.<sup>67</sup> In that case, the Supreme Court held that an employer's requirement that job applicants hold a high school diploma or pass an intelligence test was unlawfully discriminatory because it operated to exclude black applicants at a higher rate than whites and was not substantially related to the applicant's ability to perform the job. Formulating the concept of indirect discrimination Chief Justice Burger said:

What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.<sup>68</sup>

3.88 This formulation inaugurated a new era in discrimination law in the United States,<sup>69</sup> which was to have a rippling effect on the British,<sup>70</sup> Canadian<sup>71</sup> and Australian<sup>72</sup> systems some years later. The international conventions have also recognised that a preference or distinction based on race or sex may have either "the purpose or effect" of nullifying or impairing the exercise of equal rights.

### The definition of indirect discrimination in the ADA

3.89 In NSW, indirect discrimination is defined in relation to each prohibited ground. In every case the focus is on the requirement or condition and its disproportionate impact where the discriminator:

requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons [not of that race], ... comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.<sup>73</sup>

3.90 There are four elements that must be established:

the discriminator requires the aggrieved person to comply with a requirement or condition;

a substantially higher proportion of persons of a different status comply or are able to comply;

the requirement is not reasonable having regard to the circumstances; and

the aggrieved person does not, or is not able to, comply.

## Problems associated with the current definition of indirect discrimination

### *The proportionality test*

3.91 Many criticisms have been mounted against the current definition of indirect discrimination. It has been said in numerous commentaries on the ADA and other legislation in similar form that the test, which requires one to identify whether “a substantially higher proportion” of the group into which the aggrieved person falls are unable to comply with the requirement, as compared with a group of persons not having the particular characteristic, gives rise to a number of problems. One major difficulty with this approach is to identify the requisite ‘base pool’ from which the necessary proportions must be drawn. This issue was the subject of detailed consideration by the EOT, the Court of Appeal and ultimately the High Court in the *Australian Iron and Steel case* (“*AI&S case*”).<sup>74</sup> The problems which can arise may be illustrated by the facts of that case. Australian Iron and Steel (“*AI&S*”) sought to retrench workers on the basis of the “last on, first off” principle. *AI&S* had, as the EOT found, discriminated against women in its employment practices over many years. However, those practices had improved significantly in the years leading up to the retrenchments. As a result, the correct approach was a matter of critical significance.

3.92 There were four approaches to the task open, which may best be explained by reference to the following hypothetical figures, based on the *AI&S Case*.

	Initial work force	Retrenched	Remaining work force
<b>Women</b>	500	50	450
<b>Men</b>	4500	450	4050
<b>Total</b>	5000	500	4500

3.93 Each approach is concerned with the groups of women and men who survive retrenchments. The first method compares the surviving women, as a proportion of all women in the work force prior to retrenchments, with the surviving men, as a proportion of all men in the work force prior to retrenchments. Before retrenchments women constituted 10% of the work force; they also constituted 10% of those retrenched and still constituted 10% of the work force after retrenchments had been completed. The resultant proportions were identical and there was, therefore, no substantial disproportion between the effects on men and women.

3.94 However, there are three other ways of undertaking the exercise which may lead to a different result. The second method takes the number of men and women in the work force, before and after retrenchments, as a proportion of the total original work force. As appears from the table, the total number of men at all stages exceeded the total number of women in the work force and the proportion of men who overcame the obstacle of retrenchment is 81% (4050/5000), whereas the proportion of women who survived is 9% (450/5000) (10% of the work force was lost). Although this approach found favour with Chief Justice Street in the Court of Appeal in the *AI&S case*, and with the majority in the Federal Court in *Secretary Department of Foreign Affairs v Styles*,<sup>75</sup> it was rejected by all members of the High Court in *Australian Iron and Steel Pty Ltd v Banovic*.<sup>76</sup> Justice Dawson noted in *Banovic*:

The problem with that form of comparison is that the result may merely be a reflection of the fact that the work force was sexually imbalanced. Indeed, where the sexes are not evenly balanced in a work force, the result of the “last on, first off” principle will almost always result in the

retrenchment of a higher proportion of one sex ... Obviously, the reach of the subsection was intended to be far less ambitious and to extend only to discriminatory requirements or conditions imposed upon a work force, whether the sexes in the work force happen to be unequal or not. The subsection was not intended to embrace requirements which are truly non-discriminatory and it must, therefore, require something more than a direct comparison between the number of men who comply and the number of women who comply with the requirement imposed by an employer.<sup>77</sup>

3.95 The third approach is to take the proportions of men and women, not by reference to the work force at the company, to which the condition is directed, but rather by reference to the population as a whole. This approach was adopted by a majority of the Court of Appeal in the *AI&S* case, but rejected by the majority in the Federal Court in *Styles*. Because the proportions of men and women in the population at large are roughly equal, the disproportion of men and women who can comply with the condition in the table set out above will remain of the same order, namely 9:1. The majority in *Styles* rejected this approach on the basis that the tiny proportions resulting were not substantially different.<sup>78</sup> This appears to be wrong. The proportionate difference between 9 and 81 is the same as that between 0.09 and 0.81. A more serious objection is that, in common with the second method, this approach will give rise to disproportionate results whenever the work force is sexually imbalanced.

3.96 The fourth approach, which was accepted by the EOT in *AI&S* and found not to involve any legal error by the majority in the High Court, rested on the principle enunciated by Justices Deane and Gaudron, and that:

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.<sup>79</sup>

3.97 This approach was also accepted as appropriate by Justice Dawson. The reason for adopting this approach is succinctly stated by Justices Deane and Gaudron as follows:

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.<sup>80</sup>

3.98 If one had simply looked at the cut-off date for employment, after which all men and women employed were retrenched, and took those employed before that date as a proportion of the total work force, one had a built-in discriminatory factor, namely that women suffered from a delay in hiring which adversely affected their employment dates. Thus, instead of taking the whole work force, the EOT looked at a base pool, being all persons employed after the date of application of the last woman retrenched. Male applicants obtained jobs at the steel works almost immediately, whereas women suffered delays of about two years. If the last woman to be retrenched was employed on 1 January 1981, her date of application would have been 1 January 1979. Of the women who were employed after that date, all would have been retrenched. However, of the men employed after that earlier date, only those were retrenched who were employed after 1 January 1981. Thus 50% of the men may have been able to comply with the requisite condition, whereas none of the women could.

3.99 The question of establishing the base pool is a factual issue. Nevertheless, it can give rise to serious complexities which may in some cases be avoidable. The real issue is whether the consequences or effects of particular conduct impact disproportionately on one group rather than another, always accepting that, where particular grounds, such as race or marital status, involve numerous different groupings, the exercise tends to become even more complex. As a result of concern with respect to this exercise, some jurisdictions have now abandoned the terminology of “substantially higher proportion” of one group than another. Thus, the SDA now simply refers to the imposition of a condition, requirement or practice “that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.”<sup>81</sup> One benefit of this approach is to avoid apparently different criteria being applied in relation to direct and indirect discrimination.<sup>82</sup> Also, it would not require statistical analysis to show a disproportionate impact where such analysis is clearly unnecessary.

3.100 On the other hand, the proof that the act is discriminatory does not lie in the reason for doing the act, but in the way the detriment impacts disproportionately on one group compared with another. Using the *A/S* case as an example, the act was the imposition of the “last on, first off” policy. The detriment was that some people lost their jobs. However, in order for the act to constitute discrimination there must be a link between the person’s sex and the detriment – that link requires that a disproportionate percentage of women compared with men suffered detriment as a result of the act. If the only test is detriment or disadvantage, then any act which detrimentally affects men and women equally (or other groups based on the prohibited grounds) would come within the definition. Thus, although establishing disproportionate impact can be a complex process, it may be necessary to establish the link between the detriment and the ground or characteristic.

#### ***Discriminatory effects – reasonableness***

3.101 As already noted, not all conduct which has discriminatory effects should necessarily be unlawful. Thus, just as it is permissible to take account of sex, for example, if there is some inherent characteristic of one sex which is directly relevant to the question in issue, so it is acceptable to take into account factors which have no direct link with sex, although they may have a discriminatory effect when applied. One example, which is to be found in the case law, is the imposition of requirements in relation to appropriate head-wear. Such requirements may impact adversely on groups, such as Sikhs, who are required by their culture and customs to wear particular head-wear, such as the turban. If the requirement is imposed for significant safety reasons, it may be justifiable; if it is imposed purely for matters of appearance, the discriminatory effect may not be outweighed by the intended purpose and the result will be unacceptable.

3.102 The ADA presently requires that the imposition of the requirement be “not reasonable having regard to the circumstances of the case”. The United Kingdom legislation, from which ours was derived, involved a test of whether the conduct was “justifiable” rather than “not reasonable”. That is a somewhat higher test than the test commonly used in Australian legislation. The test of “reasonableness” has been preserved in recent amendments to the SDA, but the burden of proving that the practice is reasonable in the circumstances is now imposed on the respondent.<sup>83</sup> Further, the SDA now sets out the factors which are to be taken into account in determining whether a requirement is reasonable.<sup>84</sup>

3.103 In principle, the placing of a burden of proof on the respondent is appropriate. If a complainant establishes, as a matter of fact, that the condition in question has a discriminatory impact, it is the respondent who is best placed to justify the conduct. For example, if it is an employment practice, it will be the employer who will be able to

explain the reason for imposing the particular requirement and demonstrate its essential connection with the work required to be done. Although, under the ADA in its present form, the onus is placed on the complainant to demonstrate that the requirement was “not reasonable”, as a matter of practice the burden of demonstrating reasonableness will usually fall upon the respondent. In the face of a proven discriminatory effect and an absence of any ready explanation for the imposition of the practice, in circumstances where other practices with less discriminatory effects appear to be equally available, the EO Division is likely to find that the requirement adopted was unreasonable. The EO Division, in reaching its conclusion, would be entitled to take into account the fact that the respondent could have taken steps to call evidence to justify the practice. Accordingly, a change in the onus of proof is likely to reflect the realities of the present situation and is, on its face, fair.<sup>85</sup>

3.104 There is also merit in spelling out the factors which may be relevant to the question of reasonableness or justification. In the SDA, the factors are set out in the following terms:

The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.<sup>86</sup>

3.105 The terminology of the section is curious: first, it identifies the discriminatory effect, referred to as “the disadvantage”, and requires assessment of its nature and extent. Next, it requires consideration of the feasibility of overcoming or mitigating the effect and finally, it asks whether the discriminatory effect is “proportionate to” the result sought by the person imposing the condition, who may be an employer.

3.106 A more logical approach would be to identify the relationship of the requirement to the legitimate purposes of the employer; determine whether the disadvantage was disproportionate to the benefit accruing to the employer; ask whether the disadvantage could be mitigated without undue hardship to the employer and, if there are steps which might be taken to mitigate the disadvantage, determine if those steps have been or will be taken. As noted above, the assessment of the discriminatory impact will already have been undertaken. The other matters fall within the field of expertise of the employer. Drafting aside, the approach of the SDA, that it is desirable to spell out the factors which are relevant to considering whether a discriminatory effect is unlawful or not, is sound. It also follows from an identification of those factors that it is reasonable to expect the respondent to establish them.

3.107 Two other questions remain. First, there are cases where the discriminatory effect may be deliberately imposed and the use of a neutral requirement is merely a cloak for achieving that end. In these circumstances, the discrimination is deliberate and should not be justifiable. Secondly, it is necessary to resolve the difference in the standard between the current Australian test and the English test. On one view, the English test is more appropriate in that it looks for “justification” of the discriminatory impact, rather than asking whether the discriminatory impact is “not reasonable”. In *Griggs v Duke Power Company*<sup>87</sup> the US Supreme Court said, in relation to an

employment case, “the touchstone is business necessity”. In the Commission’s view, the question is better resolved by breaking the elements down into their parts. Thus, the facially neutral ground relied upon by the employer should have a sufficient justification in terms of its own legitimate purpose. The suggested link is that it be adapted to a legitimate end, that the unintended detriment is not disproportionate to the benefit and that there was no other less discriminatory option available (absent undue hardship). The need to avoid unnecessary invasion of human rights and fundamental freedoms should not be weakened by a defence which is too readily satisfied. These variations in terminology are unlikely to have great impact in terms of consequences, but the Commission prefers a test of what is “reasonably necessary” in establishing the link between the condition and the legitimate business purpose. The result will obviously be influenced by a consideration of whether there are less discriminatory options and the weighing of the resulting benefits to the employer against the discriminatory impact on the complainant and his or her colleagues.

## **Recommendation 6**

**The concept of indirect discrimination should be redefined:**

**to be consistent with the new definition of “direct discrimination”;**

**to identify how the element of “reasonableness” is to be addressed; and**

**to specify that the burden of establishing reasonableness rests with the respondent.**

**Draft Anti-Discrimination Bill 1999: cl 10**

## **OBJECTIVES OF THE LEGISLATION**

3.108 A final issue which needs to be considered in relation to the concept of discrimination is whether the legislation should include a statement of the objects and principles of the ADA. The current Preamble to the ADA describes it 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”. This statement is limited in scope and, therefore, provides little more than a bald statement of the philosophy behind the ADA. Furthermore, while the existing Preamble refers explicitly to the aim of the ADA to promote “equality of opportunity”, it does nothing to explain the content of this right to equality. As discussed earlier in this chapter, there are numerous ways in which a right to “equality” may be framed and many complex issues which surround its formulation.<sup>88</sup> In view of the Commission’s recommendation to alter the definition of discrimination to promote substantive rather than merely “formal” equality,<sup>89</sup> it is desirable that this principle be included in the Preamble to the legislation.

3.109 In light of the complexity of the ADA, and the fact that the Commission is proposing a number of significant changes to the existing legislation, it is desirable that the ADA include a preliminary provision which provides an executive summary of the ADA and the rights and obligations which it creates. This may be done by including a comprehensive statement of objects or general principles at the beginning of the ADA, in addition to an expansion of the existing Preamble to incorporate specifically principles from international human rights law into the legislation.

3.110 A clear statement of the objects of the legislation would serve three important purposes. First, it would provide an important educational tool.<sup>90</sup> Given the highly complex nature of both Federal and State equal opportunity laws, a clear and succinct statement of the various rights and obligations which exist under the ADA would be extremely useful, particularly considering the importance of the ADA for various disadvantaged groups. It would also be useful as an aid to employers (and other bodies and persons covered by the ADA) in formulating appropriate Guidelines and Codes of Practice.

3.111 Secondly, as it is unlikely that a Federal or State *Bill of Rights* will eventuate within the next few years,<sup>91</sup> a statement of objects would be a significant opportunity for the State legislature to recognise a number of important human rights which have been recognised at the international level. The precedent for the inclusion of such a statement of rights within legislation itself has already been set in a number of other NSW Acts.<sup>92</sup> Finally, a clear statement of objects within the ADA may be used by the EO Division and appellate courts as an aid to interpretation of unclear or ambiguous provisions of the legislation. Increasingly, various members of the High Court of Australia have directed that legislation should not be interpreted narrowly but in keeping with the statutory objects of the legislation. For example, Chief Justice Mason and Justice Gaudron said in *Waters*:

[T]he principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account and give effect to the statutory purpose.<sup>93</sup>

This may serve to reduce the number of decisions which are not in keeping with the remedial spirit of the legislation.<sup>94</sup>

3.112 The human rights legislation of a number of other jurisdictions throughout Australia, currently include provisions which outline the objectives and underlying principles of the legislation.<sup>95</sup> Usually such principles are incorporated either in a Preamble or in an "objects" clause. The SDA, however, includes both a Preamble and a statement of objects.<sup>96</sup> Matters which are commonly covered in "objects" clauses are: general statements of the purpose of the legislation, including the elimination of discrimination and the promotion of equal opportunity, and an executive summary of the various provisions of the Act, including the grounds and areas covered. In addition, a number also include a brief statement of the principles contained in international human rights law and list the various treaties and conventions under which these arise.<sup>97</sup> As discussed in Chapter Two of this Report, the development of human rights legislation at the domestic level has been preceded by the emergence of a number of human rights instruments at the international level.<sup>98</sup> Many of these instruments have formed the Constitutional basis for the enactment of the Federal human rights legislation and are thus important to place the ADA in its appropriate context. The Preamble of the *Anti-Discrimination Act 1991* (Qld) ("ADA (Qld)") specifically lists each of the international human rights treaties ratified by the Commonwealth government and states that it is the intention of the State legislature to support and extend Commonwealth activity in this area.

3.113 The Commission is of the view that the ADA should include both a Preamble and a statement of objects. The Preamble could be drafted similarly to the Preamble of the ADA (Qld), including a statement of the principles of equal opportunity and the relevant international instruments ratified by the Commonwealth government. The objects clause could be drafted along the lines of those contained in the SDA and the *Equal Opportunity Act 1995* (Vic), which provide a brief summary of the provisions of the Act and the purposes sought to be achieved. Every person's right to be



considered on their merits without having any irrelevant considerations taken into account is an important object which the Commission recommends for inclusion in the objects clause.

#### **Recommendation 7**

**The ADA should include a Preamble which refers to a right to substantive, as distinct from formal, equality. It should identify the relevant international human rights instruments adopted by Australia and provide a brief statement of the principles contained therein.**

**Draft Anti-Discrimination Bill 1999: Preamble**

#### **Recommendation 8**

**The ADA should include a statement of objects. The statement should provide that the objects of the Act are:**

**to promote recognition of equality of opportunity for all people;**

**to eliminate discrimination by recognising that irrelevant characteristics not be taken into account;**

**to implement strategies aimed at achieving substantive equality in public life, including provisions requiring the “reasonable accommodation” of certain attributes and permitting special measures to promote the opportunities of disadvantaged groups;**

**to provide a mechanism for conciliation of disputes involving discrimination;**

**to provide redress for people who have been unlawfully discriminated against; and**

**to educate the community about the prohibitions against unlawful discrimination and to promote the social and economic benefits of applying non-discriminatory principles and practices.**

**Draft Anti-Discrimination Bill 1999: cl 3, 128, 129**

## **Footnotes**

1. UDHR Art 1.
2. ICCPR Art 26: the ICCPR is included as a schedule to the HREOC Act Sch 2.
3. UDHR Art 2; ICCPR Art 2(1) and Art 26.
4. This Convention may be found in a schedule to the RDA.

5. This Convention may be found in a schedule to the SDA.
6. For discussion of CEDAW and its areas of operation see: Australian Law Reform Commission, *Equality Before the Law* (Report 69, 1994) Pt 2.
7. See para 3.28-3.107 below for further discussion.
8. The disparities were noted by McHugh J in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 402.
9. R Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1992) at 12. See also *Street v Queensland Bar Association* (1989) 168 CLR 461 at 569, per Gaudron J; at 582-583, per McHugh J.
10. *Street v Queensland Bar Association* (1989) 168 CLR 461 at 571.
11. *Canada (Attorney General) v Ward* (1993) 103 DLR (4<sup>th</sup>) 1 at 32 (La Forest J, quoting a decision of the United States Board of Immigration Appeals: *In the matter of Acosta*).
12. Australian Law Reform Commission, *Equality Before the Law* (Report 69, 1994) Pt 2 ch 16 where this was the minority view.
13. See, for example, C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge (Mass), 1987), ch 3; J Morgan, "Equality Rights in the Australian Context: A Feminist Assessment" in P Alston (ed), *Towards an Australian Bill of Rights* (HREOC and CIPL, 1994); Australian Law Reform Commission, *Equality Before the Law* (Report 69, 1994) Pt 2 ch 3; S Day and G Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Status of Women Canada, 1998) especially ch 2.
14. See below at para 3.44.
15. See Chapter 6 at para 6.97.
16. See para 3.65.
17. *Street v Queensland Bar Association* (1989) 168 CLR 461 at 571.
18. (1966) 6 ICJR at 305-306.
19. (1963) 2 CM LR 289 at 312.
20. (1952) 39 IAR SC 75 at 93.
21. *Re East; ex parte Quoc Phu Nguyen* [1998] HCA 73 at para 21.
22. The process is usefully described in a seminal judgment of the Supreme Court of Canada, *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.
23. For a recent illustration of the developing jurisprudence in South Africa, see *President of South Africa v Hugo* [case CCT11/96, 18 April 1997], a decision of the Constitutional Court of South Africa.
24. Section 8(2).
25. [1997] 3 SCR 624.

26. See s 1.
27. [1997] 3 SCR 624 at para 54.
28. [1997] 3 SCR 624 at para 58.
29. [1997] 3 SCR 624 at para 72.
30. Taken from ADA s 7(1)(a), relating to race discrimination.
31. ADA s 8(1).
32. [1984] 2 NSWLR 13 at 18-22.
33. *Boehringer* at 19 (discussing the analogous sections dealing with marital status discrimination: ADA s 39).
34. *Boehringer* at 20.
35. In response to the DP30, the submission of the Disability Council of NSW specifically argued that: “[a] different approach to the comparability test is needed ... People with disabilities may adopt different methods of doing things that cannot be compared with the needs or methods of people who do not have a disability”. See Disability Council of NSW, *Submission* at 1. See also DP 30.
36. (1989) 168 CLR 461 at 571.
37. (1989) 168 CLR 165 at 176.
38. *Banovic* at 179.
39. *Banovic* at 184. See also *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 360, 401 and 409, (per Mason CJ and Gaudron J quoting from *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478-479).
40. (1997) 71 ALJR 943.
41. *I W v City of Perth* at 962.
42. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 109.
43. W A McKean, *Equality and Discrimination Under International Law* (Clarendon Press, Oxford, 1983) at 286-7. See also A Bayefsky, “The Principle of Equality or Non-Discrimination in International Law” (1990) 11 *Human Rights Law Journal* 1-34; H Charlesworth, “Equality and Non-Discrimination under the Optional Protocol” in *Internationalising Human Rights: Australia’s Accession to the First Optional Protocol* (Centre for Comparative Constitutional Studies, 1992); S Pritchard, “The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice” (1995) 2 *Australian Journal of Human Rights* 3.
44. (1995) 183 CLR 373 at 483.
45. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) Vol 1 at 112.

46. EOA (Vic) s 8.
47. DA (ACT) s 8.
48. ADA (Qld) s 10.
49. DDA s 5.
50. *Woods v Wollongong City Council* [1986] EOC 92-174; *Ellis v Metropolitan Transit Authority* [1987] EOC 92-207.
51. [1991] VR 12.
52. *Waters v Rizkalla* at 16.
53. R Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1992) at 45.
54. Australian Law Reform Commission, *Equality Before the Law* (Report 69, 1994).
55. See discussion at 3.113 below.
56. [1984] EOC 92-015 (NSW Court of Appeal); [1982] 2 IR 93.
57. See Justice Kirby's judgment in *Christie v Qantas Airways Ltd* [1995] EOC 92-705; 60 IR 17.
58. EOA (Vic) Part 2; ADA (Qld) Pt 2 and 3; DA (ACT) Pt 2; ADA (NT) Pt 3 Div 1.
59. (1986) EOC 92-174.
60. See *Woods v Wollongong City Council* (1993) EOC 92-486.
61. See *Woods v Wollongong City Council (No 2)* (1993) EOC 92-511.
62. The submission of the Disability Council of NSW specifically argued that a positive obligation of "reasonable accommodation" should be introduced into the ADA and that the Act should contain guidance as to the meaning of "reasonable accommodation" and "undue hardship" within the context of the Act: Disability Council of NSW, *Submission* at 2.
63. 583 P 2d 621 (1978) at 623.
64. [1997] 3 SCR 624 at para 65.
65. Relevant factors currently include: the nature of the benefit or detriment likely to be caused to any person concerned; the effect of the disability; and the financial circumstances of, and estimated amount of expenditure to be made by, the person claiming unjustifiable hardship.
66. For a further discussion of the special measures provision recommended by the Commission, and the operation of this provision with the proposed definition of discrimination, see Chapter 6 at para 6.97.
67. 401 US 424 (1971).
68. *Griggs v Duke Power Co* at 431.

69. The development of the disparate impact doctrine after *Griggs* expanded the scope of actionable discrimination under Title VII and made the defence of discrimination claims difficult. During the 1970s and early 1980s critics claimed that it was “leading employers to abandon objective selection procedures in favour of preferential hiring or quotas”. Later, Supreme Court decisions held that defendants need only prove a business justification, rather than business necessity. Criticisms levelled against these decisions resulted in the passage of the *Civil Rights Act 1991* (US). The important feature of this Act is that for the first time the disparate impact theory received legislative recognition by a declaration that facially neutral employment policies that have a disparate impact on protected groups are discriminatory and unlawful as originally set forth in *Griggs v Duke Power Co.*
70. The concept of indirect discrimination received codification in the *Sex Discrimination Act 1975* (UK) and the *Race Relations Act 1976* (UK). Although the definitions in both Acts are largely based on the Griggs formulation, they are not identical, particularly in relation to the employer’s defence. Whereas “business necessity” is the US defence, “justifiability irrespective of” the particular ground is the defence in Britain. This is probably wider than the US defence because something not strictly necessary may still be justifiable. The requirement of detriment because of the inability to comply was inserted to ensure that the legislation will only be invoked by genuine victims.
71. Although the Canadian human rights legislation does not specifically define the term “discrimination”, the Supreme Court of Canada delivered a landmark decision on the definition of discrimination in *O’Malley v Simpson Sears Ltd* (1985) 2 SCR 536. The court unanimously sanctioned the effects concept of discrimination and defined indirect discrimination as arising “where an employer for genuine business reasons adopts a rule or standard which on its face neutral and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.” The definition appears to go beyond *Griggs* in that such discrimination could occur where the rule or standard complained of had been adopted for “genuine business reasons”.
72. The SDA incorporated a definition of indirect discrimination from its commencement in 1984 as did the DDA in 1992 while the RDA was amended in 1990 to include a definition of indirect discrimination on the ground of race. The SDA’s definition is substantially echoed in the other federal and state legislation.
73. Taken from ADA s 7(1)(c), relating to race discrimination.
74. *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; *Australian Iron and Steel Pty Ltd v Najdovska* (1988) 12 NSWLR 587; *Najdovska v Australian Iron and Steel Pty Ltd* [1985] EOC 92-140.
75. (1989) 88 ALR 621.
76. (1989) 168 CLR 165.
77. *Banovic* at 185-16.
78. *Styles* at 631, per Bowen CJ and Gummow J.
79. *Banovic* at 180.

80. *Banovic* at 179.
81. SDA s 5(2). This approach is also taken in the DA (ACT) s 8(1)(b).
82. The submissions of the Catholic Education Commission NSW and the Gay and Lesbian Rights Lobby also argued that the definition of indirect discrimination should focus on the detrimental effect rather than an inability to comply: Catholic Education Commission NSW, *Submission* at 16; Gay and Lesbian Rights Lobby, *Submission* at 2. A number of other submissions to the Commission also argued that the current definition of indirect discrimination is overly confusing and requires legislative clarification: Law Society of NSW, *Submission* at 4; National Pay Equity Coalition, *Submission* at 5; D Robertson, *Submission* at 9.
83. SDA s 7C.
84. SDA s 7B(2).
85. Under the ADA (Qld) s 205, the burden of proof of “reasonableness” in indirect discrimination is placed on the respondent. A number of submissions to the Commission in response to DP 30 also argued that, once indirect discrimination has been established, the burden of proof should then rest on the respondent to show that the requirement is “reasonable” in the circumstances: Anti-Discrimination Board, *Submission 1* at 45; M Atallah-Clugston, *Submission* at 1; Auckland Lesbian and Gay Lawyers, *Submission* at 1; Commissioner for Equal Opportunity (SA), *Submission* at 9; Disability Council of NSW, *Submission* at 1; Gay and Lesbian Rights Lobby, *Submission* at 15; Legal Aid Commission of NSW, *Submission* at 1; NSW Ministry for the Status and Advancement of Women, *Submission* at 28; National Pay Equity Coalition, *Submission* at 4; NSW Bar Association, *Submission* at 4; NSW Women’s Advisory Council, *Submission* at 2.
86. SDA s 7B(2).
87. 401 US 424 (1971).
88. For example: whether there is a right to formal or substantive equality; whether there is a right to protection from dominance; whether there is a right to have differences reasonably accommodated; and whether there is an exception in the case of “special measures” provided for a disadvantaged group.
89. That is “equality of outcome” in addition to “equality of opportunity”.
90. Education is an important function of the ADA: ADA s 119(b) provides that one of the functions of the ADB is to “acquire and disseminate knowledge on all matters relating to the elimination of discrimination and the achievement of equal rights”.
91. See H Charlesworth, “The Australian Reluctance About Rights” in P Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law and Human Rights and Equal Opportunity Commission, Canberra, 1994) at 28-33.
92. *Disability Services Act 1993* (NSW) s 3; *Guardianship Act 1987* (NSW) s 4 and *Mental Health Act 1990* (NSW) ch 2.
93. *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359.

94. The *Interpretation Act 1987* (NSW) s 33 provides that, in the interpretation of a provision of an Act or statutory rule, a construction which promotes the underlying purpose or object of the Act should be preferred.
95. SDA s 3; DDA s 3; EOA (Vic) s 3; EOA (WA) s 3; DA (ACT) s 3 and ADA (NT) s 3. See also SDA Preamble and ADA (Qld) Preamble.
96. The SDA was amended to include both a Preamble and an “objects” clause in 1992 as a result of the recommendations of the *Half Way to Equal* Report: See Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (AGPS, Canberra, 1992) (the “Lavarch Committee Report”) at 260.
97. SDA s 3 and Preamble; ADA (Qld) Preamble.
98. CERD, incorporated in the Schedule to the RDA; CEDAW, incorporated in the Schedule to the SDA; ICCPR incorporated in Sch 2 of the HREOC Act; UN *Declaration on the Rights of Mentally Retarded Persons 1971*, incorporated in Sch 4 of the HREOC Act; UN *Declaration on the Rights of Disabled Persons 1975* incorporated in Sch 5 of the HREOC Act.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 4. Areas of Operation

#### INTRODUCTION

4.1 The particular issue addressed in this chapter is the identification of the areas in which discrimination law should operate. As one critic pointed out, the *Anti-Discrimination Act 1977* (NSW) ("ADA") presently reflects a threshold division between the public and private spheres.<sup>1</sup> This division renders aspects of public life subject to regulation, but cordons off the private sphere from scrutiny. Although there may be a useful distinction between public and private areas, it is necessary to consider whether the dividing line has been correctly drawn.

4.2 If discrimination at a private level is not controlled, a society may not give full effect to the norms of non-discrimination and equality. On the other hand, forbidding discrimination by individuals and private bodies involves interfering with their personal choice, thought and expression and can intrude into intimate relationships. Deciding on the proper ambit of discrimination law therefore involves a consideration of competing interests and rights and striking a careful balance between them.

#### MODELS OF OPERATION

##### Public and private arenas

4.3 There are three models for the operation of discrimination law. First, there is the model which is primarily adopted in the present ADA, that is to provide that discrimination in specified areas of public life is unlawful. Generally speaking, the present Act identifies those areas as work, public education, the provision of goods and services, accommodation, and membership of registered clubs. These are specifically identified as being of public concern due to their intimate relationship with the socio-economic rights of the individual and are therefore recognised as being of sufficient public importance to warrant protection provided by the State.

4.4 The second model is reflected in the prohibition found in s 9 of the *Racial Discrimination Act 1975* (Cth) ("RDA"). In that provision the area of operation in relation to racial discrimination is defined as "the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life". The relevant "fields" gain meaning through the content of the phrase "any human right or fundamental freedom", which is in turn defined to include any right of a kind referred to in Article 5 of the *Convention on the Elimination of all forms of Racial Discrimination* ("CERD"). Article 5 provides as follows:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by an individual, group or institution;
- (c) Political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;



- (d) Other civil rights, in particular:
  - (i) The right to freedom of movement and residence within the border of the State;
  - (ii) The right to leave any country, including one's own, and to return to one's country;
  - (iii) The right to nationality;
  - (iv) The right to marriage and choice of spouse;
  - (v) The right to own property alone as well as in association with others;
  - (vi) The right to inherit;
  - (vii) The right to freedom of thought, conscience and religion;
  - (viii) The right to freedom of opinion and expression;
  - (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
  - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
  - (ii) The right to form and join trade unions;
  - (iii) The right to housing;
  - (iv) The right to public health, medical care, social security and social services;
  - (v) The right to education and training;
  - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks.

4.5 As this is an inclusive definition, the list should not be seen as exhaustive. However, it is curiously limited in some respects and, in particular, the basic right to own property has been treated by the High Court as not extending to all aspects of the acquisition and management of property.<sup>2</sup> The definition is, nevertheless, clearly intended to be more extensive than the areas covered by the ADA, which are largely limited to economic, social and cultural rights defined in (e) and (f). Other areas involve either constitutional rights, political rights or rights covered by Commonwealth law.

4.6 In the context of a general prohibition, the coverage provided by the CERD differs, at least in the terms in which it is expressed, from that provided by the *Convention on the Elimination of all forms of Discrimination Against Women*

("CEDAW"). While the former restricts its coverage to "public life", the latter leaves coverage open to "any distinction, ... in the political, economic, ... or *any other* field".<sup>3</sup>

4.7 In addition to the broad provision in s 9, the RDA also prohibits discrimination in specified areas.<sup>4</sup> This approach is similar to that adopted in the *Draft Model Law on Racial Discrimination*.<sup>5</sup> The reason for this apparent duplication, according to the Race Discrimination Commissioner, is that "there is considerable normative value in having a specific section which, while not detracting from the general proscription, renders discrimination unlawful in a particular area of operation".<sup>6</sup> The specific provisions in s 11 to 17 of the RDA are, however, less detailed than the corresponding provisions in the *Sex Discrimination Act 1984* (Cth) ("SDA") and the *Disability Discrimination Act 1992* (Cth) ("DDA").

4.8 The third model of coverage is to make the prohibition unlimited as to area in the same way that tortious or criminal conduct is, generally speaking, unlimited. This approach has been adopted by the *Anti-Discrimination Act 1991* (Qld) ("ADA (Qld)") with respect to unlawful sexual harassment.<sup>7</sup> The question of whether sexual harassment, broadly described as unsolicited or unwelcome conduct of a sexual nature, properly belongs within discrimination legislation is discussed in Chapter Seven.

4.9 The existence of these models gives rise to the question whether the approach adopted in the ADA is the correct approach.

#### **Retaining the public/private distinction**

4.10 As the Anti-Discrimination Board ("ADB") noted,<sup>8</sup> strenuous arguments have been put at the international level to the effect that the restriction of anti-discrimination laws to the public arena reflects the male understanding of the need for protection. By contrast, it is argued that women suffer discrimination which will not be caught by violations of civil and political rights. The ADB quotes Charlesworth and Chinkin<sup>9</sup> to the following effect:

The same importance has not been generally accorded to economic and social rights which affect life in the private sphere, the world of women, although these rights are addressed to States. This is not to assert that when women are victims of violations of civil and political rights they are not accorded the same protection, but that these are not the harm from which most women need protection.

4.11 The ADB concludes its submission on this point with the following comment:

The above arguments are supportive of a shift away from the present "public rights" approach of anti-discrimination laws. Perhaps the Queensland model in broadening the sexual harassment provisions is an appropriate one to follow. Indeed, it would also be interesting to explore the impact of similarly broadening the sex discrimination provisions of the ADA generally or, indeed, restructuring the Act so that all grounds of discrimination would be unlawful in areas of both public and private life. Of course, much thought would need to be directed to the kinds of exceptions and exemptions which would be necessary in such legislation otherwise its scope would be virtually unlimited and perhaps unworkable.<sup>10</sup>

4.12 The final caveat is important. However, the problems are not fully encapsulated in the concept of unworkability. Rather, there is a problem of principle with the approach which abandons any attempt to distinguish the public from the

private arena. Because, for example, sex may be irrelevant in relation to public activities, it does not follow that it is necessarily irrelevant in relation to private conduct. Perhaps this could be dealt with by way of appropriate exceptions, but the task is, as the ADB appears to recognise (by not attempting it), daunting. For example, sex discrimination in relation to the area of employment is limited by a genuine occupational qualification exception.<sup>11</sup> Amongst other things, the exception recognises the demands of decency and separate sleeping accommodation, at least in relation to men and women who are not married or in a de facto relationship. Assuming that this exception is appropriate, the number of areas of private life to which a similar kind of exception must apply would be extensive. Further, there are innumerable areas of private life in which gender (or any of the other prohibited grounds) is a legitimate consideration. The logic which denies the relevance of such considerations in public life simply does not apply across the board.

4.13 Furthermore, it is not entirely clear what is the gravamen of the ADB's arguments that "the deepest level of the public/private dichotomy operates with regard to gender to the disadvantage of women." The examples which follow include (perhaps relevantly to Australia) the feminisation of poverty, domestic violence, sexual assault and murder. These examples suggest that the problem is identified as the structure of social relationships, which may be, at least in part, within the definition in the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR") and, in part, dependent upon the internalisation of attitudes and beliefs within a culture. To the extent that this latter category of issues can be dealt with by the law, it is not clear that it is properly addressed by discrimination law as we presently understand it. In any event, the Commission was provided with no model which would satisfactorily overcome the difficulties of abandoning the public/private dichotomy.

4.14 A number of other submissions received by the Commission in response to *Review of the Anti-Discrimination Act 1977 (NSW)* ("DP 30")<sup>12</sup> also addressed the issue of regulation of the private sphere. The New South Wales Ministry for the Advancement and Status of Women submitted that:

the private sphere of activity is where some of the most serious and systemic discrimination against women (such as non-recognition of unpaid work and domestic violence) takes place. This area of life is not currently covered by the ADA, which designates areas of public activity such as employment and the provisions of goods and services. If the fundamental nature of discrimination against women is to be addressed, the private sphere cannot be excluded.<sup>13</sup>

4.15 On the other hand, however, the New South Wales Women's Advisory Council argued that:

Whilst acknowledging that inequality exists in the private sphere, the Act is not useful. Education would serve as a more effective model to change practices and attitudes. Where the law does intrude into the private sphere such as with rape and domestic violence, it is more a legal issue.<sup>14</sup>

4.16 Submissions from the Catholic Education Commission of New South Wales and the Seventh Day Adventists Church also argued that the private sphere is not the proper subject of regulation and should be excluded from the ambit of the ADA.<sup>15</sup>

4.17 As foreshadowed in relation to the discussion of the issues raised by the ADB, the Commission accepts the general principle that the distinction between the public and the private areas of life should be maintained and that the ADA should operate only in the public area. This conclusion is not simply a pragmatic limitation on legal

intervention in private affairs, but follows from the underlying political and philosophical principles which justify the existence of the ADA. Once it is accepted that a legitimate purpose of the ADA is to protect freedom of political and religious belief, the Act is extending its protections beyond inherent characteristics to the protection of factors which are, at least in part, the product of private choice. That protection, like protection which might be given by a *Bill of Rights*, recognises a sphere of privacy and may even provide for a legal right to privacy.

4.18 It does not follow that abusive behaviour, such as domestic violence, should be immune from State intervention because it may occur in a domestic or private arena: the proper conclusion is purely that a distinction between public and private life, the boundaries of which may be differently drawn for different purposes, remains a valid and important consideration.

### **Value of a general prohibition**

4.19 The preceding discussion deals with the justification for the approach adopted in the ADA, which currently seeks to draw a line between public areas, which are appropriately subject to anti-discrimination law, and private areas, which are not. In the next section consideration is given to identified areas of operation as set out in the present ADA. Certain recommendations are made for clarification and extension of those areas.

4.20 The principle which the Commission has sought to identify in the current Federal and State legislation is that discrimination law should appropriately apply to all conduct in the public arena. As will appear from the following discussion concerning identified areas of operation, the ADA currently achieves most of the required coverage to satisfy that principle. For example, the areas of work and the provision of goods and services alone go a long way to satisfying the principle. The question is then whether there is merit in formulating a general prohibition along the lines of s 9 of the RDA which outlaws discrimination in relation to “any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.” Further, if such a general provision were thought appropriate, there would arise a consequential question as to the need to retain the current identified areas of operation.

4.21 Given the breadth of coverage of the ADA, there is an attraction in formulating a provision in general terms. The attraction is not merely intellectual: the identification and definition of particular areas of operation may give rise to unintended or inappropriate omissions. Thus, in *IW v City of Perth*<sup>16</sup> Chief Justice Brennan and Justice McHugh made the following comments<sup>17</sup> in relation to the Western Australian *Equal Opportunity Act 1984*:

The Act is not a comprehensive anti-discrimination or equal opportunity statute. The legislature of Western Australia, like other legislatures in Australia and the United Kingdom, has avoided use of general definitions of discrimination ...

Those legislatures have also deliberately confined the application of anti-discriminatory legislation to particular fields and particular activities within those fields.

No doubt most anti-discrimination statutes are legislative compromises, resulting from attempts to accommodate the interests of various groups such as traders, employers, religious denominations and others to the needs of the victims of discrimination. As the evils of discrimination in our society have become better understood, legislatures have extended

the scope of the original anti-discrimination statutes. Many persons think that anti-discrimination law still has a long way to go.

4.22 As noted in the preceding chapter, the Commission accepts the criticism implicit in the comments by their Honours in relation to the definition of discrimination. However, the confinement to particular fields and particular activities is not necessarily undesirable or inappropriate; nor is it necessarily the result of the kinds of “legislative compromise” referred to by their Honours, although such limitations that arise under the ADA in relation to employment and education could no doubt properly be so characterised. That being said, their Honours’ comments, which led to the adoption of a construction of the Western Australian Act not based on the assumption that it would necessarily apply to all acts commonly regarded as discriminatory, requires further consideration.

4.23 For three reasons the Commission is not satisfied that a general provision along the lines of s 9 of the RDA is desirable in the ADA. First, the generality of the terminology is in some respects deceptive. As already noted, the areas identified as human rights or fundamental freedoms are not entirely unrestricted, but are defined to include any right of a kind referred to in Article 5 of the CERD.<sup>18</sup> The scope of Article 5 has already been considered and, given that the definition is only an inclusive one, the identification of particular areas may not provide a significant restraint on the scope of the provision. However, the difficulties of interpretation are illustrated by the difference in views as to its operation to be found in the judgments of Chief Justice Gibbs and Justice Brennan respectively in *Koowarta v Bjelke-Petersen*.<sup>19</sup> The case involved a refusal by the Queensland government to transfer a pastoral lease to the Aboriginal Land Fund Commission for the benefit of Aborigines living in the areas. The plaintiff asserted that the refusal was a decision based on race which deprived him and other Aboriginal people from occupying and using lands which were part of their traditional lands. In considering whether the matter complained of fell within s 9 of the RDA, Chief Justice Gibbs was of the view that it did not. His Honour commented:

However, it is doubtful whether section 9 has any application to the facts alleged. That section is very widely drawn and its width produces considerable uncertainty as to its effect.

...

A more serious question is whether the refusal to consent to the transfer of the lease impaired the exercise of Mr Koowarta’s right to “own” property. The consent sought was to the transfer of the lease to the Commission, not to Mr Koowarta ... Although the word “own” in Art 5(d)(v) should no doubt be given a wide meaning, it seems to be going too far to hold that the right to “own” property includes a right to mere possession under a licence to occupy.<sup>20</sup>

4.24 His Honour seems to have thought it appropriate to interpret the CERD strictly in its own terms and place no reliance upon the fact that the reference to the Convention was merely an inclusive one and the matters dealt with in s 9 appear not to have been limited by its terms.

4.25 A different approach is adopted by Justice Brennan.

His Honour stated:

The enjoyment of a licence to use property is undoubtedly a “civil right” within the meaning of that term in par (d) of Art 5

...

But no licence was granted to the plaintiff. He acquired no right which he was entitled to enjoy. Is he "aggrieved" by the refusal of permission to transfer the lease to the Commission because he has lost an expectancy of a licence, albeit an expectancy which was not founded upon any legal or equitable right vested in him? It is unusual for a statute to impose a duty not to prevent another from getting, having or using a mere opportunity to obtain a legal right; it is unusual for a statute to confer a statutory right reciprocal to such a duty. Nevertheless, as that appears to be the object and purpose of the Convention, it is the effect of the Act. The essence of the problem which the Convention sets out to remedy is not merely the denial of equality in the enforcement of legal rights but the denial of an opportunity to acquire legal rights or to avoid the incurring of legal liabilities when that denial of opportunity is based on race ... The effect of section 9 of the Act ... would be small indeed if "the recognition enjoyment or exercise, on an equal footing, of any human right or fundamental freedom" related only to rights which might be enforced or freedoms which might be defended under the laws otherwise in force.<sup>21</sup>

4.26 Although the use of terminology such as "the provisions of goods and services" in the ADA is more limiting than the approach adopted by s 9 of the RDA, there is nevertheless considerable scope for argument as to the breadth of the area so defined. The difference in approaches to the question of interpretation adopted by Chief Justice Brennan in *IW V City of Perth* and in *Koowarta* no doubt reflects the fact that one definition was found in a statute using particular terminology whereas the other was found in a statute picking up, in an inclusive definition, the terminology of an international Convention. The Commission is concerned that to adopt in the ADA a reference, undefined, to "human rights and fundamental freedoms" would be to invite inappropriate uncertainty and exasperation on the part of the courts, such terminology not being part of the legal discourse of the common law.

4.27 Secondly, there is a practical difficulty in adopting broad terminology. In those areas where an attempt has been made to define the scope of the ADA, careful attention has been given to the boundaries of the area so as to improve the level of certainty in respect of conduct covered by the Act. That exercise must necessarily be abandoned, at least in part, if a broad prohibition in the terms of s 9 is adopted. These practical difficulties may be least apparent in relation to racial discrimination, which is an area which invites few exceptions. The difficulties will multiply in relation to other grounds which may constitute undesirable discrimination based on prejudice and stereotyping in some contexts but may constitute a legitimate consideration in others.

4.28 Thirdly, as a practical matter, there appear to have been few cases in which s 9 of the RDA has been relied upon to the exclusion of identified areas of operation. Even in *Koowarta* the majority of the Court appeared to have relied upon s 12 as being a sufficient basis for the claim. Further, the educational value of defining the areas of operation and the fact that defined areas have been in the ADA for some 20 years suggests that it would be quite inappropriate to remove them at this stage. To retain defined areas and provide a general prohibition would reduce the significance of the general prohibition. It might even have the undesirable effect of distracting attention from the appropriate scope of the defined areas because it would be treated as a safety net.

4.29 For all these reasons, the Commission is satisfied that the introduction of a general prohibition would not be appropriate. The ground with respect to which such a general prohibition would most readily be justified is race: however, the RDA provides for such a prohibition in relation to that ground and no particular departure from the

scheme of the ADA is necessary to provide such legal protection to the residual areas to which s 9 of the RDA provides sole protection. In relation to other grounds, the conceptual and practical difficulties are significant. By contrast, the Commission believes the appropriate means of ensuring adequate coverage of the ADA is to address the defined areas of operation and, where they appear to be unduly limited, to amend them accordingly.

## IDENTIFIED AREAS OF OPERATION

4.30 Within the public arena, there is (as concluded above) value in identifying particular areas of operation, even if in the broadest terms. Members of the community, including potential transgressors and potential victims, are entitled to a level of precision in the definition of the areas covered by their legal rights and obligations.

4.31 The areas currently covered under the ADA are:

work;

provision of goods and services;

education;

access to places and vehicles;

accommodation; and

registered clubs.

4.32 The issue is whether these areas are appropriate and adequate. An analysis of the areas must be read in the light of the exceptions dealt with in this chapter and in Chapter Six of this Report.

## WORK

4.33 Work is probably the most important area of operation under the ADA. It is important not only because it has a direct effect on an individual's lifestyle and social status, but also because it has consistently constituted the largest area of complaints received by the ADB.<sup>22</sup>

### Coverage under the ADA

4.34 The ADA prohibits discrimination in work on all prohibited grounds. The type of work covered under the Act is detailed in the following table:

#### Areas of work currently covered under the ADA

	<b>Race</b>	<b>Sex</b>	<b>Marital Status</b>	<b>Disability</b>	<b>Homosexuality</b>	<b>Age</b>
<b>applicants &amp; employees</b>	s 8	s 25	s 40	s 49D	s 49H	s 49I
<b>commission agents</b>	s 9	s 26	s 41	s 49E	s 49ZI	s 49J
<b>contract workers</b>	s 10	s 27	s 42	s 49F	s 49J	s 49K
<b>partnerships</b>	s 10A	s 27A	s 42A	s 49G	s 49ZK	s 49L
<b>local government councillors</b>	s 10B	s 27B	s 42B	s 49H	s 49ZKA	s 49M
<b>industrial organisations</b>	s 11	s 28	s 43	s 49I	s 49ZL	s 49N
<b>qualifying bodies</b>	s 12	s 29	s 44	s 49J	s 49ZM	s 49O
<b>employment agencies</b>	s 13	s 30	s 45	s 49K	s 49ZN	s 49P

## Coverage in other jurisdictions

4.35 Other Australian jurisdictions cover most types of work covered in New South Wales. The RDA provides a general prohibition in s 9 as well as specific prohibitions in respect of particular areas of operation. In relation to employment, the RDA only covers applicants and employees, contract workers and employment agencies.<sup>23</sup> However, the RDA's general prohibition is meant to have an extremely wide coverage as it prohibits "any act involving a distinction, ... in the political, economic, social, cultural or any other field of public life" and consequently has the potential to cover a much wider area within the public sphere. Victoria is the only State (apart from New South Wales) that covers municipal councillors. New South Wales is the only State that intends to cover junior employees on the ground of age.<sup>24</sup> However, they are currently excepted from the age discrimination provisions as is the case in most other jurisdictions around Australia.<sup>25</sup>

## The definition of "employment"

4.36 The common law meaning of "employment" has been modified in the ADA in the following ways:

Section 4(1) defines employment to include work under a contract for services. Thus, the ADA covers employment under a contract of employment and independent contractors.

Section 4B interprets references to the employer of people in the Public Service, Police Service or Education Teaching Service to mean Department Head, Commissioner of Police and Director General of the Department of School Education, respectively.<sup>26</sup>

The employment provisions relating to discrimination on the grounds of sex, marital status, disability and homosexuality provide that for the purpose of determining the number of persons employed by an employer, a corporation shall be regarded as the employer of the employees of other corporations which are related corporations within the meaning of the *Companies Code* (NSW).

Part 4E of the ADA (which prohibits compulsory retirement) contains a specific definition of "employed in the public sector". Under this Part, the definition of "employee" includes a commission agent and a contract worker but not partners. Also, the definition makes no reference to the inclusion of a contract for services as does s 4(1) of the Act.

These discrepancies in the definitions of "employment" under the general provisions of the Act and "employee" for the purposes of the compulsory retirement provisions need to be addressed.

4.37 The ADA covers part-time, full-time and casual employment as the common law definition of employment includes these forms of work. Some jurisdictions have, however, specifically defined employment to include these forms of work.<sup>27</sup> Apart from work relationships in the common law sense, the ADA covers other work relationships, including commission agents, partnerships etc, as listed above in the table.



### ***Coverage of volunteers and unpaid workers***

4.38 The ADA has recently been amended to prohibit sexual harassment of volunteers and unpaid trainees by including them within the definition of a “workplace participant”.<sup>28</sup> However, they are not covered for the purposes of the prohibition against discrimination in the absence of a contract of employment, the “consideration” for which usually takes the form of wages or salary in return for the work performed.

4.39 The Implementation Committee of the Report on Gender Bias and the Law<sup>29</sup> cited the example of law students who routinely do placements as part of their undergraduate courses or work as volunteers in law firms, government and community agencies, as persons who currently have no redress if discriminated against.

4.40 In Queensland, the definition of “work” includes student work experience, vocational industry placement, voluntary or unpaid work, paid or unpaid work by a person with an impairment in a sheltered workshop and work under a guidance, apprenticeship or occupational training or retraining program.<sup>30</sup> The Northern Territory covers work in a sheltered workshop and vocational training programs. South Australia and the ACT cover unpaid work.<sup>31</sup> Tasmania (in relation to sex discrimination) covers employment or occupation in any capacity, with or without remuneration.<sup>32</sup> Only Victoria specifically excludes unpaid and voluntary work.<sup>33</sup>

4.41 From the point of view of the student, trainee or volunteer, there are significant benefits of an educational or work experience kind. Future employers may look for such experience. Accordingly, it is at least arguable that such circumstances fall within the area of the provision of services.<sup>34</sup> It is unfortunate that the trainee or volunteer is not expressly covered, but must rely on the definition of “services”, which, though not limited to services provided for payment, is an ill-defined concept whose application may depend on the precise circumstances of the case.

4.42 From the point of view of the employer, while there may be no requirement that the trainee or volunteer undertake work, there may be direct or indirect benefits flowing to the employer. However, it should not be necessary for the trainee or volunteer to prove such benefits to obtain the protection of the ADA, nor indeed will the provision of such benefits by the trainee or volunteer necessarily attract the protection of the Act. The protection should be available because the circumstances of the trainee or volunteer require the protection of human rights in relation to conduct in the public sphere.

4.43 In their responses to DP 30, the submissions of the ADB and the Disability Council of NSW both argued that the ADA should be amended to cover volunteer workers and people working in sheltered workshops.<sup>35</sup>

4.44 The Commission recommends that these forms of workplace relationships should be expressly covered by the ADA as an aspect of work within the definition of work.

### **Recommendation 9**

**Include work done by volunteers, trainees or unpaid workers within the definition of work.**

**Draft Anti-Discrimination Bill 1999: cl 26**

### ***Coverage of members of Parliament including Ministers***

4.45 Until recently, Ministers and members of Parliament were not liable for any breach of the ADA in relation to their staff because they are not legally the employer. However, the *Anti-Discrimination Amendment Act 1997* (NSW) made Ministers and members of Parliament liable for sexual harassment, by the member or Minister, of workplace participants or other members of Parliament. The Bill originally imposed liability for any form of unlawful discrimination on Ministers and members of Parliament, but this provision was removed by amendment in the Legislative Council.<sup>36</sup>

4.46 While the new amendments cover Ministers and members of Parliament for sexual harassment, they cannot be held vicariously liable for the sexual harassment of one staff member by another staff member because they are not the employer. The employer is the Speaker of the House and, ultimately, the Crown.

4.47 The problem, identified in relation to the 1996 complaints of sexual harassment against the Minister for Police and Emergency Services Terry Griffiths, was that the Minister responsible for the conduct was, legally, an independent third party. He was neither the employer, nor a co-employee of his own staff. In practice, however, the Minister is often personally responsible for employment and dismissal decisions, and may be responsible in part for the nature of the working environment and hence the terms and conditions of employment.

4.48 Accordingly, two questions arise. First, should the employer of Ministerial staff (the Speaker or the Crown) be responsible for the conduct of the Minister? Secondly, should the Minister be responsible?

4.49 In principle, there is no reason to exclude Ministerial staff from the protection of the ADA. Consistently with this principle, the law should accommodate the facts of that particular workplace and impose legal liability on the employer for discriminatory conduct directed at such staff. While the Minister may not be an agent or employee of the Crown, the circumstances of public administration which lead to this special arrangement do not justify leaving the staff without legal protection available to other employees. Accordingly, the Crown should be deemed to be responsible for the acts of Ministers in such circumstances.

4.50 The liability of the Minister or member of Parliament personally is less clear. In a company employment case, the liability of the individual officer responsible for a particular decision will not in practical terms be important, if the company is vicariously liable to make good any loss caused and the company is solvent. A similar result will be achieved in practical terms by making the Crown liable for unlawful discriminatory conduct against Ministerial staff. Further, where a government officer or a Minister is sued for things done in an official capacity, the Government will generally support the defence of the case financially. Thus the liability of the Minister or member of Parliament will generally be of symbolic significance.<sup>37</sup>

4.51 That is not to say that the symbolic significance is unimportant: it would be unfortunate if those who make the laws were seen to be exempt from their operation in circumstances where private citizens would otherwise be liable.

4.52 In principle, there does not appear to be any justification for exempting Ministers and members of Parliament from appropriate liability: the exigencies of office do not exempt them from the application of other general laws imposing civil or criminal liability for misconduct. In so far as they have control or exercise power in the

workplace, and thereby cause or permit discriminatory conditions of employment to arise, liability would be attracted by the provisions of the ADA.<sup>38</sup> This principle was adopted in relation to sexual harassment.<sup>39</sup> In principle, it is the correct approach.

## **Recommendation 10**

**Provide that the Crown should be liable for conduct of members of Parliament and Ministers involving discrimination under the ADA.**

**Draft Anti-Discrimination Bill 1999: cl 6**

### **Aspects of employment covered**

4.53 The three aspects of employment covered by the ADA are:

recruitment;

conditions and benefits of employment (including internal appointment and promotion); and

termination of employment.

4.54 In New South Wales, all three aspects are covered in the one section in relation to the various grounds under the heading "Discrimination against applicants and employees". In Victoria provisions dealing with applicants and employees are dealt with separately,<sup>40</sup> while Queensland distinguishes the two as discrimination in the pre-work area and discrimination in the work area. The division is also extended to partnerships and qualifying bodies.<sup>41</sup>

### **Recruitment**

4.55 It is unlawful for an employer to discriminate on any of the prohibited grounds against an applicant in relation to:

- (a) the arrangements the employer makes for the purpose of determining who should be offered employment;
- (b) in determining who should be offered employment; or
- (c) in the terms on which the employment is offered.<sup>42</sup>

4.56 The above provisions refer to the entire recruitment process which includes the preparation of job descriptions and job specifications, advertising, the preparation and evaluation of application forms, interviews and the actual selection process. An employer must therefore ensure that no aspect of the recruitment process breaches the ADA.

4.57 However, an exception to these provisions applies in relation to the ground of sex, where a woman is pregnant at the time of applying for a position or at the time of the interview (unless she could not reasonably have been expected to know of her pregnancy at that time).<sup>43</sup> No similar exception exists under the SDA and it has been suggested by a number of submissions to the Commission that this provision is too broad and should be repealed.<sup>44</sup> This issue is dealt with in Chapter Five, where the Commission recommends that pregnancy should form a separate ground under the

ADA and be subject to a requirement of reasonable accommodation, with a corresponding defence of undue hardship.<sup>45</sup>

4.58 The prohibition of discrimination on all the prohibited grounds against applicants for employment also applies to the engaging of commission agents and choice of partners in partnerships consisting of more than six partners.<sup>46</sup> Prospective employees are protected from discrimination by industrial organisations in that such organisations are also prohibited from refusing or failing to accept for membership and from discriminating in the terms on which they are prepared to admit the person to membership. Similarly qualifying bodies are prohibited from refusing or failing to confer, renew or extend an authorisation or qualification or in the terms on which it is prepared to confer such authorisation to facilitate the practice of a profession, trade or occupation. Employment agencies are also prohibited from discriminating by refusing to provide their services and in the terms or manner in which they provide their services.

### ***Conditions of employment***

4.59 Once employed, the ADA prohibits discrimination on all grounds in relation to the following:<sup>47</sup>

the terms or conditions of employment which the employer affords the employee;

by denying the employee access, or limiting the employee's access to opportunities for:

- (a) promotion,
- (b) transfer, or
- (c) training,

by denying the employee access, or limiting the employee's access to opportunities for any other benefits associated with employment; and

by subjecting the employee to any other detriment.

4.60 The ADA also protects commission agents, contract workers and partners during the work relationship. Commission agents are provided the same protection as employees. A principal cannot discriminate against a contract worker in the terms on which the principal allows him or her to work, by not allowing him or her to work or continue to work, by denying or limiting access to any benefit associated with the work in respect of which the contract of employment is made and by subjecting the worker to any other detriment. Partners are prohibited from discriminating against another partner by denying or limiting access to any benefit arising from membership of the firm or by subjecting a partner to any other detriment. Once a person is admitted to membership of an industrial organisation, although it is not an employment relationship, the Act prohibits the trade union from denying or limiting access to benefits, by depriving the member of membership or varying the terms of membership or by subjecting the person to any other detriment. Qualifying bodies are also prohibited from discriminating in the terms on which authorisation or qualification is renewed or extended or by varying terms or conditions. Employment agencies are precluded from discriminating in the manner in which they provide a person with their services.

4.61 Terms or conditions of employment are not limited to those included in an award or contract of employment. It has been held that they include all substantial

demands and requirements, benefits and concessions relating to the employment with which the employee must comply or which the employee accepts during the course of that employment.<sup>48</sup> Superannuation is an important condition of employment provided to many employees. However it is subject to various exceptions which are discussed in Chapter Six. Terms and conditions can also include physical facilities such as equipment and offices as well as accessibility of toilets etc.

4.62 It is apparent that the approach adopted under the ADA has been accepted across the country: with the exception of the recommendation that coverage be extended to volunteers and unpaid workers, the Commission recommends that no substantial change is required to the Act in this particular matter. There are, however, some changes in drafting which are desirable to clarify the operation of the law. For example, it will be necessary to ensure that the definition of “employer” is appropriate to accommodate the protection given to volunteers and unpaid workers.

### ***Termination of employment***

4.63 The ADA renders it unlawful for an employer to discriminate against an employee or independent contractor by dismissing the person on any of the prohibited grounds of discrimination. This area also covers the imposition of “any other detriment”. Similar provisions exist in relation to the related areas already identified.

4.64 In relation to “termination”, a question arises as to whether it covers the failure to renew a fixed term contract. The question has not often arisen in practice, presumably because a failure to renew, involving a discriminatory ground, will often fall within the area of appointment. However, the inclusion of the prohibition on compulsory retirement and the further ground of age discrimination, require this issue to be addressed. As the question arises only in relation to that specific ground, and concerns the operation of that ground, it is addressed in Chapters Five and Six below.<sup>49</sup>

4.65 The concept of “any other detriment” has been broadly interpreted, consistently with the breadth of the related concept, namely the provision of a “benefit”. In the United Kingdom a “detriment” has been identified as any aspect of employment practices which could reasonably be viewed by the person affected as being detrimental to his or her interests. Thus the exclusion of women from particular “dirty work” was accepted as capable of constituting a detriment, because the women were precluded from obtaining the higher rates of pay for that work.<sup>50</sup> As one member of the Court noted, this practice could probably have been viewed as a “detriment” by both men and women.<sup>51</sup> Such a conclusion would not be anomalous, but merely reflected the dangers in attempting to divide work on the ground of gender.

### **Inter-relationship with State Industrial Relations legislation**

4.66 While industrial law is not concerned with pre-employment issues, it is an area that closely overlaps with discrimination law in respect of the employment relationship. The inter-relationship with Commonwealth industrial relations laws has been dealt with in Chapter Two.

4.67 In New South Wales, the *Industrial Relations Act 1996* (NSW) (“IRA”) has incorporated principles of anti-discrimination, reiterating the need to protect workers from discrimination.<sup>52</sup> It “includes a range of measures designed to eliminate discrimination and promote equal opportunity at the workplace”,<sup>53</sup> by incorporating anti-discrimination principles as an object of the legislation, so as specifically to address anti-discrimination and pay equity.<sup>54</sup> It defines an “industrial matter” with reference to discrimination in employment on a ground to which the ADA applies<sup>55</sup> and by means of other specific provisions.

4.68 In relation to dismissal or threatened dismissal, no specific grounds of discrimination are listed. However the test of whether the dismissal was “harsh, unreasonable or unjust” may cover dismissal for a discriminatory reason.

4.69 The IRA places specific responsibilities on the Industrial Relations Commission (“IRC”) to ensure that it takes its objects and the public interest into account in the exercise of its functions.<sup>56</sup> The IRC must also take into account the principles in the ADA.<sup>57</sup> The IRC must ensure that every award it makes provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.<sup>58</sup> An award may be varied at any time to remove unlawful discrimination on the application of a party to the instrument or the President of the ADB with leave of the IRC.<sup>59</sup> The IRC is required to undertake a three yearly review of awards and in so doing must take account of various factors including any issue of discrimination under the awards.<sup>60</sup> This will provide a mechanism to remove entrenched industrial traditions of a discriminatory nature.

4.70 Under the IRA, enterprise agreements have no effect unless they are approved by the IRC. In giving approval the IRC must take account of the objects of the IRA.<sup>61</sup> Such approvals can only be granted if the agreement complies with all statutory requirements, including the ADA.<sup>62</sup>

4.71 As is the case with awards, an enterprise agreement can also be varied if it is unlawfully discriminatory. In order to establish an effective regime for the approval of enterprise agreements, an industrial organisation, a State peak council or the President of the ADB may appear or be represented in the approval proceedings. The regulations will provide that State peak councils and the President of the ADB would be notified of negotiations, thereby allowing an opportunity to be heard if there is a matter of significance emerging from the application. However, to date there have not been any regulations enacted.

4.72 Procedurally, an important provision from an anti-discrimination perspective is that the President of the ADB may intervene in any proceedings of the Commission and make submissions where the President determines that the proceedings concern unlawful discrimination under the ADA.<sup>63</sup> The President may also appeal from a decision of the Commission constituted by a single member to a full bench.

4.73 Changes have also been made to provisions relating to parental leave, which is now available to employees as of right.

4.74 In addition to the reforms in the industrial jurisdiction, the ADA no longer exempts industrial awards from its operation, allowing the Equal Opportunity Division of the Administrative Decisions Tribunal (“EO Division”) (formerly the Equal Opportunity Tribunal (“EOT”)) to scrutinise awards for discriminatory provisions.<sup>64</sup>

4.75 Unions, which were previously denied an active role in the anti-discrimination jurisdiction, are now permitted to bring a claim on behalf of a member (because it is a representative body that has genuine concern about the conduct complained of).<sup>65</sup>

4.76 Recognition of anti-discrimination principles in the industrial jurisdiction and in particular the new role given to the President of the ADB, provides a potentially powerful mechanism for elimination of direct and indirect discrimination in awards and enterprise agreements. It also provides an avenue for addressing industrial matters which have discriminatory implications. This power of intervention should allow systemic discrimination to be tackled at the source, and may address the reactive, piecemeal approach for which the ADA has occasionally been criticised.

4.77 The unfair dismissal provisions of the IRA apply to State public sector employees<sup>66</sup> and other employees except:

an employee for whom conditions of employment are not set by an industrial instrument and whose annual remuneration is greater than \$66,200;<sup>67</sup>

trainees or apprentices;

employees engaged as casuals for a short period except those who are engaged on a regular basis for a sequence of periods during a period of at least six months and who would have a reasonable expectation of continuing employment;<sup>68</sup>

employees engaged under a contract of employment for a specified period of time if the time is less than six months;

employees engaged under a contract for a specific task; or

employees serving a period of probation or qualifying period, determined in advance, if the maximum duration is three months or less. If a greater period of probation is provided then the exemption applies for that period if the longer period is reasonable given the circumstances.

4.78 Where a choice of jurisdiction is available, a number of factors may influence its exercise.<sup>69</sup> For example, a person dismissed on the grounds of sex and covered by a State award in a workplace with less than five employees will not currently be able to use the ADA, but may obtain relief under the SDA or the State or Commonwealth industrial legislation. Exceptions in the anti-discrimination legislation do not apply to applications under the industrial relations legislation.<sup>70</sup>

4.79 To prevent “double dipping” and “forum shopping”, the IRA provides that the IRC is precluded from determining an application in relation to unfair dismissal if the applicant is entitled to obtain redress under another Act or statutory instrument and the applicant has commenced proceedings under that Act or instrument, or has not given an undertaking not to do so.<sup>71</sup> The decision in *Johnston v Department of Mineral Resources*<sup>72</sup> dealt with the operation and potential interaction between the prohibition on forum shopping and the general obligations under the IRA. The IRC concluded that s 90 precluded it from determining the claims because of the proceedings before the EOT which provided “for redress in relation to the dismissal”.

4.80 The ADA does not specifically prohibit a person who has been compensated under the IRA from lodging a complaint with the ADB, and the ADB is not prohibited from accepting a complaint of discrimination after the matter is heard in the IRC.<sup>73</sup> However, the EO Division must give leave for an employee to commence proceedings on an issue that is the subject of proceedings before the IRC or the Industrial Court,<sup>74</sup> although this would appear to apply only to concurrent and not to subsequent proceedings before the EO Division of the ADT. It may be argued that the President of the ADB may take into account the fact that the complaint has been dealt with by the IRC in deciding whether to decline a complaint,<sup>75</sup> as may the EO Division in considering whether to dismiss a complaint.<sup>76</sup>

4.81 The remedies available in the two jurisdictions are not identical. The IRC can make orders for reinstatement, re-employment, remuneration or compensation in relation to applications for unfair dismissal. Where a complaint of discrimination in employment has been established before the EO Division, it can order the payment of damages, including damages for non-economic loss,<sup>77</sup> performance of any reasonable act to redress any loss or damage or enjoin the respondent from

continuing or repeating behaviour which is unlawful under the ADA.<sup>78</sup> Although the EO Division has (as the did the former EOT) the power to order reinstatement in employment related matters, in practice, it has declined to make such orders.<sup>79</sup>

4.82 Some submissions have argued that the industrial jurisdiction alone should deal with all such employment related discrimination, but most submissions on this issue argued that both the industrial and human rights jurisdictions should be involved.<sup>80</sup> None supported either the merger or transfer of jurisdictions. Indeed one of the notable advantages of preserving a dual regime is that the ADB and the EO Division provide a forum for the investigation and resolution of complaints about discrimination in the workplace which may not have been recognised or challenged in the IRC.<sup>81</sup> Given the reforms in the New South Wales industrial relations system which aim to remove anomalies, facilitate better coordination between the two jurisdictions and ensure more comprehensive protection against discrimination in employment, the Commission does not consider that there is a need to provide a single forum for resolution of employment issues. Indeed, an attempt to excise part of the area from the ADA would almost inevitably promote confusion and avoid jurisdictional disputes.

4.83 Any duplication can be resolved in other ways. The strategy adopted in South Australia is that workers who elect to pursue redress in one jurisdiction forgo whatever right they may have to process their complaint through the other jurisdiction.<sup>82</sup> Such a requirement may seem easier to impose if the redress available is identical in both jurisdictions. The view preferred by the Commission is that where the rights to take action and the redress available are not identical, as is the case currently in New South Wales, complainants could be allowed to take advantage of the remedies available under both jurisdictions, so long as the relief obtained is not the same in each jurisdiction, and the granting of different relief does not cause undue prejudice to the respondent.<sup>83</sup> The Commission considers that the present s 95A is appropriate, but should provide expressly that it be a condition of granting leave under that section that any relief received previously is not duplicated and that granting the relief sought under the ADA would not cause undue prejudice to the respondent.

4.84 Apart from the strategies introduced by the recent reforms, which are yet to be tested, and those suggested below, other means of improving cooperation and coordination between the two jurisdictions may include introducing administrative initiatives which can be implemented by personnel in both jurisdictions, better community education<sup>84</sup> and the establishment of a specialist legal centre to provide potential claimants with appropriate advice and assistance.<sup>85</sup>

#### **Recommendation 11**

**In relation to the terms of the present s 95A, provide expressly that it should be a condition of granting leave under that section that any relief received previously is not duplicated and that granting the relief sought under the ADA would not cause undue prejudice to the respondent.**

#### **Current exceptions to employment**

4.85 It is now necessary to turn to the exceptions in relation to the area of work in order to consider whether they appropriately reflect the division between public and private areas of activity discussed in the first part of this chapter. One factor which needs to be noted is that the present exceptions are not uniform in relation to the various grounds. The different considerations applicable in relation to different



grounds will be considered, as appropriate, below and in Chapter Six. The relevant exceptions are as follows:

employment in a private household on all grounds;

where there are five or fewer employees, on grounds of sex, marital status, disability, transgender and homosexuality;

in partnerships of fewer than six persons on all grounds; and

by a private educational authority, on grounds of sex, marital status, disability, homosexuality and transgender.

Each area is discussed in turn.

### ***Employment in a private household***

4.86 This exception was included in the ADA when it was first enacted and applies to discrimination on all the prohibited grounds.<sup>86</sup> A similar exception applies in most other jurisdictions.<sup>87</sup> Some jurisdictions make specific provision for excepting discrimination in employment relating to child care duties in the child's residence,<sup>88</sup> although this does not appear to extend the operation of the exception.

4.87 The effect of the exception in New South Wales is that, for example, it is not against the law for a member of a household to refuse to employ a male nanny or a homosexual person as a housekeeper because such employment is for the purposes of a private household.

4.88 Although no specific mention was made of the rationale for this exception when it was originally introduced, there appear to be public policy reasons for allowing a householder to employ whomever he or she wishes on the basis that discrimination law should not limit such personal choices. Thus, the ability to decide who may enter one's home is seen as a justifiable reason for the exception.

4.89 It may be argued that employment within a home does not constitute so significant an area of employment as to intrude significantly upon opportunities for employment generally. This is not, of course, an absolute consideration, but is a matter which can legitimately be weighed in the balance. Subject to the comments which appear below, the Commission is satisfied that the present exception is justifiable.<sup>89</sup>

4.90 The ADB has pointed out that it is difficult to determine the exact meaning of "purposes of a private household" and whether this exception also covers the recruitment practices of an agency which provides cleaners, gardeners, nannies etc for work in a private household. The ADB's suggestion was to clarify the Act so that it only applies to situations where the people in the household are the employers. The Commission disagrees with this suggestion as there appears to be no reason why an employment agency should be liable for discrimination in circumstances where the agency is merely the agent of the employer who is allowed to discriminate in relation to employment for the purposes of a private household. In the Australian Capital Territory, employment agencies are specifically excepted from the employment provisions where, "had the proposed employer so discriminated against the person, that discrimination would not have been unlawful".<sup>90</sup> This approach is correct in principle.

4.91 The principal concern in relation to the present exception is that it is expressed to apply to "employment for the purposes of a private household." What is really in

issue is not the purpose of the employment, but the place where the work is undertaken. That approach is more accurately reflected by the exception in the RDA which provides as follows:

Nothing in this section renders unlawful an act in relation to employment, or an application for employment, in a dwelling house or flat occupied by the person who did the act or a person on whose behalf the act was done or by a relative of either of those persons.<sup>91</sup>

4.92 This provision, though slightly awkward in its drafting, accurately reflects the purpose of the exclusion which is to protect the privacy of persons in their homes. The Commission recommends that similar terminology be adopted. It is suggested that the term “dwelling house or flat” be replaced with “dwelling” to ensure comprehensiveness.

4.93 There is a further question as to whether a person should be entitled to discriminate on a prohibited ground once a person has been employed. Currently the harassment of an employee, which includes the creation of a racially or sexually hostile working environment, is dealt with as a form of discrimination and is therefore subject to the ‘employment in a private household’ exception. Although there may be a justification for allowing people to discriminate in who they choose to allow into their homes, there is no similar rationale for allowing the employer to harass their employees once they have chosen to employ them. The Commission, therefore, recommends that the exception provided for discrimination in employment in a private household not apply in the case of unlawful harassment.

#### **Recommendation 12**

**In relation to the exception for employment in a private household, re-define to refer to employment, or an application for employment, which requires work to be done in a dwelling occupied by the employer or by a relative of the employer.**

**Draft Anti-Discrimination Bill 1999: cl 27**

#### **Recommendation 13**

**Exclude sexual harassment from the exception for discrimination in employment in a private household.**

#### ***Small business exception***

4.94 This exception applies to discrimination in employment on the grounds of sex, marital status, disability, transgender and homosexuality, where the number of persons employed does not exceed five. It was included in the ADA when it was first enacted. The rationale for this exception as stated in the Second Reading Speech introducing the Act (in relation to sex) was as follows:

This provision is intended to relieve an employer with a small staff from incurring the expense of making extra facilities available for members of both sexes where such an imposition would be unreasonable.<sup>92</sup>

4.95 A similar exception in relation to small business exists in Victoria,<sup>93</sup> where it applies in relation to who may be offered employment, but not elsewhere in Australia. In New South Wales, it extends beyond selection for employment to the terms and conditions of employment, access to opportunities for progression and termination.

4.96 According to a report compiled by BIS Shrapnel Pty Ltd for the New South Wales Small Business Development Corporation in 1992, just over 50% of small businesses in New South Wales employ fewer than five people and small business accounts for 46.3% of business employment in New South Wales.<sup>94</sup> The exception therefore excludes a significant number of employees from the Act's protection. A large number of the submissions received by the Commission in response to DP 30 argued for the removal of the exception.<sup>95</sup>

4.97 The most persuasive arguments in favour of the exception are based on privacy and economics. The privacy argument in this case is based on the view that relationships within small businesses are more personal and closer to family or household concerns than is the case in larger businesses. Accordingly, the freedom of choice in personal matters should be extended, even though it is here concerned with workplace relationships. The argument is entitled to consideration, although clearly the weight which should be given to this consideration is less than in the case of employment in the home.

4.98 The economic considerations are less readily defined. Although the Second Reading Speech noted above referred to the possible need for "extra facilities" (presumably referring to male and female toilets primarily) that argument would not have general application. If this assumption in relation to gender is correct, it would not apply to other grounds. Further, and unlike general concerns about the costs of regulation in respect of small businesses, the application of the ADA need not involve any administrative costs. There is no requirement to pay any impost, make returns to any regulatory authority nor to engage in any additional internal book-keeping. The present grounds do not involve any intrusion of union or other third party activities into the workplace. These matters should involve no more serious costs than the need to ensure that employees themselves comply with the general law of the State and Commonwealth.

4.99 Taking into consideration the significance of small businesses in terms of employment opportunities generally, the absence of significant economic consequences of the application of the law and the relatively limited intrusion on personal relationships, the Commission is not satisfied that the exception should be retained.

4.100 It is fortified in this view by the fact that in the areas covered by the RDA, the SDA and the DDA, there is no such exception. In these areas, the exceptions contained in the current ADA will not be effective, as employers will be subject to the Commonwealth laws.

#### **Recommendation 14**

**Repeal the small business exception.**

### ***Partnerships of fewer than six persons***

4.101 This exception now applies to all grounds of discrimination. It was first introduced in 1981 when the ADA was extended to cover partnerships consisting of six or more partners. A similar exception applies in Queensland, Victoria and Western Australia.<sup>96</sup>

4.102 The rationale for this exception is akin to the small business exception. It may be argued that a partnership relationship is a more personal relationship than one of employer and employee and therefore gives rise to a stronger privacy argument. On the other hand, a partnership of five persons is likely to be larger than a small business with five employees and, therefore, relationships generally are likely to be more formal and professional than personal. Further, anomalies are likely to arise if a partnership of five persons is not entitled to discriminate in its choice of employees, but may discriminate in relation to its own membership. It is commonly the case that professional employees will have legitimate expectations of partnership opportunities if they are successful. If, however, a partnership of four men were entitled to refuse to consider a woman for partnership, it might well mean that women employed by the firm would have less scope for promotion and progression than would men.

4.103 The Commission is not persuaded that the circumstances of small partnerships are substantially different from those of small businesses generally. For the reasons stated above in relation to the small business exception, the Commission believes that this exception should be repealed, thus extending the operation of the ADA to all partnerships irrespective of their size.

### **Recommendation 15**

**Repeal the exception applicable to partnerships of fewer than six persons.**

### ***Employment by a private educational authority***

4.104 When the ADA commenced, it covered private educational authorities. However, expressions of concern from private schools and mainstream churches resulted in an exception being introduced in 1981<sup>97</sup> in relation to sex and marital status, and to the other grounds as they were added. The exception now applies to the grounds of sex, marital status, disability, homosexuality and transgender status.

4.105 The rationale for the exception appears to be reluctance to interfere with the private sphere, although many of the institutions affected receive Government funding and are required to comply with various other Acts. In New South Wales, the exception does not apply in relation to the grounds of race or age, presumably on the basis that there are no moral or religious reasons to justify it. The Commission can also see no justification for the exception in relation to disability.

4.106 By definition and application, this exception is extremely broad. Private educational authorities include all non-government educational institutions, some of which are religious and others of which have no religious affiliation. The exception also applies to business colleges and other private post-secondary institutions, unless they are established under an Act of incorporation. In 1996, there were 867 non-

government educational institutions in New South Wales employing 19,892 teaching staff.<sup>98</sup> In addition, the exception applies not only to teaching staff but also to support and administrative staff.

4.107 The SDA and Queensland, South Australia (only on the ground of sexuality), Tasmania (only on the ground of sex), Victoria and the Australian Capital Territory legislation provide a limited exception in relation to educational institutions established for religious purposes.<sup>99</sup> The exception in the SDA applies only if the person discriminates “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”.

4.108 Overseas, Canadian federal and provincial discrimination legislation permit discrimination by religious schools only to the extent of a *bona fide* occupational qualification defence. In the United Kingdom, the *Sex Discrimination Act*<sup>100</sup> protects discrimination in relation to employment for the “purposes of an organised religion” where “employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers”.

4.109 In evaluating this exception in New South Wales, there are essentially two issues for consideration. The first is whether there remains any justification for continuing this exception. Secondly, if there is, should its terms be modified?

4.110 These issues were considered at length in the Federal sphere in relation to s 38 of the SDA, both by the Sex Discrimination Commissioner in her Report on the Review of Exemptions<sup>101</sup> and in the Lavarch Committee Report,<sup>102</sup> albeit in a slightly narrower context in relation to educational institutions established for religious purposes. The Lavarch Committee concluded:

While the Committee accepts the right of religious schools to set standards of behaviour for teachers and staff, it cannot accept that there should be a double standard between men and women employed in such schools or that the rights of teachers between government and church schools should be significantly different.<sup>103</sup>

4.111 Accordingly, the Lavarch Committee suggested that s 38 should be reworded to avoid ambiguity, to meet a standard of “reasonableness” and to allow for an objective assessment of the circumstances.

4.112 In her 1992 Report, the Sex Discrimination Commissioner recommended that the exemption in s 38 be removed “to ensure protection against discrimination to all Australians including the large number of teachers employed in the non-government school system”. The Commissioner’s “less desirable but satisfactory” solution was to adopt the proposal that “any discrimination must be reasonable in addition to being in good faith”. This test is unattractive because of its vagueness.

4.113 It is useful to note the issues identified by the ADB in its research report *Discrimination and Religious Conviction*<sup>104</sup> which also assisted the Sex Discrimination Commissioner in her Report. The issues as summarised by the Sex Discrimination Commissioner were:

separation of church and state;

autonomy of religious institutions;

role of religious school in faith community (including parents and parish priest);

church doctrine on marriage and family;  
role of teacher as exemplar;  
public knowledge of individual's lifestyle; and  
congruence of private practice and public expectation.<sup>105</sup>

4.114 The ADB also considered the issues favouring the removal of the exception, which were summarised as follows:

discrimination breaches fundamental rights;  
a teacher's private life is not a work related matter;  
loss of employment is a non-job related issue;  
disciplinary action not caused by poor job performance;  
pressure for dismissal primarily from parents and parish; and  
disruption of students' education for non-school related reasons.<sup>106</sup>

4.115 Various submissions received by the Commission, some citing personal experiences, have identified examples of discrimination in employment by private schools which are difficult to justify.<sup>107</sup> Each of these submissions supported the removal of the exception, at least in relation to non-religious schools. For example, the New South Wales Independent Teachers' Association argued that it was unjustifiable that all staff in private educational institutions (including gardeners, cleaners and other support staff) are exempt from the operation of the Act.<sup>108</sup> The Association also pointed out that a number of private schools receive considerable funding from both State and Federal governments and argued that they should therefore be subject to the same legal requirements as government schools. The National Pay Equity Coalition also argued that, even if there were a justification for the exemption in relation to religious educational institutions, there was no corresponding justification in relation to other private educational institutions.<sup>109</sup>

4.116 In contrast to such submissions, a number of religious organisations expressed concerns that the removal of the exception may lead to an erosion of the constitutional right to freedom of religion.<sup>110</sup> The submission of the Seventh Day Adventist Church specifically stated that the Church does:

not consider that the genuine occupational qualification exception is sufficient protection for private schools and neither is section 56 adequate for preserving the special character of church schools for which they have been established.<sup>111</sup>

4.117 The NSW Parents' Council also argued that the exception should be retained on the basis that parents who choose a particular educational authority because of its philosophy have a right to expect that "adherence to the philosophy [will be] promoted by the authority".<sup>112</sup>

4.118 The arguments in relation to this particular exception may usefully be considered separately in relation to religious educational institutions and others. Dealing first with non-religious institutions, it is necessary to set aside concerns relating to religious doctrine and the sensitivities of persons who adhere to a particular

faith. Adopting that course, there is an absence of persuasive argument in favour of maintaining the exception. Indeed, there is some force to the proposition that the law would be inconsistent if it permitted those who educate children to be exempt from application of important principles relevant to human rights in their employment practices whilst hopefully inculcating appropriate and accepted non-discriminatory values in their pupils. Further, it cannot be said that private educational institutions are in some exceptional position because their funding comes from parents. Some level of parental funding is also to be found in government schools and significant levels of government assistance are available to most private schools. Accordingly, the Commission is satisfied that the exception in relation to non-religious educational institutions is unjustifiable.

4.119 The question of employment in religious educational institutions involves different considerations to the extent that the imposition of discrimination laws may intrude upon or impair freedom of religious belief and the exercise of such beliefs. On one view, a religious school providing education in the secular world and receiving any funding and tax benefits from the Government should be subject to secular regulation proportionate to the degree of secularity of its activities.<sup>113</sup> Many submissions to the SDA Review echoed this view. This raises the question of the degree of connection between the school and the religion, and the degree to which the tenets and beliefs of the religion are integral to the general philosophy and operation of the school. For example, many such schools are not established for the propagation of a particular religion, but operate by the tenets of the religion and are linked to the parent religious body via articles of association, governing bodies and property holdings.

4.120 The underlying doctrines and tenets of various religions may have a discriminatory effect in some circumstances. For instance, some Christian schools refuse to employ homosexual persons as such a lifestyle is considered contrary to the tenets of the Christian religion. In the United Kingdom, the *Sex Discrimination Act 1975*<sup>114</sup> protects discrimination in relation to employment for “the purposes of an organised religion” where employment is limited to one sex so as to comply with the doctrines of the religion”. Depending on the interpretation given to “purposes” of an organised religion, employment in a school for Moslem girls may be limited to women.<sup>115</sup>

4.121 Three further distinctions need to be made. First, the treatment of employment in seminaries or institutions whose dominant or primary purpose is the inculcation of religious beliefs or preparation for a religious career may need to be dealt with separately from general educational institutions which have a religious foundation or philosophy. Secondly, it is necessary to determine how widely any exception should apply. In relation to each category of institution, if the exemption is legitimate in respect of teaching staff, is it also legitimate or justifiable in respect of administrative or other staff, including secretaries and gardeners? Thirdly, there is a question as to the precise nature of the exception: should it extend to employment practices where compliance with the ADA would contravene the doctrines, tenets, beliefs or teachings of a particular religion or creed or should it extend to practices which, if carried out in compliance with the Act, would cause injury to the “religious susceptibilities” of adherents to that religion or creed? These three issues are dealt with in turn.

#### ***Nature of institution***

4.122 The question of religious institutions, such as seminaries, is dealt with separately, in Chapter Six.<sup>116</sup> The concern here is limited to general private educational institutions, being institutions other than those which have a dominant or primary purpose of providing religious education.

### ***Nature of employment***

4.123 Although a school may have general educational purposes, some teachers may be required for religious instruction. If a tenet of the religion requires that religious instruction be given by males, it is reasonable that the general provision prohibiting discrimination on the ground of sex should not apply. Whether or not such a tenet would operate in relation to the teaching of secular subjects may not give rise to any clear answer and may depend upon whether one looks merely to the tenets of the religion or looks also to the susceptibilities of its adherents who may wish their children to be taught at a school which is generally run in accordance with religious principles. Thus, for example, a religion which is opposed to homosexuality as a lifestyle may deem it inappropriate to have teachers, even in relation to secular subjects, who are homosexual, on the basis that they wield influence over students and are often seen as role models. Of course, whether the sexual preference is known or likely to be known may be a relevant consideration.

4.124 In relation to non-teaching staff, the significance of influence is likely to be greatly reduced. In such cases, the issue may depend upon the level of contact between employee and student or between employee and teaching staff, to the extent that that is relevant.

### ***Formulation of exception***

4.125 In the next chapter, the Commission recommends that the ADA provide protection from discrimination on the ground of religious belief.<sup>117</sup> As a result, conflicts may arise in the operation of the prohibition with respect to employment on other grounds and the doctrines of a particular religion. The SDA presently provides a limited exception for educational institutions where: the institution is conducted in accordance with the “doctrines, tenets, beliefs or teachings of a particular religion or creed”; and the discrimination is “in good faith to avoid injury to the religious susceptibilities of adherents of the religion or creed”.<sup>118</sup>

4.126 While a direct conflict must be appropriately resolved by an exception, there is greater difficulty in expanding the exception in order to “avoid injury to the religious susceptibilities of adherents of the religion or creed”. First, the reference to “religious susceptibilities” is so imprecise as to be unhelpful in discrimination law. Secondly, it is not clear what the extension is intended to achieve: if the employment of a woman in a particular position does not contravene the doctrines of the religion or creed, it is not clear in what way it could legitimately affect “religious susceptibilities” of followers of those doctrines. In the Commission’s view, the exception should be limited to those practices which can fairly be described as resulting in conflict between the ADA and doctrines of a religion. Accordingly, the exception should be limited to the first limb of the terminology noted above.

4.127 There is, however, a further question as to how any appropriate exception should apply. Within many religions there is disagreement as to the relevance of particular factors. In some cases, religious beliefs appear to undergo liberalisation and may result in increased tolerance, reflecting changing views of the society in which they operate. These developments are reflected in the debates in some Christian denominations as to the appropriateness of the ordination of women and as to the role of homosexual persons in the church and its ministry. There is a danger that the courts may get embroiled in these debates. This process can be undesirable and can lead to the appearance that the law is intruding inappropriately into religious disputes. Accordingly, it is desirable that the exception, where available, should apply if the EO Division is satisfied that the employer has acted in a bona fide belief that the doctrines of the religion are being complied with, so long as the belief, if not generally adhered to within the religion, or not supported by majority of the adherents of the creed, is



nevertheless treated as a respectable view by members of that particular religious group.

4.128 There then arises a question as to how the exception should properly be framed. Because of the variety of circumstances to which it applies, the Commission considers it is most appropriately dealt with as a genuine occupational qualification defence. The exception should apply to the grounds of sex, marital status [proposed domestic status], homosexuality [proposed sexuality] and transgender status. It should also apply to the proposed ground of pregnancy. However, there appears no justification for such an exception applying to allow discrimination on the grounds of race and age, or on the proposed grounds of political opinion or carer responsibilities. In relation to the proposed ground of religion, as the Commission is recommending a “genuine occupational qualification” exception to apply to all employment situations<sup>119</sup> a specific exception in relation to employment in religious schools is not necessary. Accordingly, the Commission recommends that the defence be formulated in keeping with the following principles.

#### **Recommendation 16**

**For religious educational authorities, substitute for the current exception for employment in a private educational authority, an exception based on a genuine occupational qualification. The exception should provide that:**

**it only applies to the grounds of sex, pregnancy, domestic status, sexuality and transgender status [Draft Anti-Discrimination Bill 1999: cl 28(5)(b)];**

**the educational institution must be conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed [Draft Anti-Discrimination Bill 1999: cl 28(5)(c)];**

**the employer must act on a bona fide belief that the discrimination was required in order to comply with the tenets of the particular religion or creed [Draft Anti-Discrimination Bill 1999: cl 28(6)]; and**

**if the existence or operation of the tenet of the particular religion or creed is disputed by some adherents of that religion or creed, it is sufficient if the view is one which is treated as a reasonable view by the adherents of that religion or creed [Draft Anti-Discrimination Bill 1999: cl 18(2)].**

#### **PROVISION OF GOODS AND SERVICES**

4.129 Discrimination in the provision of goods and services is, and has been for a considerable time, the second largest area of inquiry and complaint in New South Wales.<sup>120</sup> This indicates that it is an area of considerable importance. However, some commentators have expressed scepticism about the effectiveness of the prohibition on the basis that arguments of economic rationalism have given rise to significant exceptions and have limited the application of the prohibition in this area. For example, one commentator concludes that:

While some institutional policy changes have been effected in respect of women's financial dealings, this area [of goods and services] has not constituted a major locus of social change.<sup>121</sup>

4.130 This section examines the adequacy of the prohibition of discrimination in the provision of goods and services in New South Wales by considering:

the definitions and terminology used in other jurisdictions; and

judicial interpretation of the provision in New South Wales and elsewhere.

4.131 Although there do not appear to have been problems in practice, there are theoretical difficulties arising from the fact that the areas, as presently defined, overlap. For example, the area of goods and services overlaps with the areas of education and accommodation. Similarly, conditions of employment which provide for welfare services or health insurance for employees could form part of the terms and conditions of employment or come within the separate area of provision of services. Likewise, many services provided by clubs and incorporated associations could fall within two areas.

4.132 The theoretical problem only becomes a practical issue if different exceptions apply. For example, if there is an exception in relation to the conduct of Church schools, that exception should not be able to be avoided by bringing a complaint on the basis of failure to provide services. This difficulty can be overcome by ensuring that the exceptions, which have application to particular areas, are phrased so as to apply to the particular conduct, even if the conduct itself may be identified as falling within two or more areas.

### **Coverage under the ADA**

4.133 Discrimination in the provision of goods and services was an area included in the ADA when it was originally enacted in 1977. Since then, it has been included as an area of discrimination in relation to all grounds progressively added. Until recently,<sup>122</sup> the prohibition on the ground of race was couched in different terms to the prohibition on other grounds.<sup>123</sup> This anomaly has now been removed by amending s 19 to be consistent with the language of analogous provisions in respect of other types of discrimination. The prohibition applies to:

the refusal to provide goods or services; and

the terms on which the goods or services are provided,

regardless of whether the provision is for payment or not.

4.134 The scope of the area depends largely on the interpretation of the terms "goods" and "services". The ADA does not define the term "goods". The term "services" is interpreted inclusively in s 4 which provides a list of the "most obvious situations"<sup>124</sup> in which services may be provided.<sup>125</sup> In 1997, this definition was amended for the first time, expanding it to include:

- (f) services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not.<sup>126</sup>

4.135 The background to this amendment is discussed in relation to the area of "Access to places, vehicles and facilities".<sup>127</sup> The ADA also specifically covered

access to places where liquor is sold in relation to sex discrimination, until the recent amendment moved this provision.

4.136 An analysis of the types and grounds of goods and services complaints received in New South Wales shows that they have remained largely consistent over the past few years. In 1996, the majority of goods and services complaints were complaints of age discrimination,<sup>128</sup> followed by complaints of race discrimination.<sup>129</sup>

4.137 In 1994/95 the ADB found that, of the complaints of race discrimination received, 29% were complaints against entertainment and recreation providers and 17% were complaints about the provision of services by public authorities. Complaints by lesbians and gay men in the goods and services area related predominantly to the provision of services by public authorities, insurance providers and trade and business operators.<sup>130</sup> Disability discrimination complaints tend to spread evenly across most categories of goods and services such as transport, the provision of goods, public authorities, public access and insurance.<sup>131</sup> The largest number of complaints in relation to goods and services related to the provision of entertainment.<sup>132</sup>

### **Coverage in other jurisdictions**

#### ***United Kingdom***

4.138 The ADA's definition of services is largely based on the United Kingdom model. The relevant provisions in the *Sex Discrimination Act 1975* (UK)<sup>133</sup> and the *Race Relations Act 1976* (UK)<sup>134</sup> prohibit discrimination in "the provision (for payment or not) of goods, facilities, or services to the public or a section of the public" and provide a list described as "examples".<sup>135</sup>

#### ***Australia***

4.139 All Australian jurisdictions prohibit discrimination in the provision of goods and services. However, the extent of coverage varies.

4.140 Section 13 of the RDA prohibits a person who supplies goods and services to the public or a section of the public from refusing or failing to supply those goods and services on demand or by supplying the goods and services on less favourable terms. The definition of "services" is less expansive than that in the ADA; it states that it includes "the provision of facilities by way of banking or insurance or of facilities for grants, loans, credit or finance". There are separate provisions which specifically deal with access to places, vehicles and facilities<sup>136</sup> and services associated with the disposition of land, housing and business or residential accommodation.<sup>137</sup> Apart from these specific provisions, the general prohibition in s 9 gives effect to the CERD which specifically covers "the right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks".<sup>138</sup>

4.141 The SDA and DDA prohibit discrimination in the provision of goods, services and facilities.<sup>139</sup> The expression is similar to the ADA except that they also refer to the manner in which goods and services are provided and facilities made available. Like the RDA, services associated with the disposition of land are dealt with in separate sections,<sup>140</sup> as are services associated with administering Commonwealth laws and programs.<sup>141</sup> The inclusive list defining "services" is almost identical to the list in the ADA with the addition under the SDA and DDA of "services provided by a government".

4.142 In Victoria, in addition to referring to supply of, and the terms of supplying, goods and services, there is also a provision referring to “subjecting a person to any other detriment in connection with the prohibition of goods and services”.<sup>142</sup> The definition of services is identical to New South Wales and includes the access to and use of any place that members of the public are permitted to enter.

4.143 In Queensland, the prohibition is a combination of the SDA and Victorian provisions. It covers failure to supply goods and services, the terms on which they are supplied, the way in which they are supplied and any unfavourable treatment connected with such supply.<sup>143</sup> The prohibition applies in relation to all grounds. Breastfeeding is identified as an attribute only in the area of goods and services.<sup>144</sup> As is the case under the SDA, there is a specific prohibition against discrimination in the administration of any State law and program which will extend the area of the provision of goods and services.<sup>145</sup> Insurance and superannuation are specifically excluded from the definition of services and are dealt with as separate areas under the ADA.<sup>146</sup> The ADA (Qld) does, however, include access to and use of any place, vehicle or facilities and the provision of scholarships, prizes or awards.

4.144 In South Australia, the prohibition covers goods, services and facilities<sup>147</sup> and is couched in quite different terms to the corresponding prohibition in New South Wales. Unlike other jurisdictions, where the definition of “services” is inclusive, the *Equal Opportunity Act 1984* (SA) (“EOA (SA)”) provides an exclusive list thereby restricting the coverage to the services listed in the definition. Additional services mentioned in the definition are access to places, services provided by an employment agency, the provision of a scholarship, prize or award, services provided by an introduction agency, provision of coaching or umpiring in sport, and services provided by a Government department, instrumentality or agency.

4.145 Like the SDA, DDA and South Australia, in Western Australia the prohibition covers goods, services and facilities<sup>148</sup> and covers refusal to supply, terms of supply and manner of supply. In Western Australia it applies in relation to all prohibited grounds except family responsibility. The definition of services is very similar to the corresponding definition in New South Wales, but includes services provided by government and a government authority. Separate provisions exist prohibiting discrimination in relation to access to places and vehicles,<sup>149</sup> disposition of land<sup>150</sup> and sport in relation to impairment and age (with some limitations).<sup>151</sup>

4.146 The prohibition in the Australian Capital Territory applies to goods, services and facilities and is very similar to the above with a few variations.<sup>152</sup> The definition of services includes government and the provision of scholarships, prizes and awards.

4.147 In the Northern Territory, the prohibition covers goods, services and facilities<sup>153</sup> and is in similar terms to the corresponding provision under the ADA (Qld). The definition of services is expressed in terms which are more extensive than most other jurisdictions. The additional services described are loans, credit guarantees, hire purchase schemes or any other type of financial accommodation, recreation, including entertainment, sports, tourism and the arts, services provided by a government or local government council, statutory corporation, and company or other body corporate controlled by government. Insurance and superannuation are specifically excluded from the definition of “services” and, like the ADA (Qld), are dealt with as a separate area of operation. Artificial fertilisation procedures are excluded from the definition of services and consequently from the coverage of the Northern Territory Act.<sup>154</sup>

4.148 In Tasmania, the grounds covered are gender, marital status, pregnancy, parental status and family responsibilities.<sup>155</sup> The provision of facilities, goods and

services is an identified area of activity<sup>156</sup> and the definition of services includes access to and use of any place and disposition of land.<sup>157</sup>

4.149 It is evident from the above that, coverage in the area of “goods and services” is fairly consistent around Australia. However, although the definition of “services” under the ADA is stated to be inclusive, two major areas which are not specifically mentioned, and which do appear in the legislation of other States, are the areas of superannuation and sporting activities. Complaints in these areas are generally dealt with as “goods and services” complaints under the ADA.<sup>158</sup> In relation to sporting activities, the basic area under which these will fall in the future is that of clubs and associations. The Commission recommends that the area of superannuation be specifically included within the definition of “services” within the ADA.

4.150 As the definition of “services” under the ADA is stated to be inclusive, it is necessary to consider judicial interpretation of the term “services”, given its broad coverage.

### **The scope of the ADA**

4.151 The definition of “services” appearing in the EOA (WA)<sup>159</sup> in terms similar to the current definition in the ADA was considered by the High Court in *IW v City of Perth*.<sup>160</sup> One question raised in that case was whether the City discriminated against the appellant, who had an impairment, namely being infected with HIV, in refusing to give planning approval for a drop-in centre for persons who were infected with HIV. This question involved the scope of the area identified as provision of services. The meaning of “services” was considered by Chief Justice Brennan and Justice McHugh in a joint judgment,<sup>161</sup> by Justices Dawson and Gaudron in a joint judgment,<sup>162</sup> by Justices Toohey,<sup>163</sup> Gummow<sup>164</sup> and Kirby.<sup>165</sup> A majority considered that the word was, in the terminology of Justices Dawson and Gaudron, “apt to include the administration and enforcement by the City of Perth of the Planning Scheme”. Their Honours continued:

That being so, the Tribunal was correct in holding that “in administering a town planning scheme ..., regulating the use of land ..., securing provision for traffic ..., and generally implementing or enforcing measures directed to the amenity of the area, ... the City of Perth [was] providing a service to residents.”<sup>166</sup>

4.152 However, the five members of the majority (other than Chief Justice Brennan and Justice McHugh who dissented on that question) were divided on whether the refusal to grant planning approval involved discriminatory conduct prohibited under the Act. Justices Dawson and Gaudron identified the service as “the exercise of a discretion to grant or withhold planning approval” and noted that there was no refusal to provide that service as a decision had been made.<sup>167</sup> However, these members of the Court held that if discriminatory considerations affected the manner in which the discretion was exercised, there was discrimination in providing the service. This finding may have ramifications for the ADA, as the current section relating to the provision of goods and services does not identify the manner in which services are provided as part of the conduct prohibited under the Act.<sup>168</sup> As a result, to ensure that such a situation is covered, the current prohibition in the ADA should be amended to include the manner in which such goods and services are provided.

4.153 In addition to this, it is also necessary to consider the basis upon which Chief Justice Brennan and Justice McHugh took a different view to the majority in relation to

the definition of “services”. Whilst accepting that the term “services” had a wide meaning, in the ordinary sense of the word,<sup>169</sup> their Honours added:

As the evils of discrimination in our society have become better understood, legislatures have extended the scope of the original anti-discrimination statutes. Many persons think that anti-discrimination law still has a long way to go. In the meantime, courts and tribunals must faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope. But when ambiguities arise, they should not hesitate to give the legislation a construction and application that promotes its objects. Because of the restricted terms of a particular statute, however, even a purposive or beneficial construction of its provisions will not always be capable of applying to acts that most people would regard as discriminatory.<sup>170</sup>

4.154 Their Honours then indicated why they held that this particular concept did not extend to the consideration of a planning approval application:

Thus, when a council is called on as a deliberative body to exercise a statutory power or to execute a statutory duty, it may be acting directly as an arm of government rather than as a provider of services and its actions will be outside the scope of the Act ... Such “legislative” acts have to be contrasted with the acts involved in making operational decisions as to whether a particular service should be provided to certain individuals or to a section of the community.

Similarly, when a council is required to act in a quasi-judicial role in exercising a statutory power or duty, it may be inappropriate to characterise the process as the provision of a service for the purpose of the Act even in cases where the product of the process is the provision of a benefit to an individual.

4.155 Other members of the Court were not persuaded that this particular distinction, in the context of the Act, was appropriate. Thus, Justice Gummow stated:

There is no reason in logic or good sense to deny the proposition that the Council may be engaged in the provision of services, not only to the community as a whole, but also to individual applicants who invoke the exercise of the powers of the Council under the town planning law. There is no dichotomy here between the discharge of statutory functions and the provision of services to those seeking the discharge of these functions.<sup>171</sup>

4.156 The critical issue for the Chief Justice and Justice McHugh appears not to have been an issue of principle requiring, in policy terms, such a distinction, but rather the need to adopt a careful interpretation, “given the artificial definitions of discrimination in the Act and the restricted scope of their applications”.<sup>172</sup> Accordingly, the Commission is of the view that the matter should be clarified in the legislation so as to give effect to the interpretation accepted by a majority of the High Court. The manner of achieving this result is to provide expressly for an area concerning discrimination in the exercise of powers and functions by government or public authorities and their officers. This is dealt with in the last section of this chapter.<sup>173</sup>

### **Access to places**

4.157 A further issue which arises in relation to the definition of “services” is that of whether access to places, vehicles and facilities is best dealt with as an aspect of the provision of services, or whether it should form a separate area. Currently the definition of “services” under the ADA includes access to places, vehicles and facilities.<sup>174</sup> This matter is discussed below, under the heading “Access to places, vehicles and facilities”.<sup>175</sup>

### **Definition of “goods”**

4.158 A notable feature in the anti-discrimination legislation considered above is the absence of a definition of the term “goods”. One definition of the term “goods” is found in the *Sale of Goods Act 1923* (NSW) which provides that “goods” include:

all chattels personal other than things in action or money

4.159 Chattels are generally defined as movable, tangible articles of property.<sup>176</sup> This definition would exclude shares and securities from the definition of “goods” since they are not tangible property, although they can be bought and sold. Choses in action are defined as follows:

A *chose in action* is a thing of which a person has not the present enjoyment, but merely a right to recover it (if withheld) by action. Thus, money at a bank or money due on a bond is a *chose in action*.<sup>177</sup>

4.160 In many cases, the provision of various benefits will be covered by other concepts, including employment, the provision of services and club membership. Similarly, money may be provided pursuant to a contract of insurance or employment, or through financial accommodation, such as a loan or credit agreement. However, in some areas, which are of increasingly widespread relevance, dealings are undertaken through various forms of choses in action. This is particularly true in relation to investments generally. Whilst there was good reason, for the purposes of the *Sale of Goods Act*, to limit the definition of “goods”, those reasons do not apply to the ADA. Accordingly, it is appropriate to define goods so as to include choses in action and money.

### **Provision of “benefits”**

4.161 There is no mention of “benefits” within the goods and services provision. In contrast, the provisions dealing with registered clubs specifically include a reference to “access to benefits” as do the provisions relating to education.

4.162 In *L v Registrar of Births Deaths and Marriages*,<sup>178</sup> the benefits derived from the functions of a registrar in keeping a register and recording particulars<sup>179</sup> were linked to the services provided by the Registrar, even though it is obligatory to avail oneself of these benefits. In *Woods v Wollongong City Council*,<sup>180</sup> the EOT referred to a decision of the Victorian Board in *Byham v Preston City Council*<sup>181</sup> which found that the Council had unlawfully discriminated against an elderly man, who required the assistance of elbow crutches, by imposing a requirement that he obtain access to the first floor of the Municipal offices via a staircase. The Victorian Board identified two services provided by the Council, namely the benefit of participating in local government and the means by which that benefit might be achieved, which supported the proposition that access involving the use of a staircase was a service. The EOT in *Woods* disagreed with the Victorian Board’s reasoning in that it included the provision of benefits of the complex as being within the ordinary meaning of the term “services”. It was therefore unnecessary to consider whether the means of

access to the complex was a “service” within the meaning of the Act or not. In *City of Perth v DL (Representing the Members of People Living with AIDS (WA) Inc)*,<sup>182</sup> it was held that:

A person provides a service or services to another ... when the first person does something which provides to the second a benefit or a result which is of assistance to or desired by the second person, whether the benefit or assistance is provided directly or indirectly.

On the basis of the above, it is accepted that at least some benefits are now included within the definition of services.

4.163 The question is whether the provision of services should be defined to include the provision of benefits, which may not be limited to some form of interest in real or personal property or money. In the view of the Commission, this is not necessary. The present inclusive definition of services includes the kind of benefits which may flow from providing, for example, entertainment or recreation. The fact that the definition is expressed to be inclusive should be sufficient to provide the necessary coverage. The term “benefits” is so vague as to be uninformative in terms of identifying specific areas which may be covered and neither extends nor gives substance to the present definition. The Commission is not satisfied that the addition of this concept in this area is either necessary or desirable.

#### **Recommendation 17**

**In the area of provision of goods and services, include the manner in which the goods and services are provided.**

**Draft Anti-Discrimination Bill 1999: cl 35(1)(c)**

#### **Recommendation 18**

**Include in “services” a specific reference to superannuation.**

**Draft Anti-Discrimination Bill 1999: cl 36(1)(c)**

#### **Recommendation 19**

**Include in the definition of “goods” a chose in action and money.**

**Draft Anti-Discrimination Bill 1999: cl 36(1)**

### **Education**

4.164 Education as an area of operation is only concerned with discrimination by educational authorities against students or prospective students. Although it is not one of the main areas of complaint,<sup>183</sup> it is an important area in the context of the general social problem of discrimination. Education may significantly determine a person’s future opportunities in many respects and occupies a substantial portion of a normal life span. It can also be a means of changing attitudes and hence patterns of discrimination in society. As one writer has argued:



education is a powerful instrument of social control which serves to reproduce cultural norms and existing social inequalities. On the other hand, the liberal vision suggests that the hope for a better society, where prejudice against women and minorities has been eliminated, rests with education rather than prescriptive legislation.<sup>184</sup>

4.165 Education can refer to any learning process, but in this context is used to refer to the organised provision of instruction. Institutionally, it covers discrimination in “a school, college, university or other institution at which education or training is provided”.<sup>185</sup> Thus, TAFE colleges, secretarial colleges and other colleges of advanced education are covered by the Act. However, the ADA’s coverage is currently restricted to “public” education, except in relation to the ground of race and in relation to sexual harassment.

#### **Coverage under the ADA**

4.166 The ADA prohibits discrimination on all grounds by a public educational authority against prospective students and current students. The four situations identified are:

- admission;
- access to benefits;
- expulsion; and
- subjection to any other detriment.

4.167 The ADA prohibits an educational authority from discriminating on any of the proscribed grounds:

by refusing or failing to accept the person’s application for admission as a student; or

in the terms on which it is prepared to admit the person as a student.

4.168 The ADA also prohibits discrimination on all grounds by denying or limiting a student’s access to any benefit provided by the educational authority. All other jurisdictions around Australia also prohibit discrimination in access to benefits. The rationale is that once admission is granted, there should be no justification for discriminating against a student.

4.169 The term “benefits” has wide coverage. The obvious benefits include access to library, computer or other facilities and tuition and counselling services. Discrimination can also occur in the curriculum offered, which is a benefit provided by the educational authority. The design of the curriculum, that is the courses which are offered, the content of those courses and the materials which are used to teach those courses are all significant areas covered by the ADA.

4.170 A benefit may also include other facilities, such as an environment conducive to study. In *Metwally v University of Wollongong*,<sup>186</sup> it was held that isolating a student by subjecting him to a racially hostile environment was discrimination on the ground of race. Similarly, creating a hostile environment to, for instance, homosexual students such that they are unable to enjoy available benefits on equal terms, may amount to discrimination on the ground of homosexuality, even though technically the benefits or facilities are available to all students.

4.171 Another aspect of discrimination in access to benefits arises where entry to courses is determined in a discriminatory way. Curriculum streaming on the basis of sex is a classic example. In *Leves v Haines*<sup>187</sup> the complainant attended a girls' high school and her twin brother attended a boys' high school. The complainant had a limited range of elective subjects to choose from, while her brother had the opportunity of a wider choice. The EOT held that the educational authority had discriminated because less favourable treatment had occurred on the basis of sex: the complainant had less access to the benefit of scholastic and vocationally relevant skills than was available to the boys in the boys' high school. The elective courses were benefits provided by the educational authority. The unavailability of such benefits could be based on legitimate considerations, such as lack of funding, but not on assumptions based on sex. This decision was upheld by the New South Wales Court of Appeal.<sup>188</sup> Even where there is no curriculum streaming, teaching itself can be done in a discriminatory manner with the teacher, for example, devoting more attention to girls than boys or vice versa, in a co-educational class.

4.172 Facilities and services provided by schools may be another focus of concern. Expenditure patterns on teaching or sports equipment, library or counselling facilities which, for instance, ignore the needs of girls or ethnic minorities could be discriminatory in denying some students equal effective access to those benefits. Similarly, the failure to provide adequate facilities to students with a disability could have the effect of denying those students access to benefits that the school provides.

4.173 In addition to the prohibition on discrimination in admission or access to benefits, it is also unlawful under the ADA to discriminate in education by expelling a student or subjecting the student to any other detriment on any of the prohibited grounds. Thus, for example, a high school student cannot be expelled for getting married or falling pregnant or for being homosexual.

4.174 Queensland and the Northern Territory use different terminology by making it unlawful to treat a student less favourably (or "unfavourably" in Queensland) in any way in connection with the student's training or instruction. All other jurisdictions deal with expulsion and subjection to any other detriment as two separate limbs.

4.175 No change is recommended to the area of education as currently defined. However, it is necessary to address the current limitation to public education.

#### **Coverage in other jurisdictions**

4.176 Discrimination in education is specifically covered by all Australian anti-discrimination legislation (except the RDA) in very similar terms to New South Wales.<sup>189</sup> Although there is no specific mention of discrimination in education in the RDA, the general provision prohibiting any act of discrimination covers education, as it is a relevant area for the purposes of the governing CERD.<sup>190</sup>

4.177 The SDA covers the same situations as New South Wales. Additionally, in giving effect to the CEDAW, the provisions specifically dealing with education in Article 10 of that Convention are relevant to all educational authorities covered by the SDA and provide valuable guidance and direction on what is meant to be achieved by the less detailed prohibition in the legislation.

#### **Exception – education in a private educational authority**

4.178 The current exception concerning employment by a private educational authority has already been discussed above. Education in a private educational authority is also currently exempt from the provisions of the ADA. This exception was first introduced in 1981, together with the private educational authority exception in

relation to employment. Thus, the general prohibition against discrimination in relation to admission of students, the terms and conditions of such admission, access to benefits provided and expulsion do not apply to private educational institutions if such discrimination is on the grounds of sex, marital status, disability, homosexuality, age or transgender status.

4.179 Although the exception does not apply to race discrimination, s 17(3) allows an educational authority to be exempt from the general prohibition against race discrimination in education in prescribed circumstances. None are presently prescribed.

4.180 Exceptions in relation to education exist in the SDA in relation to religious institutions,<sup>191</sup> in Queensland in relation to non-State school authorities,<sup>192</sup> in South Australia in relation to sexuality where an educational institution is administered in accordance with the precepts of a particular religion,<sup>193</sup> in Western Australia if the discrimination is in good faith in favour of adherents of a particular religion on any prohibited ground except race, impairment or age or by prescription in regulations in relation to race, religious or political conviction,<sup>194</sup> and in the Australian Capital Territory in relation to religious institutions.<sup>195</sup>

4.181 The rationale for the current exception is that the State should not interfere with education in the private sphere. As stated above, the inclusion of this exception was mooted by the private school lobby group and mainstream churches. As with restricting private educational authorities in employment, there seems little justification in giving private educational authorities as they are currently defined such a broad exception in relation to the services they provide. Educational bodies, whether public or private, provide a service which, except for certain carefully justified circumstances, should be free from unlawfully discriminatory criteria. The exceptions provided in other jurisdictions suggest that the only area in which an exception may be justified is in relation to religious schools, where discrimination may be needed to cater to particular religious doctrines. This is consistent with the conclusion reached above in relation to the area of employment.

4.182 The purpose of excluding prescribed private educational authorities from the prohibition against race discrimination was to cover situations like "certain schools ... designed to provide language classes for migrants both in the English language and the languages and cultures of their home country".<sup>196</sup> Such situations will be covered by the proposed special measures provision and do not warrant an exception by prescription.

4.183 The Commission is not satisfied that, in the important area of education, discrimination should be permitted except to the extent necessary to resolve a conflict with other fundamental human rights or freedoms. The only basis on which the Commission is satisfied that such a conflict exists is in relation to religious freedom. Furthermore, the Commission can see no justification for providing such an exception, even for religious educational institutions, in relation to the grounds of race, age or disability or in relation to sexual or other forms of harassment.<sup>197</sup>

4.184 In principle, this approach should not give rise to any broad areas of disputation. For example, if the tenets of a particular religion require that boys be educated separately from girls or, indeed, that girls not be provided with education, a private educational institution based upon those precepts would be entitled to exclude female students entirely. Adherents to that faith would presumably accept that result and would not seek to have their daughters educated within the religious education system. Those who do not adhere to such a precept would either be dissident members of the faith or non-believers. It is not considered necessary that discrimination laws should provide protection to dissidents within a particular religion

or creed, nor should non-believers be entitled to impose their views upon adherents to the particular faith. Accordingly, the exception is supportable in so far as it is limited, as with the question of employment, to private educational institutions with a religious foundation.

#### **Recommendation 20**

**Repeal the exception for private educational authorities in relation to education on all grounds.**

#### **Recommendation 21**

**Repeal the exception for prescribed educational authorities from the prohibition on race discrimination in education.**

#### **Recommendation 22**

**Provide a limited exception for educational institutions which operate in accordance with religious tenets for the grounds of sex, domestic status, sexuality, transgender status and religion.**

**Draft Anti-Discrimination Bill 1999: cl 44**

### **ACCESS TO PLACES, VEHICLES AND FACILITIES**

#### **Legislative development**

4.185 When first enacted in 1977, the ADA included a prohibition against discrimination on the ground of race in relation to access to places and vehicles and a prohibition on the ground of sex in relation to access to places where liquor is sold.<sup>198</sup> Thus (in relation to race) s 18 provided that it was unlawful to discriminate as follows:

- (a) by refusing access to or use of any place or vehicle that the public or a section of the public was entitled to use or access, for payment or not;
- (b) in the terms on which access or use of such place or vehicle was allowed;
- (c) by refusing the use of any facilities in such place or vehicle that the public or section of the public was entitled or allowed to use;
- (d) in the terms on which the use of such facilities was allowed;
- (e) by requiring the person to leave or cease the use of any such place, vehicle or facility.

4.186 The reason for introducing these provisions in relation to race and sex respectively may be found in the social conditions at the time. For example, it was the practice of many hotels at the time to exclude women from the public bar area (although the definition of services which covered services relating to entertainment,

recreation or refreshment should have dealt with this issue adequately). It is noteworthy, however, that to date there has been only one reported case<sup>199</sup> in which discrimination on the ground of race in relation to access to places and vehicles has been substantiated and none in relation to access to places where liquor is sold on the ground of sex.

4.187 In 1993, when the age discrimination provisions were included in the ADA, a provision mirroring the race discrimination prohibition in relation to access to places and vehicles<sup>200</sup> was included in relation to age. In 1996, when the transgender amendments were made, an access to places and vehicles provision<sup>201</sup> was included.

4.188 These provisions<sup>202</sup> have, however, been recently repealed<sup>203</sup> and some aspects have been incorporated within the amended definition of “services”, which applies to all grounds of discrimination. The amendment to the definition of “services” has added the following paragraph:

- (f) services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not.

4.189 The rationale for this amendment was mainly to achieve consistency within the ADA by avoiding separate coverage for particular grounds. The need to amend the Act was also highlighted in the decision of *Wolk v Randwick City Council*.<sup>204</sup> In that case, a local male resident challenged the right of the Randwick Council to deny him access to the Coogee baths, which the Council leased to a women’s swimming club for the use of women only, on the grounds of his sex. His argument was based on the fact that it was unlawful for councils to discriminate in the provision of services on any grounds set out in the ADA. However, Judge Patten decided that access to the Coogee Baths was not the provision of a service by the Council and consequently dismissed the complaint. His Honour said:

It seems to me as pointed out in *Pearce* that in a number of respects the Act, for instance, section 18, makes specific reference to discrimination in relation to the use of places in contradistinction to the provision of services. As it seems to me, the material before the Tribunal does no more than indicate that the respondent, at the highest, restricted access to a place, namely, the swimming pool which is the subject of these proceedings, under its control.<sup>205</sup>

4.190 Whether this reasoning can be supported in light of the High Court decision in *IW v City of Perth*<sup>206</sup> is doubtful, except on the basis that by explicit reference to access in relation to some grounds, an intention to read down the general term “services”, may be implied. It may be argued that the actual result in *Wolk* could have been justified as a “special measure”.

### **Coverage in other jurisdictions**

4.191 The definitions of services in the United Kingdom’s *Sex Discrimination Act 1975* and *Race Relations Act 1976*, which were used as sources in formulating the definition of services in the ADA, contain a list of examples of services which include access to places, accommodation in a hotel, boarding house or similar establishment and facilities for education. A conscious decision appears to have been made by the draftsman to adopt a different approach in New South Wales by dealing with each of these areas separately in the ADA.

4.192 All Australian anti-discrimination legislation, except the SDA, make provision for access to places and facilities either as a separate area or within the definition of services. The RDA contains a very similar provision<sup>207</sup> to the ADA's previous provision in relation to race, in addition to a separate provision relating to goods and services.<sup>208</sup> The SDA only prohibits discrimination in the provision of goods, services and facilities<sup>209</sup> and makes no reference to access to places. Understandably, access to premises is a specific area in the DDA<sup>210</sup> as it is a crucial issue for people with physical disabilities. The contents of the provision are very similar to the prohibition contained in the now repealed s 18 of the ADA. In addition, the DDA also covers discrimination in the provision of means of access to such facilities.

4.193 In Victoria, Queensland, South Australia and Tasmania (in relation to sex) the definition of services includes access to and use of places that members of the public are permitted to enter. In the Northern Territory the definition of services includes "access to or use of any land, place, vehicle or facility that members of the public are or a section of the public is, permitted to use". In Western Australia, discrimination in the area of access to places and vehicles is prohibited on the grounds of race, sex, marital status and pregnancy, impairment and age in similar terms to the now repealed s 18 of the ADA in addition to the prohibition in relation to the provision of goods, services and facilities. The position is similar in the Australian Capital Territory in that there are two separate provisions dealing with access to premises and the provision of goods, services and facilities. The terminology for access to premises is couched in almost identical terms to the corresponding provisions in the DDA.

#### **Judicial consideration**

4.194 In *Pearce v The Glebe Administration Board*,<sup>211</sup> the EOT was concerned with a case involving a request for permission made on behalf of a group of homosexuals to use two sections of vacant land for an assembly point, demonstration and rally. One part of the land belonged to the Anglican Church, which refused permission. The complainant alleged that discrimination had occurred on the ground of homosexuality in relation to the refusal to provide a service, being access to and use of vacant land. The EOT's decision that the term "service" did not extend to cover access to land was based on the existence of separate coverage for access to places and vehicles for race (at that time) and the absence of such express coverage in relation to homosexuality. The judgment also suggested that the grant of a bare permission to use land, entirely dissociated from any other activity is outside the concept of "services".

4.195 Similarly, in *Woods v Wollongong City Council* the complaint was about a retail shopping centre which was under construction and which the complainant alleged, discriminated against people with disabilities in relation to access to the building. The EOT decided that because the shopping centre had not yet been opened, no provision of services had occurred.

#### **Conclusion**

4.196 Although the new paragraph included in the definition of services covers access to and the use of any place or vehicle which the public or section of the public is entitled to use, the substantive prohibitions have not been redrafted to cover the terms on which access to or use of any place, vehicle or facility is allowed, nor to cover the situation where a person is required to leave or cease the use of any place, vehicle or facility, matters which were covered by the now repealed s 18, 38L and 49ZYM. There is also no express reference to discrimination in the provision of means of access to facilities, as is the case under the DDA.

4.197 In relation to discrimination on the ground of disability, a number of the submissions to the Commission in response to DP 30 specifically identified lack of consultation at the planning stage of development as a major barrier to access to public places for people with disabilities.<sup>212</sup> The Commission has recommended that a complaint of apprehended contravention of the Act should be permitted to cover situations such as that which arose in *Woods v Wollongong City Council* and that the EO Division should be permitted to grant appropriate relief.<sup>213</sup> A number of the submissions received by the Commission in response to DP 30 also advocated the inclusion of access to places, vehicles and facilities as a separate area across all grounds of discrimination.<sup>214</sup>

4.198 The Commission is satisfied that it is appropriate to make express reference to access to or use of a place, facility or vehicle. The principal question is whether this should be dealt with as an aspect of the provision of services, or whether it should form a separate area. If it is to be treated as an aspect of services, then it will be necessary to ensure that the terminology of the prohibition is appropriate to have clear application to the extended concepts. On the other hand, to develop a separate area covering access to places is likely to give rise to other forms of confusion. Frequently the provision of services includes permitting the use of a facility or access to a place, such as a cinema for the purposes of seeing a film. The ease of application of the ADA is not improved by multiplying areas. Accordingly, the Commission is satisfied that the present form of coverage, namely by including access to places as part of the current definition of services, is a satisfactory approach. Some minor changes to the wording of the prohibition can ensure that the concepts may readily be applied.

### **Recommendation 23**

#### **Include in the area of goods and services:**

**access to any place, vehicle or facility which members of the public are entitled to use;**

**the terms on which such access is allowed;**

**the provision of means of access; and**

**the requirement to leave or cease the use of any such place, vehicle or facility.**

Draft Anti-Discrimination Bill 1999: cl 35, 36

### **ACCOMMODATION**

4.199 Discrimination on all grounds is prohibited under the ADA in the provision of accommodation.<sup>215</sup> It is an area in which discrimination has been prohibited since the Act commenced in 1977. Although it has never been one of the main areas of complaint,<sup>216</sup> it is nevertheless an area in which discrimination does occur.

4.200 "Accommodation" is defined to include residential or business accommodation.<sup>217</sup> In some other jurisdictions "accommodation" is defined more specifically. For instance, in Victoria it is defined by reference to the premises and includes "business premises, a house or flat, a hotel or motel, a boarding house or hostel, a caravan or caravan site, a mobile home or mobile home site, a camping site". Queensland and the Northern Territory do the same and also include a "building or construction site".

4.201 Such discrimination is prohibited in relation to applicants for accommodation as well as occupiers, and by both owners and agents.

### **Coverage under the ADA**

4.202 The specific forms of conduct on discriminatory grounds covered by the ADA are:

refusing an application for accommodation;

the terms on which accommodation is offered;

deferring an application or according a lower order of precedence in any list of applicants;

denying or limiting access to benefits associated with accommodation occupied by a person; and

evicting or subjecting the person to any other detriment.

4.203 The prohibition against discrimination in accommodation does not include the sale and purchase of freehold title to property.<sup>218</sup>

4.204 To ensure that the ADA's coverage does not intrude into the private sphere of activity, there are exceptions that apply where the provider or a near relative of the provider resides on the premises or where the accommodation is for no more than six persons.<sup>219</sup> Charitable bodies or other bodies that do not distribute profits to members and which provide accommodation to persons with a particular disability are also excepted from the operation of the prohibition.<sup>220</sup>

4.205 In relation to providing accommodation for a person with a disability, it is inevitable that in many cases special facilities or services will be required. Similarly, where a person with a disability is already in occupation but requires a benefit associated with accommodation to be provided in a special manner, it will not be discriminatory to deny or limit such access to the benefit in particular circumstances.<sup>221</sup>

4.206 The ADA also contains a general exception for establishments providing housing accommodation for aged persons whereby admission is restricted to persons of a particular sex, marital status or race.<sup>222</sup> However, it is recommended in Chapter Six of this Report that this exception be repealed as the same effect can be achieved by other means.<sup>223</sup>

### **Coverage in other jurisdictions**

4.207 All Australian jurisdictions prohibit discrimination in accommodation. The RDA prohibits discrimination in relation to disposal of land and accommodation on the ground of race in the same provision.<sup>224</sup> The prohibition in relation to discrimination in accommodation applies to refusal to permit a person to occupy any residential or business accommodation and termination of the right to such occupation. It is also unlawful to impose any terms or conditions that limit the class of persons that may be the invitees or licensees of the occupier.

4.208 Other jurisdictions that prohibit discrimination in the disposal of land and accommodation make provision for the two in separate sections.<sup>225</sup>



4.209 The SDA prohibits discrimination in accommodation<sup>226</sup> in almost identical terms to New South Wales. The exceptions are also similar, with the addition of an exception for accommodation provided by a religious body.

4.210 The DDA's prohibition against discrimination in accommodation<sup>227</sup> is similar to the New South Wales provision in relation to disability. In addition, however, it prohibits the refusal of permission to an occupier to make reasonable alterations, provided the accommodation is restored to its previous condition when the occupier leaves, and it is done at the occupier's expense.<sup>228</sup>

4.211 Victoria covers the issues covered in New South Wales and mirrors the DDA provision allowing the occupier to make reasonable alterations. It also prohibits discrimination by varying terms on which accommodation is provided<sup>229</sup> and refusing to extend or renew the provision of accommodation and the terms of such extension or renewal.<sup>230</sup> Victoria is the only State Act that provides that the provisions in relation to accommodation apply despite anything to the contrary in any other Act or any document affecting or relating to the land.<sup>231</sup>

4.212 Coverage of discrimination in accommodation in Queensland,<sup>232</sup> Western Australia<sup>233</sup> and the Northern Territory<sup>234</sup> are similar to Victoria except that the provisions do not have an express overriding effect in relation to other conflicting Acts. South Australia<sup>235</sup> and the Australian Capital Territory<sup>236</sup> are more akin to New South Wales in that neither of them prohibits the refusal to make reasonable alterations in relation to impairment. Like New South Wales, South Australia also has a catch-all provision prohibiting subjection to "any other detriment". Detriment is specifically defined to include "humiliation or denigration".

#### **Grounds and occurrence of accommodation complaints**

4.213 According to the ADB's Annual Reports most of the complaints in accommodation are on the grounds of race, age and marital status.<sup>237</sup> Discrimination on the ground of race is a frequent occurrence particularly for Aborigines and people from non-English speaking backgrounds. It is claimed that the requirement that prospective tenants must be able to meet their obligations to pay rent and maintain the property is often used as a mask for other reasons.<sup>238</sup> It is noteworthy that in New Zealand, the *Human Rights Act 1993* provides that "employment status" is one of the grounds on which discrimination in accommodation is prohibited. It is defined to mean "being unemployed or being in receipt of a benefit or compensation under the *Social Security Act 1964* or the *Accident Rehabilitation and Compensation Insurance Act 1992*".

4.214 Because apparently legitimate reasons are given, discrimination in accommodation is difficult to prove. The exceptional circumstances of *Lamb v Samuels Real Estate Pty Ltd*<sup>239</sup> provide a recent case in point. In this case, the complainant, an Aboriginal woman, alleged that she had been refused accommodation on the ground of her race, although the reason given by the agent was that there was no rental accommodation that suited her needs. When a Caucasian friend of the complainant went to the office and asked for identical accommodation, she was told that there was accommodation available. The EOT upheld the complaint.

4.215 Within the complaints received on the ground of age are complaints from people refused accommodation because of their young children (often based on assumptions about children's behaviour)<sup>240</sup> and from young and old people, based on assumptions about financial position. The ADB also receives complaints from young high school and university students who have been refused holiday

accommodation.<sup>241</sup> The young often claim to be stereotyped as unreliable and unable to pay rent because of their low or erratic incomes. This is also alleged by new migrants. Older people often complain that they are assumed to be on a pension, unable to afford rent or look after themselves or the property.

4.216 Discrimination in accommodation on the basis of marital status can affect single people of both sexes. As one commentator has observed “single women with children are perceived as deviant because they do not conform to the stereotype of the nuclear family with a wage earning father and dependent mother”.<sup>242</sup> Single men are also subject to disadvantage because they are seen as the converse of the stereotype of the “houseproud” woman. There have also been instances where a policy preference based on need in relation to public housing may result in what appears to be discrimination on the basis of marital status.<sup>243</sup>

4.217 The purpose of the prohibition is clearly to ensure that property owners and agents do not take irrelevant considerations into account when letting or leasing accommodation. The prohibition inhibits a property owner’s freedom of choice<sup>244</sup> and many owners and agents are circumspect about what they tell unwanted tenants, making a case of discrimination difficult to establish. The Tenants Union of New South Wales has suggested that much of the discrimination in accommodation is not reported to anti-discrimination bodies. In a submission to the National Housing Strategy,<sup>245</sup> the Tenants Union stated that most tenants “do not know where to complain, they do not think such action would achieve anything or they fear retaliation by the owner or agent”. This fear is particularly apparent in small country towns, but in such places discrimination may have a particularly severe impact on people who are socio-economically or racially more vulnerable.<sup>246</sup>

### **The Commission’s view**

4.218 One problem with the current provisions of the ADA is that the definition of “accommodation” is not sufficiently comprehensive, merely stating that it includes “residential or business accommodation”. The *Residential Tenancies Act 1987* (NSW) defines “residential premises” to mean:

- (a) any premises or part of premises (including any land occupied with the premises) used or intended to be used as a place of residence; and
- (b) includes a moveable dwelling or the site on which a moveable dwelling is situated or intended to be situated (or both the moveable dwelling and the site), if the moveable dwelling is used or intended to be used as a place of residence”.

4.219 Clearly caravans and mobile homes are expressly covered under this definition; any other premises will also be residential if they are “intended to be used as a place of residence”. Although the current definition in the ADA has not given rise to reported problems, the classification of accommodation in New South Wales used by the Australian Bureau of Statistics for the 1996 Census indicates that there are a wide variety of types of dwelling.<sup>247</sup> As a result, the Commission recommends that the ADA include a definition in the terms of that referred to above.

4.220 In relation to the substantive provisions in the area of accommodation, while the Commission is of the view that discrimination in accommodation is more of a problem than is evidenced by the number of complaints received by the ADB, there does not appear to be any particular legislative change that will improve the situation. The remedy lies in increasing awareness of the law and, in appropriate cases, assisting people to bring complaints and in reducing discrimination by education.<sup>248</sup>

4.221 However, one area where the legislative provisions may be improved is in relation to disability discrimination. Although the current disability provisions in relation to accommodation have not caused any particular problems in known cases, the Commission favours amendment to mirror the DDA provision by incorporating the prohibition on refusal to permit reasonable alterations. Given the difficulty in getting owners to make any alterations, however minor they may be, it is probable that occupiers would prefer to make the alterations themselves if permitted to do so. However, in including this provision, care must be taken to ensure that the provider of accommodation is not conveniently relieved of the duty to make reasonable alterations and adjustments themselves.

4.222 This approach is sound in principle and would bring the ADA in line with the DDA and other State legislation. As a result the Commission recommends that the ADA be amended specifically to include such a prohibition.

#### **Recommendation 24**

**Insert a definition of accommodation in the ADA in the terms of that contained in the *Residential Tenancies Act 1987 (NSW)*.**

**Draft Anti-Discrimination Bill 1999: cl 49**

#### **Recommendation 25**

**Amend the provisions relating to discrimination in accommodation on the ground of disability to prohibit a refusal to permit a person to make reasonable alterations to a premises occupied by that person.**

**Draft Anti-Discrimination Bill 1999: cl 47**

#### **Exception – accommodation in a private household**

4.223 The ADA currently excepts discrimination on all grounds in respect of the provision of accommodation where the person providing the accommodation or a near relative resides on the premises and the accommodation is provided for no more than six persons. The exception was in the ADA when it was first enacted in 1977. The rationale for this exception is that one is entitled to decide who to live with as that is, and should be, entirely dependent on personal choice. Again, this is an instance of the private area being cordoned off from the scrutiny of the ADA.

4.224 A similar exception is provided for in Federal legislation and in all States and Territories, with only minor variations. The RDA provides an exception in relation to shared accommodation in a dwelling house,<sup>249</sup> although no limitations are specified in terms of numbers. The SDA,<sup>250</sup> the DDA,<sup>251</sup> Queensland,<sup>252</sup> and Western Australia<sup>253</sup> provide a similar exception to New South Wales, but limited to accommodation provided to no more than three people. Victoria,<sup>254</sup> South Australia<sup>255</sup> and the Australian Capital Territory<sup>256</sup> provide an almost identical exception to New South Wales. In Tasmania, shared accommodation for fewer than five adult persons (in relation to sex discrimination) is excepted<sup>257</sup> and in the Northern Territory, the exception applies if the accommodation is in the main home of the person or near relative of the person irrespective of numbers.<sup>258</sup>

4.225 The ADB submitted that the ADA should be consistent with the DDA and the SDA and limit the exception to circumstances where the accommodation is provided for no more than three people. It also made the point that:

In most situations where people take boarders into their home or rent out a self-contained flat attached to their house, the accommodation will be for less than three people. Where more people are accommodated it is more likely to operate as a business and the Board considers that it is inappropriate to exclude businesses from the ambit of the Act.<sup>259</sup>

4.226 However, the appropriate number of persons involves a somewhat arbitrary limitation on the exception. The purpose of the limitation should be to exclude circumstances where accommodation is provided as a business activity, where privacy issues are of limited relevance. The number of persons accommodated will obviously tend to reflect the size of the building and the level of privacy which could reasonably be anticipated in the circumstances. The current figure of six could suggest a business operation if six individuals were involved. However, that would not be so clear if there were three couples or two couples, each with a young child. As a result, despite the recommendation of the ADB, the number of six persons does not appear to be inappropriate in the circumstances. The Commission, therefore, recommends no change in that respect.

4.227 However, it is the view of the Commission that the exception should not cover a self-contained flat attached to the main house. The Commission believes that the appropriate scope for this exception is to cover a person's right to determine who should live in the same premises, meaning the main home, not who should be the person's neighbour, unless entrance is through a common door. As such, the Commission suggests modifying the exception to mirror the Northern Territory legislation which refers to accommodation in the main home.

#### **Recommendation 26**

**Retain the exception for accommodation in a private household but specify that the accommodation must be in the main home.**

Draft Anti-Discrimination Bill 1999: cl 50

#### **REGISTERED CLUBS**

4.228 As noted previously, the aim of anti-discrimination law is to regulate those areas of activity that fall within the "public" sphere. The right to associate freely is a basic democratic right with which the State is often reluctant to interfere. It is common, therefore, for anti-discrimination laws to be restricted to those clubs and associations which operate in the public domain. In New South Wales, the area is currently confined to those clubs which are already regulated by the State under the *Registered Clubs Act 1976* (NSW).<sup>260</sup>

#### **Coverage under the ADA**

4.229 Under the ADA, registered clubs are prohibited from discriminating against persons on any of the grounds covered under the Act in determining whether, or on what terms, to admit them as members. They are also prohibited from discriminating against members of the club:

by denying or limiting the member's access to any benefit provided by the club;

by depriving the member of membership or varying the terms of membership; or

by subjecting the person to any other detriment.

4.230 Some exceptions apply, including exceptions on the ground of sex for single sex clubs and for unisex clubs where it is impracticable to provide equal or simultaneous access to club benefits to both men and women.<sup>261</sup> Clubs which are established for the principal purpose of providing benefits to people of a particular race, disability or age are also excepted.<sup>262</sup> These exceptions are considered in more detail in Chapter Six.<sup>263</sup>

#### ***Definition of registered clubs***

4.231 A “registered club” is a club which is registered under the *Registered Clubs Act 1976* (NSW).<sup>264</sup> To be registered, a club must be incorporated<sup>265</sup> and must satisfy the requirements set out in s 10 of the *Registered Clubs Act*, including those concerning membership numbers, the purposes for which the club is established, accommodation, book-keeping and the financial entitlements of club members and employees. Registered clubs must operate on a not-for-profit basis which means that the profits cannot be distributed to members. They must, instead, be used for the promotion of the aims and objectives of the club.

4.232 Clubs seek registration under the *Registered Clubs Act* principally in order to obtain liquor and gaming licences from which they can generate income. Examples of registered clubs include leagues clubs, bowling clubs, golf clubs, ethnic clubs and returned servicemen’s clubs. The number of registered clubs is slowly declining because of falling membership numbers, the restructure of the industry which has led to the amalgamation of many clubs, and increased competition.<sup>266</sup>

#### ***Access to places where liquor is sold***

4.233 Section 32 of the ADA used to make it unlawful for a person who holds a licence, permit or authority under the *Liquor Act 1912* (NSW) to discriminate against another person on the ground of sex by denying or refusing the person access to or use of a place where liquor is sold. This effectively covered other bodies which sell liquor which may not have come within the definition of registered clubs. For example, it would have proscribed discrimination by some sporting clubs and community service organisations which had a function licence under the *Liquor Act 1912* (NSW) but which were not registered under the *Registered Clubs Act 1976* (NSW).

4.234 The section, however, applied only to the ground of sex. Because of this inconsistency, s 32 was repealed by the *Anti-Discrimination Amendment Act 1997* and is now intended to be covered by the amended definition of “services” which applies equally across all grounds under the ADA.

#### ***Membership of industrial organisations***

4.235 Industrial organisations, including employee unions and employer bodies as defined under relevant industrial relations legislation, are prohibited from discriminating against a person on any of the grounds covered under the ADA, by refusing or restricting a person’s admission to membership or by denying or limiting a member’s access to any benefits provided by the organisation.<sup>267</sup>

### **Membership of sporting and recreational clubs**

4.236 Membership of sporting clubs which are registered clubs is covered under the ADA. Participation, or eligibility to participate, in a sporting activity is also covered if it can be classified as a benefit or facility provided by a registered club.

4.237 The issues, however, are not always so simple. In some cases, the relevant sporting activity is controlled not by the registered sports club of which an individual is a member, but by the peak sporting association, of which the club is a member body or which individual club members can join. In these cases, it is the peak body which sets the competition rules, including eligibility to participate in a sporting event, and the discriminatory acts of the peak sporting association may be outside the operation of the Act, because the association is a “voluntary body”.<sup>268</sup>

### **Voluntary bodies**

4.238 Voluntary bodies are defined as bodies which operate on a not-for-profit basis and which are not created by a statute.<sup>269</sup> They are excepted from the provisions of the ADA, except in relation to employment, primarily on the basis that they are considered to be “private” in nature and regulation of them would be seen as an encroachment on the right of freedom of association.<sup>270</sup>

4.239 This broad exception effectively allows many clubs and associations to discriminate in determining whether to admit persons as members and in deciding who has access, and on what terms, to benefits provided by the club or association. There are a large number of voluntary bodies, established to meet a variety of community needs including sporting, social, cultural, political and economic needs. Examples include community service organisations such as Apex and Rotary International, charitable or benevolent institutions, sports clubs, political associations, business or trade groups (including chambers of commerce), environmental action groups and ethnic community groups. Many have large memberships and provide significant benefits to sections of the public.

4.240 In Chapter Six of this Report, the Commission has recommended the repeal of the current exception for voluntary bodies.<sup>271</sup>

### **Coverage in other jurisdictions**

4.241 Discrimination by clubs and associations is prohibited in all other Australian equal opportunity laws to varying extents depending on how a “club” or an “association” is defined. Some draw the distinction at the number of members, whether or not the body is incorporated and whether or not the body sells liquor, occupies Crown land or receives any public funding or assistance. While some provide exceptions for voluntary non-profit associations, most other jurisdictions provide greater coverage than the ADA.

4.242 Section 25 of the SDA makes it unlawful for a club, the committee of management of a club or a member of such a committee to deny or restrict a person’s admission to membership of the club or to limit a member’s access to any benefits of the club because of the person’s sex, marital status or pregnancy. The SDA defines “club” as an association, whether incorporated or not, of at least 30 persons who associate for social, literary, cultural, political, sporting, athletic or other lawful purpose and which:

provides and maintains its facilities, wholly or partly, from its own funds; and

sells or supplies liquor for consumption on its premises.<sup>272</sup>

4.243 The SDA provides a broad exception for non-profit associations,<sup>273</sup> excluding any club, registered organisation, body established by statute and association that provides grants, loans, credit or finance to its members.

4.244 More extensive coverage is provided under the DDA. Section 27 of that Act makes it unlawful for a *club* or an *incorporated association* to deny or restrict a person's membership or to limit a member's access to any benefits provided by the club because of the person's disability.<sup>274</sup> A "club" is defined as an association, whether incorporated or not, of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purpose that provides and maintains its facilities, wholly or partly, from the funds of the association.<sup>275</sup> There is no requirement for a minimum number of members, nor does the club have to sell or supply liquor. Section 27 also expressly applies to associations which are incorporated. Voluntary bodies are not excepted.

4.245 The RDA does not specifically prohibit discrimination by clubs and associations, but it does prohibit discrimination in access to places, and facilities within those places, which members of the public can enter or use.<sup>276</sup> Also relevant is s 9 which prohibits any form of racial discrimination which affects the enjoyment or exercise of human rights and fundamental freedoms set out in the CERD. They include a person's right to participate equally in cultural activities and have access to any public place or service such as transport, hotels, restaurants, cafes, theatres and parks.<sup>277</sup> Like the DDA, the RDA draws no distinction between clubs and voluntary bodies.<sup>278</sup>

4.246 State equal opportunity laws vary substantially. In Victoria, clubs may not discriminate in admission to membership and access to benefits if they occupy any Crown land or receive any public funding. A club or organisation which does not occupy any Crown land or receive public funding is a "private club" and is exempt.<sup>279</sup> Whether or not a club is incorporated or operates on a non-profit basis is irrelevant.

4.247 The Western Australian, Northern Territory and Tasmanian legislation reflects the definition of "club" contained in the SDA.<sup>280</sup> However, Western Australia provides a general exception for voluntary bodies which does not apply to disability or age discrimination if the voluntary body is incorporated.<sup>281</sup> The Australian Capital Territory legislation defines a "club" as one that holds a liquor licence and excepts voluntary bodies.<sup>282</sup>

4.248 Uniquely, the ADA (Qld) provides that a club must be a profit-making venture.<sup>283</sup> The EOA (SA) prohibits discrimination by associations but does not define "associations".

#### **The case for redefining the area**

4.249 Registered clubs appear to have been singled out for inclusion as an area within the ADA in 1981 for two reasons. First, they were considered to form an important part of public life, providing a wide range of services to the community including bars, restaurants, sporting and gaming activities.<sup>284</sup> That many had large memberships and reported annual turnovers of millions of dollars was also considered to have removed them from the "private" arena.<sup>285</sup> The second reason was that accountability structures were already in place, making registered clubs easily identifiable for the purpose of enforcement. Voluntary non-profit organisations, on the other hand, many of which were unincorporated in 1981, would have presented problems in terms of legal accountability.

4.250 Circumstances have since changed and there appears to be a general consensus that the area should not be confined to registered clubs.<sup>286</sup> A number of persuasive arguments have been put to the Commission in support of adding to the area of operation of the ADA those other clubs and associations whose activities place them in the public domain, many of which are currently excepted as voluntary bodies.<sup>287</sup>

4.251 The ADB submitted that not all voluntary bodies merit the exception as not all fall wholly within the private domain. Many, in fact, "have a significant ancillary role in relation to the political and commercial life within society which brings them very much into the public domain".<sup>288</sup> A large number perform valuable community functions for which they often receive substantial public funds and should, for this reason, be subject to anti-discrimination law.<sup>289</sup> It has also been argued that it is anomalous that the public activities of non-profit bodies are becoming increasingly accountable to government regulators in terms of their funding, registration and reporting requirements yet they still enjoy a broad exception under the ADA.<sup>290</sup>

4.252 It is also significant that large numbers of voluntary non-profit bodies are now incorporated under the *Associations Incorporation Act 1984* (NSW).<sup>291</sup> Incorporation offers them certain advantages: it gives the association a legal status in its own right and it limits the liability of members for any debts of the association. Many are also choosing to become incorporated in order to be eligible for public funding. By comparison, the number of registered clubs has been slowly declining.<sup>292</sup>

4.253 There are more than 26,000 incorporated voluntary bodies compared to 1,525 registered clubs.<sup>293</sup> These figures suggest that an increasing number of people who have dealings with incorporated non-profit associations have little or no protection under the ADA.<sup>294</sup> This may be borne out by the ADB's own statistics. In the year to 30 June 1996, for example, it handled over 500 inquiries about discrimination in clubs and associations but received only 45 written complaints. A large number of inquiries probably concerned clubs and associations which were not registered clubs and therefore fell outside the ADA's jurisdiction.

4.254 The broad exception for voluntary bodies effectively sanctions discrimination by many clubs and associations which are not operating exclusively in the private sphere. Those bodies which fall within the public domain should be added to the area currently defined by reference to registered clubs.

### **Defining the new area**

4.255 The Commission has considered each of the distinguishing factors used by other jurisdictions to distinguish between "public" and "private" clubs including:

minimum membership numbers;

whether the club provides and maintains its facilities, in whole or in part, from its own funds;

whether the club sells or supplies liquor for consumption on its premises;

whether the club is incorporated;

whether the club is a profit-making body;

whether the club occupies any public land; and

whether the club receives any form of public funding.<sup>295</sup>



4.256 Several of the criteria are of questionable relevance. The SDA sets the minimum membership at 30, which is a far cry from the five members required to form a public company<sup>296</sup> or an incorporated association.<sup>297</sup> Setting minimum membership levels inevitably involves an arbitrary cut-off point. Also, whether a club should or should not come within the ambit of operation of the ADA is a matter of policy which should be decided irrespective of whether a club sells or supplies liquor or operates for a profit.

### ***Incorporation***

4.257 The ADB has submitted that bodies which are incorporated should be subject to the ADA in the same way as registered clubs.<sup>298</sup> Incorporation signifies an intention by the club or association to become a legal entity, drawing on the benefits that such status brings. It also indicates that the club or association is aware of certain legal obligations associated with becoming incorporated including financial and reporting requirements. Incorporation requires the establishment of a formal mechanism for the operation of the club, with a constitution and rules.

4.258 Requiring an association to be incorporated will bring within the scope of the Act those clubs and associations which are formally established and which therefore can be categorised as "public". It is likely to exclude the majority of voluntary not-for-profit associations which have no formal mechanisms in place and whose activities are "private" in nature, such as a baby-sitting club.

4.259 Given that incorporation is fast becoming an eligibility requirement for most forms of government funding, it is also likely to cover those clubs and associations which seek or receive any kind of public grant, including the lease or occupation of public land, itself a legitimate criterion for the imposition of minimum standards of legal behaviour.

4.260 Unfortunately, incorporation may also exclude from the purview of the Act some other associations which are not wholly private. One example is political parties. Presently, the major ones are unincorporated and are considered to be voluntary bodies. Some groups argue that they should be covered because they are "public" in nature and receive public funding in a variety of forms.<sup>299</sup>

4.261 Local sporting and recreational clubs are not likely to be incorporated and therefore would not come within the scope of the ADA on this criterion. However, because of the tiered structure which exists in sport, local clubs may be required to comply with rules relating to equal opportunity and anti-discrimination imposed by the umbrella association which controls the sport concerned.

4.262 Generally speaking, most sport is organised at either a national and/or State level which feeds down to regional and local clubs. The umbrella organisations, mostly at State and regional levels, are responsible for establishing and managing sporting competitions.<sup>300</sup> They set down the rules of competition, arrange venues and the refereeing or umpiring of games, collect membership fees and award competition prizes etc. They also apply for government funding to assist with the organisation and promotion of the sport concerned. Players in a sporting team are members of the local club. The local club is, in turn, a member body of the regional or State-based association, depending on the type of sport and competition involved.

4.263 Most umbrella or peak sporting associations are incorporated and those that are not are likely to become incorporated as a result of the introduction of new funding guidelines by the Department of Sport and Recreation which stipulate that sporting and recreational associations must be incorporated in order to be eligible for grants.<sup>301</sup>

### ***Should a different test apply for disability and race discrimination?***

4.264 The ADB has submitted that the ADA should be amended in order to provide protection and redress for people discriminated against on the ground of race and disability by clubs and associations consistently with Federal laws.<sup>302</sup>

4.265 The DDA covers all incorporated associations and all clubs, whether incorporated or not, which provide and maintain their facilities, partly or wholly, from their own funds. Under the DDA, coverage would apply equally to a small social club (if it owned and maintained any "facilities") as to a football club with thousands of members. The RDA also provides broad coverage of clubs and associations, based on the right of persons to be free of any racial discrimination in all areas of public life. Neither of these statutes has led to a flood of complaints. The Commission recognises the principle that it is desirable to maintain consistency with Federal laws. However, there is also merit in achieving consistency of coverage across the grounds within the ADA. This is not an issue the Commonwealth laws need to address.

4.266 While the Commission accepts that there may well be unincorporated associations that can be categorised as operating in the public domain, many could not. On balance, the simplicity and transparency of the criterion of incorporation and its close correlation with other relevant factors such as public funding, make it the preferable basis for defining this area. The Commonwealth Acts may provide more extensive coverage in relation to particular grounds, but that is a discrepancy which is acceptable.

### ***What exceptions should apply to incorporated bodies?***

4.267 Some incorporated clubs and associations may have valid reasons for wishing to discriminate in who to admit as members and in the access of members to its benefits or facilities. For example, incorporated clubs or associations which are established to promote the interests of people with a particular disability should be able to deny membership to persons who do not have that particular disability and to limit access to its premises accordingly.

4.268 These considerations will need to be addressed in relation to both grounds and areas and are dealt with in Chapter Six.<sup>303</sup>

### **Conclusions**

4.269 The Commission has given careful consideration to each of the models presented in other jurisdictions and to the submissions it has received on this issue. There is no easy or fool-proof formula which can be applied to separate "public" from "private" clubs. Regardless of which criteria are used, there will inevitably be some clubs and associations which properly ought to be covered which will fall outside the jurisdiction. On the other hand it is desirable to avoid, so far as reasonably practicable, catching others which should not be covered. The latter category would then have to seek and justify an exemption.

4.270 Mindful of these qualifications, the Commission has concluded that the requirement of incorporation is probably the criterion which will bring most clubs and associations, which it is intended should be subject to anti-discrimination laws, within the purview of the ADA.

4.271 The Commission believes that the area should be defined by reference to an association of persons created for a lawful purpose and that is incorporated under the *Corporations Law*, the *Associations Incorporation Act 1984* (NSW), the *Co-operatives Act 1992* (NSW) or an equivalent law in another jurisdiction. Registered clubs need

not be singled out. Given that they must be an incorporated body to come within the *Registered Clubs Act 1976* (NSW), they would necessarily be covered under the proposed definition.

4.272 The area of operation should be renamed “clubs and associations”.

#### **Recommendation 27**

**The area currently identified as “registered clubs” should be renamed “clubs and associations” and extended to cover all associations of persons which are incorporated or registered as corporations in Australia.**

Draft Anti-Discrimination Bill 1999: cl 53

#### **DISPOSAL OF INTERESTS IN LAND**

4.273 The ADA currently has no provision that prohibits discrimination in the disposal of interests in land. Consequently it is not unlawful to refuse to sell a property or other interest in land to a prospective buyer for discriminatory reasons. This is contrary to the position under the RDA, the SDA and the DDA and in most other jurisdictions.<sup>304</sup> It was submitted to the Commission that coverage of the ADA should be extended to prohibit discrimination in the disposal of interests in land.<sup>305</sup>

#### **Coverage in other jurisdictions**

4.274 The provisions in the SDA<sup>306</sup> and the DDA<sup>307</sup> prohibit discrimination by refusing or failing to dispose of an estate or interest in land or in the terms or conditions on which an estate or interest in land is offered to the other person. Both Acts except discrimination in the disposal of an estate or interest in land by will or gift.

4.275 The RDA<sup>308</sup> combines the prohibition with the prohibition against discrimination in accommodation. There is no exception for disposition by will or gift. However, it defines “dispose” to include “sell, assign, lease, sub-lease, sub-let, license or mortgage and also includes agree to dispose and grant consent to the disposal of”<sup>309</sup> but makes no reference to disposition by will or gift.

4.276 Most State legislation is couched in similar terms to the SDA and DDA. However, Victoria excludes the disposal or offering of a leasehold interest in land for the purpose of accommodation from the general disposition of land prohibition, probably because it is otherwise covered in relation to discrimination in accommodation.<sup>310</sup> In Queensland, there is an exception that permits discrimination on the grounds of sex, age, race or religion in the disposal of an interest in land or a building of cultural or religious significance where such discrimination is in accordance with the particular culture or religion and is necessary to avoid offending the cultural or religious sensitivities of the people of the culture or religion.<sup>311</sup> The provision in South Australia is identical to the SDA and DDA. In Victoria, Queensland and South Australia it applies to all prohibited grounds. In Western Australia it is unlawful only on the grounds of sex, marital status, pregnancy, race and age. It does not apply to discrimination on the grounds of family responsibility, religious or political conviction or impairment. The Australian Capital Territory and the Northern Territory, like New South Wales, do not make express provision for discrimination in the disposition of land.

4.277 The application of the South Australian provision was considered in *Wright v City of Brighton*.<sup>312</sup> In that case a prospective purchaser complained of discrimination on the ground of age, where the property consisting of three small town houses was being sold only to people aged over 55. The Council applied development restrictions for low cost housing for the elderly and had allowed the development prior to the introduction of age discrimination legislation in South Australia. However, the Supreme Court of South Australia held that within the legislation, it is possible to “discriminate for the benefit of a certain age group, whereas it is not permissible to discriminate against a certain age group” and held that it was not discriminatory to restrict the use of certain approved accommodation for people above the age of 55.

4.278 While the result of the case seems to be correct in policy terms, the reasoning is doubtful. The provision of a benefit to one group inevitably discriminates by excluding others. The reasoning, if applied to race, means that it is permissible to provide a benefit to a particular racial group, to the exclusion of all others. That logic would mean that South Australia could limit access to State schools to Anglo-Saxons. The fallacy in this reasoning was exposed in *Gerhardy v Brown*<sup>313</sup> in which the High Court unanimously rejected an argument that granting an area of South Australia to the Pitjantjatjara people and allowing them to exclude all others (including other Aboriginal people) involved no racial discrimination. As Justice Brennan stated:

It was submitted that s 10 [of the RDA] applies only when all the persons who suffer the comparative disadvantage are of the one race, ... and that the section does not apply when those persons are of several races (in the present context, all non-Pitjantjatjara races) and constitute the majority of the community. The submission was founded on the use of the word “particular”. But the submission overlooks the distributive operation of s 10 which provides that each racial group (“persons of a particular race”) should enjoy the right enjoyed by the advantaged racial group (“persons of another race”). If the persons suffering a comparative disadvantage are of different races, s 10 operates so that every disadvantaged racial group enjoys the same right to the same extent as it is enjoyed by the advantaged racial group.<sup>314</sup>

4.279 Of course, the South Australian Court in *Wright v City of Brighton* was not concerned with a provision of the same kind as s 10 of the RDA, but the reasoning adopted by it is relevant in relation to special measures generally, and it will be necessary to return to this issue when discussing the special measures exception in Chapter Six.

#### **What is an “interest in land”?**

4.280 An issue not dealt with in any of the Commonwealth or State legislation is the extent of coverage of an interest in land. In Commonwealth legislation relating to land, an “interest in relation to land” means a legal or equitable estate or interest in the land or any other right, charge, power or privilege over or in connection with the land.<sup>315</sup>

4.281 The *Conveyancing Act 1919* (NSW) defines land to include “tenements and hereditaments, corporeal and incorporeal and every estate and interest therein vested or contingent, freehold or leasehold, and whether at law or in equity”.<sup>316</sup> Tenements and hereditaments mean respectively, whatever can be the subject of tenure and whatever is capable of devolving upon death. In other words, an interest in land must be capable of being transferred.

### **Strata title**

4.282 For the purposes of ownership, land may be divided horizontally, vertically or in any other way. Thus, a strata title, which is a form of title used to divide blocks of high-rise flats and some low-rise townhouse developments, is an interest in land. Strata title in New South Wales is governed by the *Strata Titles Act 1973* (NSW).

### **Tenancy in common**

4.283 Tenancy in common requires two or more people to hold title in common in undivided shares in the land and any building on it. Normally the tenants do not have any right to occupy any particular part of the building; instead, the co-owners possess the entire land and building. The agreement between tenants in common may contain prohibitions and restrictions on the rights to transfer their shares. However, a covenant that prohibits a co-owner from selling without the consent of other co-owners may be invalid in some circumstances.<sup>317</sup>

### **Company title**

4.284 This is a form of ownership of a building by a company, the shareholders of which are entitled to exclusive occupation of particular flats within the building by virtue of the rights attached to their shares.<sup>318</sup> Because it involves the ownership of shares in a company, interests in company title are regulated by the *Corporations Law*. An important provision commonly found in company title articles of association is the restriction on the right to transfer shares. Sometimes the directors have an unfettered discretion to refuse to register the transfer of shares and other times the discretion is limited to refusal where the purchaser is not a respectable or responsible person.<sup>319</sup> Section 1094 of the *Corporations Law* provides that where a company refuses or fails to consent to register a transfer of shares, the court may on the application of the proposed transferee intervene and make appropriate orders. In practical terms, this provision enables existing shareholders to determine who shall be their neighbours. Such decisions can reflect discriminatory attitudes.

### **Community title**

4.285 This is governed by the community titles legislation<sup>320</sup> and in effect fills the gap that existed between conventional land subdivision and strata title subdivision. The main advantage of this scheme is that it provides a mechanism for the construction of small to very large size developments and allows the implementation of multiple uses such as residential and commercial uses within the one development. It also encourages developers to build community facilities for the benefit of purchasers.

### **Time-shares**

4.286 A relatively recent development is the proliferation of time-share schemes. Such schemes permit the purchase of time-based rights in or in relation to land, usually in connection with holiday resorts. Thus, a person may purchase a right to occupy a particular apartment for a certain number of weeks in a year. In some cases, the time of year is specified at the outset; in others it is left open and worked out on the basis of an agreed formula. Most time-share schemes in Australia are title based: that is the purchaser obtains an interest in the realty of the resort either as a tenant in common with all other purchasers in the time-share "intervals"<sup>321</sup> or, where the resort is the subject of a strata plan, as a tenant in common in a particular lot.<sup>322</sup> Thus, the purchaser is a tenant in common with a fractional interest in the resort or in a specific strata lot and receives a certificate of title for that fractional interest in the land. In either case, the resort is normally first leased to a management company for a

long term. The management company will usually hold the common property of the development and the purchasers become members of the company. The time-share owner's rights of use and occupation are regulated by the company's articles of association and are thus both contractual and proprietary.

4.287 There are four other types of time-share schemes that are not title-based.

A scheme can be a company-based scheme, similar to the company title form of ownership and governed by the *Corporations Law*.

It can be a unit trust scheme where the resort is held by trustees on trust for the use and enjoyment of unit holders who have no proprietary interest in the resort.

A scheme can be based on the issue of redeemable preference shares in a company which confer the right to occupy an apartment but usually confer no right to share in the proceeds of any winding up of the company.

A scheme can involve the grant of a contractual licence to occupy an apartment for a specified time.

### **Retirement villages**

4.288 Interests in retirement villages may be obtained in various ways. The most common method is where a resident takes a lease of a unit for a specified term or for the resident's life time. The resident is required to pay an "up front" purchase price and obtains a leasehold interest in the village property and an exclusive right to occupy the unit for the agreed time. Alternatively, a resident may purchase a "licence" from the village owner. This is intended to give the resident only a contractual right and not a proprietary interest in the village. Thirdly, a resident may purchase a freehold title to a unit registered under the *Strata Titles Act 1973* (NSW) or the community title legislation. Fourthly, a resident may obtain company title by purchasing shares in a home unit company which owns the retirement village.

### **Conclusions**

4.289 The dividing line between the main areas currently covered by the ADA, namely the provision of work, goods, services and accommodation, and those not covered, namely the disposal and transfer of interests in land and some other forms of property is riddled with anomalies. The Commission has already recommended that the definition of goods be extended to cover choses in action and money.<sup>323</sup> The area of accommodation will cover various forms of residential leases and licences. There is no reason why the transfer of interests in land generally should not be covered. If a landlord is not allowed to discriminate racially in letting premises, nor should the sale of land on racial grounds be permitted. To permit such discrimination might found a legal basis for apartheid.

4.290 Accordingly, the Commission recommends that the approach adopted in other jurisdictions be adopted in New South Wales and the area of disposal or transfer of any interest in land be covered by the ADA.

### **Recommendation 28**

**Include "disposal of interests in land" as an area of discrimination.**

Draft Anti-Discrimination Bill 1999: cl 59, 60, 61

## **DISCRIMINATION IN GOVERNMENT ACTIVITIES**

4.291 Government activities may be broadly described as “the exercise of certain powers and the performance of certain duties by public authorities or officers, together with certain private persons or corporations exercising public functions.”<sup>324</sup> Thus, any person performing any function under a State law or program, or in the course of carrying out any other responsibility for the administration of State law or the conduct of a State program would be considered to be engaged in a government activity.

### **Coverage under the ADA**

4.292 There is currently no specific prohibition against discrimination in the area of government activity. However, some conduct which would fall within the term government activities will also fall within one of the existing areas of operation and such conduct will be covered under the ADA. The most relevant area is the provision of services.<sup>325</sup> Although discrimination is not specifically prohibited under state laws and programs, recent amendments to the Act provide that sexual harassment of another person in the course of performing any function under a State law or for the purposes of a State program, or carrying out any other responsibility for the administration of a State law or State program, is unlawful.<sup>326</sup> For the purposes of the sexual harassment provisions a “State program” is defined to mean “a program conducted by or on behalf of the State Government”.<sup>327</sup>

4.293 A further issue to be considered is whether discrimination in local government activities and programs should be covered. Currently, the only reference to local government in the ADA is in relation to the prohibition of discrimination by local government councillors against other councillors “in the course of his, her or their official functions”.<sup>328</sup> Curiously, this provision is included under discrimination in work in relation to all prohibited grounds. The definition of “services” also includes a reference to “services provided by a council or public authority”. Thus, activities of councils have been held to be within the coverage of the ADA in relation to the provision of services in a number of decided cases.<sup>329</sup> In relation to sexual harassment, the extent to which the recently introduced provision covers local government is unclear.

### **Coverage in other jurisdictions**

4.294 Both the Commonwealth and Queensland have legislative provisions covering the area of government activity.

4.295 Section 26 of the SDA provides that discrimination against a person on the grounds of sex, marital status, pregnancy and potential pregnancy by another person in the course of performing any function or exercising any power under a Commonwealth law or for the purposes of a Commonwealth program, or carrying out any other responsibility for the administration of a Commonwealth law or program, is unlawful.

4.296 The scope of this provision was considered in *Hough v Caboolture Shire Council*.<sup>330</sup> In that case, the complainant was dismissed from her position as a labourer under the Community Employment Program (“CEP”) which was a Commonwealth program within the meaning of s 26. The respondent council argued that s 26 applied only to administration of a program and not to participation in a program or expenditure of funds received under a Commonwealth program. It was held that the respondent was performing functions and exercising powers for the purposes of the CEP on the basis that employment of labour was one of the functions, powers and responsibilities under the CEP. Thus, dismissal on relevant grounds was held to be an act of discrimination “in the performance of the functions” or “in the

exercise of” powers or “in the fulfilment” of the responsibilities within the meaning of s 26.

4.297 The scope of s 26 was also considered in another case involving the Caboolture Shire Council, where it was held that s 26 could extend so as to render unlawful discrimination occurring in relation to other areas such as work, goods and services etc, as well as sexual harassment.<sup>331</sup> Since these cases, the SDA has been amended to prohibit expressly sexual harassment in the same areas of Commonwealth government activity as those listed in s 26.<sup>332</sup>

4.298 The impact of s 26 of the SDA was more recently considered in *Hagar v Minister for Health and Family Services*.<sup>333</sup> In this case, the complainants, being three men who suffered from osteoporosis, asserted that they had been discriminated against on the ground of their sex because a certain drug was unavailable to them under the pharmaceutical benefits scheme administered by the Commonwealth Department of Human Services, whereas it was available to women with a similar condition. This resulted in the men having to pay a higher price for the drug than did women. The complainants argued that this was discrimination in the provision of goods and services under s 22 of the SDA and in the administration of Commonwealth laws and programs. Since the discriminatory conduct constituted the performance of functions and the exercise of power under the *National Health Act 1953* (Cth) and for the purposes of a Commonwealth program (being the administration of the pharmaceutical benefits scheme), the Human Rights and Equal Opportunity Commission (“HREOC”) held that the Minister and the Commonwealth had discriminated against the complainants under s 26 of the SDA. On appeal, the Federal Court reversed the decision, but did not suggest that s 26 would not have supplied the relevant area, had the conduct been discriminatory.<sup>334</sup>

4.299 Section 29 of the DDA provides that discrimination on the grounds of disability is unlawful in the performance of any functions or the exercise of any power under a Commonwealth law or for the purposes of a Commonwealth program. The wording mirrors that in s 26 of the SDA.

4.300 Section 101 of the ADA (Qld) and s 21 of the *Sex Discrimination Act 1994* (Tas) also prohibit discrimination in the administration of State laws and programs. The drafting of the Queensland provision is very similar to the corresponding provisions in the SDA and the DDA: it applies to all prohibited grounds.

#### **Need for a separate area**

4.301 It is the public nature of State and local government activity that provides the rationale for consideration of its separate coverage under the ADA. As one commentator has observed:

the government must seek to give the impression that it is non-discriminatory in its own activities in order to ensure its legitimacy as a serious initiator of legislative policy.<sup>335</sup>

4.302 It is clearly sound in principle that the Government should comply with its own anti-discrimination standards in the programs it develops and administers. Although a majority of the High Court in *IW v City of Perth*<sup>336</sup> held that a local council's consideration of a planning application could constitute a “service” for the purposes of anti-discrimination law, the division of opinion in that case makes it desirable to clarify the result under the ADA. It is clear that the concept of “services” is broad but not unlimited and the outer limit will no doubt mean that some aspects of government administration are covered, but others are not.



4.303 The Commission is satisfied that the administration of State and local government laws and programs should be included within the area of operation covered by the ADA. This should be achieved by express provision to that effect.

#### **Recommendation 29**

**Include the exercise of functions and powers of local government and the administration of State and local government laws and programs as a new area.**

Draft Anti-Discrimination Bill 1999: cl 62

## **Footnotes**

1. M Thornton, "The Public/Private Dichotomy: Gendered and Discriminatory" (1991) 18(4) *Journal of Law and Society* 448 at 448-463.
2. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. See also *Mabo v Queensland [No 1]* (1988) 166 CLR 186.
3. Emphasis added.
4. RDA s 11-17 prohibits race discrimination in the following areas: access to places and facilities (s 11); disposal or acquisition of land, housing and accommodation (s 12); provision of goods and services (s 13); joining trade unions (s 14); employment (s 15); advertisements (s 16); and inciting or assisting the doing of an act which is unlawful by reason of the foregoing prohibitions (s 17).
5. This was prepared by the Secretary General of the United Nations for the purpose of guiding governments in enacting legislation against racial discrimination as to what is considered "best practice" at the international level. The General Assembly noted the final draft by decision 48/426 (20 December 1993).
6. Race Discrimination Commissioner, *The Racial Discrimination Act 1975: A Review* (AGPS, Canberra, 1995) at 59.
7. ADA (Qld) s 119.
8. Anti-Discrimination Board, *Submission 1* at 33.
9. H Charlesworth and C Chinkin, "The Gender of Jus Cogens" (1993) 15 *Human Rights Quarterly* 63-76.
10. Anti-Discrimination Board, *Submission 1* at 34.
11. ADA s 31; see also Chapter 6 at para 6.169.
12. DP 30.
13. NSW Ministry for the Status and Advancement of Women, *Submission* at 23.
14. NSW Women's Advisory Council, *Submission* at 5 (the reference to a legal issue appears to be a reference to the criminal law).

15. Catholic Education Commission of NSW, *Submission* at 3; Seventh Day Adventist Church, *Submission* at 6.
16. (1997) 71 ALJR 943.
17. *IW v City of Perth* at 949.
18. RDA s 9(2).
19. (1982) 153 CLR 168.
20. *Koowarta* at 182-184.
21. *Koowarta* at 266.
22. The ADB Annual Reports from 1987 have detailed statistics of discrimination complaints by ground. The percentage of employment related complaints have varied between 52% of complaints (1989/1990) to 64% of complaints (1986/1987). In both 1995/1996 and 1994/1995 57% of complaints were employment related: See New South Wales – Anti-Discrimination Board *Annual Report 1986/1987*; *Annual Report 1987/1988*; *Annual Report 1989/1990*; *Annual Report 1994/1995*; *Annual Report 1995/1996*.
23. RDA s 15.
24. See ADA s 49ZYI(3). The exception for junior employees from the provisions of the ADA was meant to operate until July 1996, after which it could cease to operate on a day appointed by proclamation. However, as yet the exception has not been repealed.
25. See Chapter 6 at para 6.315.
26. *Anti-Discrimination Amendment Act 1997* (NSW) Sch 1[7].
27. SDA s 4; DDA s 4; ADA (Qld) s 4; EOA (WA) s 4; ADA (NT) s 4.
28. ADA s 22B.
29. New South Wales, Department for Women and Attorney General's Department, *Gender Bias and the Law: Women Working in the Legal Profession: Report of the Implementation Committee* (Sydney, 1996).
30. ADA (Qld) s 4 definition of "work".
31. EOA (SA) s 4; DA (ACT) s 4.
32. SDA (Tas) s 3 definition of "employment".
33. EOA (Vic) s 4 definitions of "employer" and "employment".
34. See below at para 4.129.
35. Anti-Discrimination Board, *Submission 1* at 89-90; Disability Council of NSW, *Submission* at 4.
36. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 5 December 1996 at 7023ff.

37. It should be noted that the submission of the Combined Community Legal Centre Group specifically argued that members of Parliament should be covered in relation to all acts of discrimination under the Act: Combined Community Legal Centre Group NSW, *Submission* at 8.
38. See ADA s 52 and discussion of aiding and abetting provisions in Chapter 7 at para 7.215.
39. ADA s 22B(7).
40. EOA (Vic) s 13 and 14.
41. ADA (Qld) s 14-19 and 21-22.
42. See, for example, ADA s 8(1) in relation to race discrimination.
43. ADA s 25(1A). A similar exception also applies in relation to the dismissal by an employer of a woman who was pregnant at the time of application or interview for a position: ADA s 25(2A).
44. Anti-Discrimination Board, *Submission 1* at 63; Gay and Lesbian Rights Lobby, *Submission* at 6; NSW Ministry for the Status and Advancement of Women, *Submission* at 21; National Pay Equity Coalition, *Submission* at 2.
45. See Chapter 5 at para 5.40.
46. The Commission has however recommended that all partnerships be covered: see Recommendation 15 above.
47. See, for example, ADA s 8(2) in relation to race discrimination.
48. R Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1992) at 47 referring to *O'Callaghan v Loder [No 2]* [1984] EOC 92-023; *Allders International Pty Ltd v Anstee* (1986) 5 NSWLR 47 at 55; C Niland, "The Litigation Trap in EEO" (1989) 3(3) *Directions in Government* at 38.
49. See Chapter 5 at para 5.111 and Chapter 6 at para 6.388.
50. *Ministry of Defence v Jeremiah* [1980] 1 QB 87.
51. *Ministry of Defence v Jeremiah*, per Brightman LJ at 104.
52. See Chapter 2 for impact of Federal industrial legislation.
53. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 23 November 1996 at 3844.
54. IRA s 3(f) specifically provides that one of the objects of the Act is "to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value".
55. IRA s 6(f).
56. IRA s 146(2).
57. IRA s 169.
58. IRA s 23.

59. IRA s 169(4).
60. IRA s 9.
61. IRA s 33.
62. IRA s 35.
63. IRA s 167.
64. *Anti-Discrimination (Amendment) Act 1994* (NSW) Sch 4[23]. For a discussion of the functions of the former EOT and the new EO Division (of the ADT) see Chapter 9 of this Report.
65. ADA s 88(1A) and 88(1B).
66. Despite the fact that Commonwealth award employees are not specifically excluded under the IRA, in the case of *Cohen v Government Insurance Office of Australia Ltd* (NSW, IRC, Connor C, 30 September 1996, unreported) the IRC decided that the IRA did not intend to cover Commonwealth award employees. A recent decision of the Full Bench of the IRC has confirmed that the IRA does not apply to Commonwealth award employees (*Moore v Newcastle City Council* (1997) 43 NSWLR 614). However the Commission reached this conclusion through a construction of the terms of s 83 of the IRA, the provision dealing with the application of the legislation. Having found that the s 83 of the IRA did not contemplate coverage of Commonwealth award employees, constitutional arguments did not require resolution (*Moore* at 14-15).
67. IRA s 83, as indexed by regulations.
68. This and the following points have been added by regulation and apply to relevant employees who enter into an employment agreement from October 1.
69. For example, standing to bring a claim; processes used to bring a claim; procedures, level of formality and rules of evidence; expertise of members of tribunal; type of remedy sought; possible defences to respondent, ie exceptions; and speed and cost. See also NSW Pay Equity Taskforce, *A Woman's Worth: Pay Equity and the Undervaluation of Women's Skills in NSW* (Issues Paper, 1996) at 69 based on J Niland, *Transforming Industrial Relations in NSW: A Green Paper* (NSW GPO, 1989-1990) Vol 1.
70. See *Rebel Liquor Pty Ltd v Best* (1996) 40 AILR 9-055.
71. IRA s 90.
72. (1997) 73 IR 267.
73. The Board has received advice from the Crown Solicitor to the effect that a complainant can have the dismissal dealt with in the IRC with the appropriate remedy; when this is completed they can lodge a complaint with the ADB about the discriminatory treatment while employed.
74. ADA s 95A.
75. ADA s 90(2)(a).
76. ADA s 111(1).

77. Currently damages payable cannot exceed \$40,000: s 113(1)(b)(i) ADA. However, in Chapter 10 of this Report the Commission recommends that the limit on damages in the EO Division be increased.
78. ADA s 113.
79. See Chapter 10.
80. Anti-Discrimination Board, *Submission 1* at 20-21; Commissioner of Equal Opportunity (SA), *Submission* at 2; Law Society of NSW, *Submission* at 3; NSW Department of Industrial Relations Employment Training and Further Education, *Submission* at 11; Public Service Association of NSW, *Submission* at 1; D Robertson, *Submission* at 4.
81. For example the *AIS* case, in which an industrial practice accepted by all parties and long advocated by the union movement, was found to be discriminatory. See *AIS v Banovic* (1989) 168 CLR 165; *AIS v Najdovska* (1988) 12 NSWLR 587.
82. EOA (SA) s 100.
83. See *Mercedes Benz (Australia) Pty Ltd v Commissioner for Equal Opportunity* [1992] EOC 92-465 per Hayne J at 79,329; Anti-Discrimination Board, *Submission 1* at 26; ADA (Qld) s 153 and 154.
84. The Department of Industrial Relations, Employment, Training and Further Education in its submission suggested that information should be provided in major community languages and in forms appropriate for workers with disabilities making print communication difficult: NSW Department of Industrial Relations, Employment, Training and Further Education, *Submission* at 11.
85. The ADB suggested this, modelled on the Disability Discrimination Legal Centre (Inc), having expertise in both employment and discrimination issues. The NSW Working Women's Centre provides advice to women on employment issues, including discrimination, but could not be expected to fulfil the role of a specialist legal centre for discrimination in employment: Anti-Discrimination Board, *Submission 1* at 20-21.
86. Race: s 8(3); sex: s 25(3)(a); marital status: s 40(3)(a); disability: s 49D(3)(a); homosexuality: s 49ZH(3)(a); age: s 49ZYB(3); and transgender: s 38C(3)(a).
87. RDA s 15(5); SDA s 14(3); DDA s 15(3); DA (ACT) s 24; ADA (NT) s 35(2); ADA (Qld) s 26(1); EOA (Vic) s 16; EOA (SA) s 34(1), 56(1), 71 and 85f(1); EOA (WA) s 11(3), 35B(3), 37(3), 54(4)(a), 66B(3) and 66W(3). Many of the jurisdictions refer to "domestic duties" at the person's home.
88. SDA s 35(1); DA (ACT) s 25; ADA (Qld) s 27(1); EOA (Vic) s 25 (public or private employment relating to care of children); SDA (Tas) s 26(1)(c) (residential care of persons under 18 years).
89. It is noted that the submission of the Ministry for the Advancement and Status of Women advocated the removal of the exception, based on their argument that the operation of the Act should be extended into the private sphere: NSW Ministry for the Advancement and Status of Women, *Submission* at 26.
90. DA (ACT) s 26A.
91. RDA s 15(5).

92. New South Wales, *Parliamentary Debates* (Hansard) Legislative Assembly, 23 November 1976 at 3340.
93. EOA (Vic) s 21.
94. Quoted in the Report of the Inquiry into Pregnancy Discrimination: NSW Anti-Discrimination Board, *“Why Don’t You Ever See a Pregnant Waitress” – Report of the Inquiry into Pregnancy Related Discrimination* (Sydney, 1993) at 19.
95. Auckland Gay and Lesbian Lawyers Group, *Submission* at 1; Combined Community Legal Centre Group NSW, *Submission* at 9; Disability Discrimination Legal Centre, *Submission* at 6; Gay and Lesbian Rights Lobby, *Submission* at 6; NSW Ministry for the Status and Advancement of Women, *Submission* at 26; National Pay Equity Coalition, *Submission* at 4; NSW Independent Teachers’ Association, *Submission* at 1.
96. ADA (Qld) s 16-18; EOA (Vic) s 31; EOA (WA) s 14, 35E, 40, 57, 66E and 66Z.
97. *Anti-Discrimination (Amendment) Act 1981* (NSW) Sch 5[9(e)] and 17[c].
98. Australian Bureau of Statistics, *Schools Australia* (1996) Catalogue No. 4221.0, Table 1.
99. SDA s 38; ADA (Qld) s 29; SDA (Tas) s 26(1)(a); EOA (Vic) s 76 and 77; DA (ACT) s 33(1).
100. *Sex Discrimination Act 1975* (UK) s 19.
101. Sex Discrimination Commissioner, *Report on the Review of Permanent Exemptions under the SDA 1984* (AGPS, Canberra, 1992).
102. Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (AGPS, Canberra, 1992) (“Lavarch Report”).
103. Lavarch Report at 266.
104. NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* (Sydney, 1984).
105. Sex Discrimination Commissioner, *Sex Discrimination Act 1984 – A Review of Exemptions* (AGPS, Canberra, 1992) at 70. See also NSW Anti-Discrimination Board, *Discrimination and Religious Conviction* ch 7.
106. Sex Discrimination Commissioner *Review of Exemptions* at 71. See also Anti-Discrimination Board *Discrimination and Religious Conviction* Chapter 7.
107. Blacktown State Electorate Council, *Submission* at 1; S Coates, *Submission* at 2; Combined Community Legal Centre Group NSW, *Submission* at 9; Disability Discrimination Legal Centre, *Submission* at 6; P Fitzgerald, *Submission* at 13; Gay and Lesbian Rights Lobby, *Submission* at 6; J Griffin, *Submission* at 1; NSW Ministry for the Advancement and Status of Women, *Submission* at 24; National Pay Equity Coalition, *Submission* at 2; NSW Independent Teachers’ Association, *Submission* at 1.
108. NSW Independent Teachers’ Association, *Submission* at 2.

109. National Pay Equity Coalition, *Submission* at 2.
110. Catholic Education Commission NSW, *Submission* at 3; Presbyterian Church of Australia, *Submission* at 1; Seventh Day Adventist Church, *Submission* at 4. See also J McEvoy, *Submission* at 1.
111. Seventh Day Adventist Church, *Submission* at 5.
112. NSW Parents' Council, *Submission* at 2.
113. B N Bagni, "Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organisations" (1979) 79 *Columbia Law Review* 1514, referred to in Sex Discrimination Commissioner, *Sex Discrimination Act 1984 – A Review of Exemptions* (AGPS, Canberra, 1992) at para 4.49.
114. *Sex Discrimination Act 1975* (UK) s 19.
115. R Townsend-Smith, *Sex Discrimination in Employment: Law, Practice and Policy* (Sweet and Maxwell, London, 1989) at 134.
116. See Chapter 6 at para 6.60. For a detailed discussion of the Commission's recommendation to include religion as a new ground of discrimination see Chapter 5 at para 5.141.
117. See Chapter 5 at para 5.157.
118. See SDA s 38.
119. See Chapter 6 at para 6.430.
120. NSW Anti-Discrimination Board, *Annual Report 1995/1996* at 20. The ADB Annual Reports from 1987 have detailed statistics of discrimination complaints by ground. The percentage of goods and services related complaints have varied between 16.5% of complaints (1988/1989) to 24% of complaints (1995/1996) and have always been the second largest in number following the area of employment. In 1995/1996, the ADB received 2613 enquiries of goods and services discrimination and 469 (24%) formal complaints. This constituted a 3% increase from the previous year.
121. M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne, 1990) at 126.
122. *Anti-Discrimination Amendment Act 1997* (NSW) Sch 1[9].
123. The pre-amended s 19 applied to:
  - the refusal to provide goods or services; or
  - the refusal to provide goods or services "of the like quality, in the like manner or on the like terms" as are provided to other members of the public or where the person requesting those services belongs to a section of the public, to that section.

The issue of "requesting" the services was also peculiar to this section. When originally enacted, discrimination on the grounds of sex and marital status in the area of provision of goods and services was identical to the original s 19. When the ADA was amended in 1981 to include discrimination on the ground of physical impairment, the goods and services provisions in relation to sex

and marital status were amended to conform with the new provisions in relation to physical impairment. Section 19 remained unamended. This issue was considered in *Mahmut v Department of Health* [1984] EOC 92-646. The EOT took the view that it is important to endeavour to interpret the Act coherently and interpreted the phrase "person requesting" as simply a way of referring to the person alleging discrimination. The amendment has resolved this problem.

124. *Mahmut v Department of Health* [1984] EOC 92-646.
125. Until recently, it included only the following:
  - (a) services relating to banking, insurance and the provision of grants, loans, credit or finance;
  - (b) services relating to entertainment, recreation or refreshment;
  - (c) services relating to transport or travel;
  - (d) services of any profession or trade; and
  - (e) services provided by a council or public authority.
126. *Anti-Discrimination Amendment Act 1997* Sch 1[5].
127. At para 4.185.
128. 187 complaints or 40% of goods and services complaints: NSW Anti-Discrimination Board, *Annual Report 1995/1996*.
129. 83 complaints of race discrimination: Anti-Discrimination Board, *Annual Report 1995/1996*.
130. NSW Anti-Discrimination Board, *Annual Report 1994/1995* at 35-36.
131. This is particularly so in relation to physical disability: information supplied by Eric Poulos, Policy Officer, ADB. 12% of complaints were made in relation to services provided by a public authority, 10.5% in goods and in transport/travel, 7% in professional services, 6% in public access, 2% in credit/finance and in local government and 1% in insurance/superannuation. All figures are for the 1996-1997 financial year: information supplied by Michael Sparks, ADB.
132. 42% of the goods and services complaints in 1996-1997 were in the provision of entertainment services (information supplied by Michael Sparks, ADB).
133. *Sex Discrimination Act 1975* (UK) s 29.
134. *Race Relations Act 1976* (UK) s 20.
135. The list of examples in subsection (2) reads as follows:
  - (a) access to and use of any place which members of the public or a section of the public are permitted to enter;
  - (b) accommodation in a hotel, boarding house or other similar establishment;



- (c) facilities by way of banking or insurance or for grants, loans, credit or finance;
- (d) facilities for education;
- (e) facilities for entertainment, recreation or refreshment;
- (f) facilities for transport or travel; and
- (g) the services of any profession or trade, or any local or other public authority.

136. RDA s 11.

137. RDA s 12.

138. CERD Art 5(f).

139. SDA s 22; and DDA s 24.

140. SDA s 24; and DDA s 26.

141. SDA s 26. Thus, in *Worrall v Belconnen Community Youth Support Scheme* [1986] EOC 92-151, discrimination in the operation of a Commonwealth program for unemployed youth came within the scope of this section. The complaint failed for other reasons.

142. EOA (Vic) s 42.

143. ADA (Qld) s 46.

144. ADA (Qld) s 7(2).

145. ADA (Qld) s 101.

146. ADA (Qld) s 53 and 67.

147. EOA (SA) s 5(1), 39, 61, 76 and 85k.

148. EOA (WA) s 20.

149. EOA (WA) s 19.

150. EOA (WA) s 21A.

151. EOA (WA) s 66N and 66ZJ.

152. DA (ACT) s 20.

153. ADA (NT) s 41.

154. ADA (NT) s 4(8).

155. SDA (Tas) s 16.

156. SDA (Tas) s 21.

157. SDA (Tas) s 3.

158. Complaints in the area of superannuation would fall within para (a) of the definition, which includes “services relating to banking, insurance and the provision of grants, loans, credit or finance” and sporting activities would be covered by para (b) of the current definition which includes “services relating to entertainment, recreation or refreshment”.
159. EOA (WA) s 4(1).
160. (1997) 71 ALJR 943.
161. *IW v City of Perth* at 947-951.
162. *IW v City of Perth* at 954.
163. *IW v City of Perth* at 956-957.
164. *IW v City of Perth* at 964-966.
165. *IW v City of Perth* at 983-985.
166. *IW v City of Perth* at 954.
167. *IW v City of Perth* at 955.
168. See s 49M(1), which contains para (a) (refusal) and (b) (terms) but contains no equivalent to para (c) of s 66K(1) of the WA Act, referring to the manner in which the services are provided.
169. *IW v City of Perth* at 947.
170. *IW v City of Perth* at 949.
171. *IW v City of Perth* at 966.
172. *IW v City of Perth* at 949.
173. See below at para 4.301.
174. ADA definition of “services”: para (f) provides that “services” include “services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not”.
175. See below at para 4.185.
176. P G Osborn, *Osborn’s Concise Law Dictionary* (7th edition, Sweet and Maxwell, London, 1983).
177. H N Mozley, *Mozley and Whitley’s Law Dictionary* (11th edition, Butterworths, 1993).
178. [1985] EOC 92-142.
179. The benefits derived from this service were listed in the judgement and included proof of age proof of identity/age for obtaining a passport, proof of next of kin for inheritance purposes.
180. [1993] EOC 92-486.

181. [1991] EOC 92-377.
182. [1994] EOC 92-634 at 77,380. This was the case known as *IW v City of Perth* on appeal to the High Court.
183. According to the ADB's Annual Reports over the last five years, complaints in the area of education have constituted only 3-5% of all complaints received. In 1995/96 it constituted 3% compared with employment, which constituted 55%.
184. G Rowe, "Different Children: Legal Responses to Discrimination in Schools" in R Chisholm (ed), *Teachers, Schools and the Law in NSW* (NSW University Press, Sydney, 1987) at 116-148.
185. ADA s 4(1) definition of "educational authority" lists the institutions covered.
186. [1984] EOC 92-030.
187. (1987) 8 NSWLR 442.
188. *Leves v Haines* (1987) 8 NSWLR 442.
189. In NSW the definition of an educational authority also specifies the institutions covered. In all other jurisdictions which specifically prohibit discrimination in employment, there are separate definitions for educational authority and educational institution – however, the content is the same. The exception applicable in NSW to private educational institutions is not as wide in other jurisdictions. See below at para 4.178.
190. CERD Art 5(e)(v) refers to the right to education and training.
191. SDA s 38(3).
192. ADA (Qld) s 42.
193. EOA (SA) s 50(2).
194. EOA (WA) s 73, 44(3) and 61(3).
195. DA (ACT) s 33(2).
196. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 24 November 1976 at 3391.
197. For a further discussion of the changes recommended to the harassment provisions see Chapter 7 at para 7.8.
198. ADA s 32.
199. *Butler v Stewart* [1995] EOC 92-690.
200. ADA s 49ZYM inserted by *Anti-Discrimination (Age Discrimination) Amendment Act 1993* (NSW), repealed by *Anti-Discrimination Amendment Act 1997* (NSW).
201. ADA s 38L inserted by *Transgender (Anti-Discrimination and Other Act Amendment) Act 1996* (NSW), repealed by *Anti-Discrimination Amendment Act 1997* (NSW).

202. ADA s 18, 32, 38L and 49ZYM.
203. The repealing provisions contained in the *Anti-Discrimination Amendment Act 1997* (NSW) commenced operation on 4 July 1997.
204. [1995] EOC 92-721.
205. *Wolk v Randwick City Council* at 78,410.
206. (1997) 71 ALJR 943.
207. RDA s 11.
208. RDA s 13.
209. SDA s 22.
210. DDA s 23.
211. *Pearce v Council of the City of Sydney* [1985] EOC 92-131.
212. Anti-Discrimination Board, *Submission 1* at 87; Australian Quadriplegic Association, *Submission* at 1; R Brading, *Submission* at 1; Commissioner for Equal Opportunity (SA), *Submission* at 6; Disability Council of NSW, *Submission* at 4; Disability Discrimination Legal Centre, *Submission* at 1; Family Resource and Network Support Inc, *Submission* at 1; P Jenkin, *Submission* at 2. In relation to disability discrimination, the submission of the ADB specifically recommended the introduction of disability standards (similar to those provided under s 31 of the DDA) as a possible solution to this problem: Anti-Discrimination Board, *Submission 1* at 87.
213. See Chapter 3 para 3.58 and Recommendation 4.
214. Combined Community Legal Centre Group NSW, *Submission* at 8; Disability Council of NSW, *Submission* at 4; Gay and Lesbian Rights Lobby, *Submission* at 9.
215. ADA s 20 (race), s 34 (sex), s 38N (transgender), s 48 (marital status), s 49N (disability), s 49ZQ (homosexuality) and s 49ZYO (age).
216. In 1995/1996 the Board received 75 complaints regarding discrimination in accommodation which constituted 4% of complaints received: NSW Anti-Discrimination Board, *Annual Report 1995/1996*. The figures were similar in 1994/1995 (82 complaints) and 1993/1994 (52 complaints). In comparison with the number of complaints received, the Board received 1091 enquiries regarding accommodation discrimination in 1995/1996: NSW Anti-Discrimination Board, *Annual Report 1995/1996*.
217. ADA s 4.
218. Dealt with below at para 4.289.
219. ADA s 20(3) (race), s 34(3) (sex), s 38N(3) (transsexual), s 48(3) (marital status), s 49N(3) (disabled), s 49ZQ(3) (homosexuality) and s 49ZYO(3) (age).
220. ADA s 49N(5).
221. ADA s 49N(6).

222. ADA s 59.
223. See Chapter 6 at para 6.95.
224. RDA s 12.
225. SDA s 23 and 24; DDA s 25 and 26; EOA (Vic) s 47 and Pt 3 Div 5; ADA (Qld) Pt 4 Div 7 and 8; EOA (SA) s 38 and 40; EOA (WA) s 21 and 21A.
226. SDA s 23.
227. DDA s 25.
228. DDA s 25(2)(d).
229. EOA (Vic) s 50(a).
230. EOA (Vic) s 50(d) and (e).
231. EOA (Vic) s 58.
232. ADA (Qld) s 81-92.
233. EOA (WA) s 21, 26, 32, 35L, 47, 49C, 63, 66L and 66ZG.
234. ADA (NT) s 38-40.
235. EOA (SA) s 40, 62, 77 and 85L. South Australia does not however have an unjustifiable hardship defence to the provision of accommodation in relation to impairment. Instead s 84 excepts discrimination that occurs because the premises are constructed in a way that they are inaccessible or where the owner or occupier of the premises fails to ensure that every part or a particular part is accessible to the person.
236. DA (ACT) s 21.
237. In 1995/1996, 20 (age), 19 (race), 12 (marital status); in 1994/95, 30 (race), 17 (age), 7 (marital status). In 1993/1994, 17 (race), 10 (marital status), age was not a prohibited ground.
238. Information supplied by D Ramsay, Policy Officer, Tenancy Union of NSW (24 June 1997).
239. [1996] EOC 92-790.
240. The Board has even received an application from a real estate agency for exemption from the ADA to allow refusal of applications from people with children documenting damage done by the children of previous tenants to the premises.
241. Note that in South Australia, there is an exception where accommodation is provided for recreational purposes where the use of that accommodation is limited, on a genuine and reasonable basis, to persons of a particular age group: EOA (SA) s 85I(5).
242. M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne, 1990) at 127.

243. *Olsen v Public Housing Authority* (ADB, February 1980, unreported).
244. *Burke v Trullagan* [1986] EOC 92-161, where the EOT found that owners who refused to rent a unit to an unmarried couple because of the owner's religious beliefs had unlawfully discriminated against the couple.
245. Tenants Union of NSW, "Discrimination and the Private Rental Market – Problems Faced by Tenants of NESB", Submission to the National Housing Strategy (February 1992).
246. M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Sydney, 1990) at 129.
247. For example, private dwellings include cabin, houseboat, improvised home, tent, house or flat attached to a shop, office etc and non-private dwellings include nursing home, childcare institution, convent, monastery: ABS Census Dictionary 1996.
248. It is worth noting that the *Residential Tenancies Act 1987* (NSW) deals with the rights and obligations of landlords and tenants under residential tenancy agreements. Although the remedies available are limited, the Tenancy Union has suggested that that Act should include a provision making it unlawful to discriminate on the grounds prohibited under the ADA as the complainant will often require a quick resolution which the Residential Tenancies Tribunal is better equipped to provide. (Tenants Union of NSW "Discrimination and the Private Rental Market – Problems Faced by Tenants of NESB" Submission to the National Housing Strategy (February 1992); confirmed by D Ramsay, Policy Officer, Tenancy Union of NSW (24 June 1997)).
249. RDA s 12(3).
250. SDA s 23(3).
251. DDA s 25(3).
252. ADA (Qld) s 87.
253. EOA (WA) s 21(3).
254. EOA (Vic) s 54.
255. EOA (SA) s 40(3).
256. DA (ACT) s 26.
257. SDA (Tas) s 26(1).
258. ADA (NT) s 40(1).
259. Anti-Discrimination Board, *Submission 1* at 93.
260. ADA s 4.
261. ADA s 34A(3) and 34A(4).
262. ADA s 20A(3), s 49O(3) and s 49ZR(3) respectively.
263. See Chapter 6 at para 6.152, 6.188, 6.297, 6.356.

264. ADA s 4.
265. Either under the *Corporations Law* or, if it was registered or applied for registration before the commencement of Pt 10, as a co-operative under the *Co-operatives Act 1992* (NSW).
266. New South Wales, Liquor Administration Board (Department of Gaming and Racing), *Annual Report 1995-1996* at Appendix 8.
267. For example, ADA s 28(1) and (2) applying to discrimination on the ground of sex.
268. ADA s 57 and see *Umina Beach Bowling Club v Ryan* [1984] EOC 92-110; *Tullamore Bowling and Citizens Club Ltd v Lander* [1984] EOC 92-109.
269. ADA s 57. A registered club is not a “voluntary body” under s 57(2).
270. ADB, *Submission 2* at 5-7.
271. See Chapter 6 at para 6.73, Recommendation 47.
272. SDA s 4.
273. SDA s 39.
274. The prohibition applies also to a committee of management of a club or incorporated association or a member of such a committee.
275. DDA s 4.
276. RDA s 11.
277. CERD Art 5(e)(vi) and 5(f).
278. This may give rise to issues of inconsistency between the ADA and the RDA. Presently, the ADB refers any race discrimination complaints about voluntary bodies which are outside the jurisdiction of the ADA to HREOC.
279. EOA (Vic) s 78.
280. EOA (WA) s 4; ADA (NT) s 4; and SDA (Tas) s 3.
281. EOA (WA) s 71(1) and 71(2).
282. DA (ACT) s 31.
283. ADA (Qld) s 4.
284. At that time, there were over 1500 registered clubs with a total membership of more than 1.5 million people. Some clubs had memberships of several thousands and reported turnovers of millions of dollars a year: New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 March 1981 at 5114.
285. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 March 1981 at 5114.

286. Anti-Discrimination Board, *Submission 2* especially at 16-21; Anti-Discrimination Board *Submission 1* at 117-118; J Anderson, *Submission* at 6; J Clementson, *Submission* at 1; Combined Community Legal Centre Group NSW, *Submission* at 9; Disability Discrimination Legal Centre, *Submission* at 6; Gay and Lesbian Rights Lobby, *Submission* at 9; NSW Ministry for the Advancement and Status of Women, *Submission* at 24; National Pay Equity Coalition, *Submission* at 2; NSW Independent Teachers' Association, *Submission* at 1; D Robertson, *Submission* at 13. It should be noted, however, that the submission of the Seventh Day Adventist Church specifically opposed the repeal of the exception for voluntary bodies from the operation of the Act: Seventh Day Adventist Church, *Submission* at 5.
287. For a discussion of the Commission's recommendation to repeal the voluntary bodies exception see Chapter 6 at para 6.87.
288. Anti-Discrimination Board, *Submission 2* at 13.
289. National Pay Equity Coalition, *Submission* at 2.
290. Anti-Discrimination Board, *Submission 2* at 13.
291. Statistics from the Department of Fair Trading, which administers the *Associations Incorporation Act 1984* (NSW), shows that over the last four years, over 2000 new associations have become incorporated annually. Figures reported by Anti-Discrimination Board, *Submission 2* at 12.
292. There were 1525 clubs at 30 June 1996, down from 1558 at 30 June 1992: New South Wales, Liquor Administration Board (Department of Gaming and Racing), *Annual Report 1995-1996* at Appendix 8.
293. As at 30 June 1996: Anti-Discrimination Board, *Submission 2* at 12-13.
294. NSW Anti-Discrimination Board, *Annual Report 1995-1996* at 15.
295. A number of submissions received by the Commission argue that a body which receives public funding for a program from either Federal, State or local government should not be able to discriminate in the area of membership or restrict the benefits, services or facilities that are publicly funded to members: Anti-Discrimination Board, *Submission 1* at 118; National Pay Equity Coalition, *Submission* at 2.
296. *Corporations Law* s 114.
297. *Associations Incorporation Act 1984* (NSW) s 71.
298. Anti-Discrimination Board, *Submission 2* at 19.
299. For example, political parties receive \$1.50 for every vote obtained, parliamentary salaries are paid from public funds and parties have a certain amount of free access to media advertising during elections to promote their agendas: Women in Politics, an incorporated coalition of women's organisations, reported in Anti-Discrimination Board, *Submission 2* at 18.
300. Many of these would be members of national associations but for the purposes of the ADA, the issue is whether the body carries on activities in NSW.
301. The guidelines are effective in the 1996-1997 financial year.



302. Anti-Discrimination Board, *Submission 2* at 19.
303. See Chapter 6 at para 6.152, 6.188, 6.297, 6.356, 6.436.
304. EOA (Vic) s 47; ADA (Qld) Pt 4 Div 7; EOA (SA) s 38 (sex, sexuality, marital status or pregnancy), s 60 (race), s 75 (impairment), s 85j (age); and EOA (WA) s 21A (sex, marital status or pregnancy), s 47A (race), s 66ZH (age).
305. The submission of the Combined Community Legal Centre Group specifically argued that the Act should be amended to cover disposal of interests in land across all grounds of discrimination: Combined Community Legal Centre Group NSW, *Submission* at 9.
306. SDA s 24.
307. DDA s 26.
308. RDA s 12.
309. RDA s 3.
310. EOA (Vic) s 47. See also EOA (Vic) s 49 and 50. The Victorian prohibition applies despite anything to the contrary in any other Act or document affecting the land.
311. ADA (Qld) s 48.
312. [1991] EOC 92-389.
313. (1985) 159 CLR 70.
314. *Gerhardy v Brown* at 122.
315. *Native Title Act 1993* (Cth) s 253 and see various lands acquisitions acts. See also *Maddalozzo v Commonwealth* (1978) 34 FLR 332 at 334.
316. *Conveyancing Act 1919* (NSW) s 7.
317. P Butt, *Land Law* (3rd edition, LBC Information Services, Sydney, 1996) at 782.
318. *The CCH Macquarie Dictionary of Law* (2nd ed, CCH, Sydney, 1993).
319. Butt at 783.
320. *Community Land Development Act 1989* (NSW); *Community Land Management Act 1989* (NSW); *Strata Titles (Community Land) Amendment Act 1989* (NSW); and *Miscellaneous Acts (Community Land) Amendment Act 1989* (NSW).
321. For example, if there are 100 apartments in the resort, each with 51 weekly "intervals" for sale, a purchaser of two weeks in one apartment will obtain 2/5100th interest as tenant in common in the real estate of the resort: Butt at 813.
322. Given the same facts as above, the purchaser will obtain a 2/51th interest in Lot 1 (Butt at 813).

323. See above at para 4.160, Recommendation 19.
324. *Words and Phrases Legally Defined* (3rd ed, Butterworths, London, 1989) Volume 2 at 327.
325. See, for example, *Mahmut v NSW Department of Health* [1994] EOC 92-646.
326. ADA s 22J (inserted by *Anti-Discrimination Amendment Act 1997* (NSW)).
327. ADA s 22J(2).
328. ADA s 4.
329. *Woods v Wollongong City Council* [1986] EOC 92-174; *Gulliver v Council of City of Sydney* [1986] EOC 92-185; *Byham v Preston City Council* [1991] EOC 92-377; *Williams v Council of the Shire of Exmouth* [1990] EOC 92-296 .
330. *Hough v Council of the Shire of Caboolture* [1993] EOC 92-480.
331. *A v Caboolture Shire Council* [1992] EOC 92-403.
332. SDA s 28L.
333. [1997] EOC 92-881; See also *Commonwealth v Human Rights and Equal Opportunity Commission* (1997) 77 FCR 371.
334. *Commonwealth v Human Rights and Equal Opportunity Commission* (1997) 77 FCR 371.
335. M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne, 1990) at 132.
336. (1997) 71 ALJR 943.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 5. Grounds of Discrimination

#### INTRODUCTION

5.1 As originally introduced in 1976, the *Anti-Discrimination Bill 1976* (NSW) had nine grounds, namely: race, sex, marital status, age, religious and political conviction, physical handicap or condition, mental disability and homosexuality. A further ground, trade union membership, was inserted in the Legislative Council. After considerable debate, the *Anti-Discrimination Act 1977* (NSW) ("ADA") which was passed in 1977 included only three grounds, namely: race, sex and marital status.

5.2 Race, the first ground identified in the ADA, was extended in 1994 by adding the concepts of "ethno-religion" and "descent" to the definition.<sup>1</sup> The first form of unlawful vilification, namely racial vilification, was added in October 1989.<sup>2</sup>

5.3 The concept of sex discrimination was amended by a reference to the characteristic of pregnancy in 1994.<sup>3</sup> Sexual harassment was not specifically defined in the original Act but was developed by the Equal Opportunity Tribunal ("EOT") and the courts as an important form of sex-based discrimination in employment.<sup>4</sup> However, it has now been defined as a separate form of unlawful conduct by the 1997 amendments to the ADA.<sup>5</sup>

5.4 The concept of sex discrimination was extended further by the inclusion of a specific ground relating to transgender discrimination in 1996.<sup>6</sup> Included at the same time was the unlawful act of transgender vilification.<sup>7</sup>

5.5 The ground of physical impairment was added in 1981 and in 1982 the ground of intellectual impairment was also introduced.<sup>8</sup> These were re-defined and extended to cover mental illness and past and future disability in 1994 under the single ground of disability.<sup>9</sup> Also in 1982 the ground of homosexuality was added, which has been extended by rendering unlawful homosexual vilification as from March 1994.<sup>10</sup> Vilification on the ground that a person has or is believed to have HIV/AIDS was also made unlawful in 1994.<sup>11</sup>

5.6 In 1990, a new ground of "compulsory retirement from employment on the ground of age" was inserted.<sup>12</sup> However, its operation was staggered, commencing with application to public sector employees in January 1991, extending to Local Council employees in January 1992 and then to all public and private sector employees as from January 1993. In June 1994, a general prohibition of discrimination on the ground of age commenced.<sup>13</sup>

5.7 It is clear that the scope of the ADA has been expanded in a somewhat piecemeal fashion over the 20 years of its existence. In some respects the grounds are more limited than those available in other jurisdictions in Australia. There remains pressure for a continuing expansion of the existing grounds and the introduction of new grounds.

5.8 The purpose of this Chapter is to consider both the scope of the current grounds and the justifications which may be advanced for including new grounds. The issues of principle which arise in this context have already been dealt with in Chapters Three and Four. It is important that, so far as possible, the grounds covered by the ADA be justified on a principled basis. However, the Commission acknowledges that changes inevitably follow from changing social attitudes and practices. It also recognises the need to provide coherent legislation which can be the basis for establishing appropriate norms of public conduct, without causing undue confusion.

## EXISTING GROUNDS

### Race

5.9 The first Commonwealth legislation in the area of discrimination was the *Racial Discrimination Act 1975* (Cth) (“RDA”). This Act adopted from the international *Convention on the Elimination of All Forms of Racial Discrimination* (“CERD”) the definition found in Article 1.1 of CERD, namely discrimination based on “race, colour, descent, or national or ethnic origin”. Each of these terms is included in the definition in the ADA which, in addition, includes the concepts of “nationality” and “ethno-religious origin”.

### Nationality

5.10 The inclusion of “nationality” may probably be traced to an English decision in 1972 in which the House of Lords declined to equate nationality with national origin.<sup>14</sup> In truth, the concept of nationality differs significantly from that of national origin. As noted by one commentator:

[National origin] is something an individual cannot alter, even though he may immigrate and change his allegiance. This factor gives national origins its affinity with race: both are ineradicable characteristics, independent of personal choice, which frequently give rise to hostile stereotypes. Nationality, by contrast, is primarily a legal category commonly – though less so in Britain than elsewhere – equivalent to citizenship, which may, with the approval of the authorities, be changed at a person's election.<sup>15</sup>

5.11 Despite this conceptual difference, the justification for including nationality is that it avoids an escape route, through which persons and authorities can discriminate on the grounds of race by identifying nationality or citizenship as the ground of distinction.

### Ethno-religious origin

5.12 The concept of “ethno-religious origin” is novel. It appears to have been introduced into the definition of race in order to ensure that Jews and Sikhs were within its scope. In an historical sense, this concern is understandable: much of the pressure for outlawing racial discrimination arose in the post-World War II years as the full enormity of the Holocaust became apparent. It would indeed be ironic if Jews did not fit within the CERD definition of race. Nevertheless, the reason for the amendment remains obscure. As long ago as 1979, the New Zealand Court of Appeal accepted that, in the context of the *Race Relations Act 1971* (NZ), Jews constituted a group on the grounds of “ethnic origins”.<sup>16</sup> The Commission is not aware of any judicial determination which would cast doubt on that conclusion.

5.13 It is also suggested that the definition has been broadened to cover Sikhs. Again, the amendment seems quite unnecessary for that purpose: the *Race Discrimination Act 1976* (UK) was applied in 1983 to protect Sikhs by holding unlawful, as a form of indirect racial discrimination, a refusal by a school to admit a Sikh boy who declined to cut his hair and cease wearing a turban.<sup>17</sup>

5.14 Accordingly, the insertion of this term in the definition in 1994 was almost certainly unnecessary. More importantly, its scope is confusing. In his Second Reading Speech, the Attorney General stated:

The effect of the latter amendment is to clarify that ethno-religious groups, such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act.<sup>18</sup>

This gives rise to a possible argument that the phrase imports, almost by the back door, a ground of discrimination on the ground of religion, at least in some circumstances which may not be carefully defined.

5.15 If this were the intention, the proper course is to consider on its merit the addition of religion as a ground. As the Commission concludes that such a ground should be introduced,<sup>19</sup> with the necessary

restrictions to avoid inappropriate coverage, the term “ethno-religious origin” should be removed from the definition of race. Groups such as Jews and Sikhs would still be covered by, for example, the category defined by “ethnic origin”.

### **Language**

5.16 A common problem in relation to race discrimination complaints is whether discrimination on the grounds that a person is not fluent in a particular language, usually English, is a basis for a complaint. In the United States of America, the traditional approach was to treat a condition of employment that a person be fluent in English as falling within the concept of disparate impact or, in our terminology, indirect discrimination. That approach has merit in that the ability to speak English obviously can be a relevant consideration in relation to employment in some circumstances. Treating it as a form of indirect discrimination would permit the imposition of such a requirement in circumstances where it was reasonable to do so. For example, in a job where communication with a largely Greek speaking clientele is required, fluency in Greek would be an understandable requirement. Similarly, in the manufacturing industry or mining, the ability to communicate with one’s workmates may be an important safety consideration. In some workplaces of which the Commission is aware, the language of communication may not be English at all, but may be a language of a dominant migrant group who have been employed in that workplace. In addition, the employer may require a foreman who is fluent in the workplace language and the language of management, which may be English.

5.17 The difficulty in relation to the ADA is that fluency in a particular language may be treated as a characteristic and, therefore, constitute an element of direct discrimination. As already noted, the definition of the precise characteristic in question may not always be easy. In the circumstance envisaged, the characteristic may be “inability to speak fluent English”. That characteristic may be identifiable as one appertaining generally to persons of numerous races, although not of course Anglo-Saxon or Anglo-Celtic Australians. However, the fact that the characteristic applies to a number of races and its absence appertains generally to a number of other races does not necessarily take it outside the scope of the ADA. As the High Court has noted in the context of s 10 of the RDA, such provisions may need to be given a “distributive” operation protecting each particular racial group.<sup>20</sup>

5.18 The question of language has been considered in a number of Australian cases in the context of employment.<sup>21</sup> In *Campos v Tempo Cleaning Services*<sup>22</sup> it was held that language came within the meaning of what constitutes discrimination on the ground of race<sup>23</sup> since it is a characteristic that appertains generally or is generally imputed to persons of a particular race. The case of *Oset v Ministry of the Cabinet*<sup>24</sup> is another in which it was argued that the language difficulties of the complainant were the reason for her dismissal and that this therefore constituted discrimination on the grounds of race. The Western Australian Equal Opportunity Tribunal appears to have assumed that this ground might be available. On the facts, however, the Tribunal found that the decision not to extend her employment was based on her lack of skills.

5.19 In *Lyffyt v Capital Television*<sup>25</sup> the Australian Capital Territory Human Rights Office held that since an accent may distinctively mark a person to be of a certain race, unfavourable treatment on the basis of a person’s accent would amount to indirect discrimination on the ground of race. However, the complainant was unable to prove that her accent was an operative factor in the decision not to employ her on a permanent basis and thus her claim was dismissed.

5.20 The Commission is of the view that *Campos* was probably correctly decided, given the extended definition of discrimination on the basis of characteristics appertaining to a particular ground. However, fluency in a particular language may be a genuine occupational qualification in some circumstances. Accordingly, the Commission will return to this question in defining relevant exceptions in Chapter Six.

### **Recommendation 30**

**Remove the term “ethno-religious origin” from the definition of race.**

## Draft Anti-Discrimination Bill 1999: cl 18(1)

### Sex

#### *General*

5.21 The scope of this ground raises questions relating to pregnancy and breastfeeding, which may involve particular characteristics appertaining to the female sex.

5.22 The separate ground of family and carer responsibilities is dealt with as a proposed new ground.<sup>26</sup> As it is clearly intended to be a gender-neutral ground, it is not appropriately dealt with in this context. On the other hand, in so far as current social practices may give rise to indirect discrimination claims on the basis that women in particular bear a greater burden of family responsibilities, the extent of overlap with the ground of sex is considered below.

#### *Pregnancy*

5.23 Discrimination on the ground of sex because of pregnancy is widespread in employment. Women are often dismissed, denied promotion or chosen for retrenchment ahead of other employees on informing employers of their pregnancy.<sup>27</sup> However, it is not always clear that pregnancy is an irrelevant consideration, especially in employment cases. The example often cited in support of this proposition is that of the employer who seeks to replace an existing employee on maternity leave. Is the employer required to ignore the fact that a particular applicant, otherwise suitable for the job, is herself pregnant and would expect to take maternity leave shortly after appointment?

5.24 A case which in part illustrates the point is the English case of *Webb v EMO Cargo (UK) Ltd.*<sup>28</sup> The case involved an employer who dismissed an employee after she advised the employer that she was pregnant. She had been recruited for an unlimited period, but initially to cover the maternity leave of another employee. The first tribunal to hear the case found that there had been no unlawful sex discrimination and that the complainant was dismissed, not because of her pregnancy, but because she would not be available to cover for the absent employee during the critical time. The tribunal held further that the correct comparison was with the hypothetical man who would be unavailable at the critical time. This finding was upheld on appeal, but the House of Lords, mindful of the need to construe the provisions of the *Sex Discrimination Act 1975* (UK) in accordance with European Community law on equal treatment, referred the matter to the European Court of Justice ("ECJ") for a preliminary ruling.<sup>29</sup>

5.25 The ECJ held that the dismissal of a female employee on the ground of pregnancy constituted direct discrimination on the ground of sex. It distinguished between the case of a pregnant woman who was unable to perform work because of her pregnancy (which is not an illness) and a man unable to perform work because of a medical condition. The Court also found that the dismissal was not justified as the appellant was recruited for an indefinite period and her unavailability due to pregnancy was only for a limited time relative to the length of her contract. Subsequently, the House of Lords upheld the appeal.

5.26 Of greater concern is the case of a woman who seeks employment for a short term position, for example where another employee is on maternity leave. That is not quite the same as the situation in *Webb v EMO Cargo* referred to above. Assume, however, the woman is rejected because, being pregnant, she cannot complete the short-term contract. The employer might legitimately complain that it was grossly inequitable to require it to hire and train two persons for a short term position, rather than one. Of course, should the first fall sick, that result may be unavoidable. However, the issue is whether that risk must be accepted where it reaches the level of certainty. One answer to this difficulty would be to provide a genuine occupational qualification exception with respect to such employment. The scope of such an exception would require careful consideration so as to avoid the exception overwhelming the ground.

5.27 There is currently an exception provided from the prohibition with respect to pregnancy and employment in circumstances where, when the employer interviewed the woman "the woman was

pregnant, unless, at that date, the woman did not know and could not reasonably be expected to have known that she was pregnant".<sup>30</sup> No such exception exists under the provisions of the *Sex Discrimination Act 1984* (Cth) ("SDA").

5.28 This exception was considered at length by the Anti-Discrimination Board ("ADB") in its Report of the Inquiry into Pregnancy Related Discrimination,<sup>31</sup> and by the Implementation Committee of the Report into Gender Bias and the Law.<sup>32</sup> Both recommended the removal of this exception on the basis that the employer's only concern should be whether the pregnant woman is the best applicant for the job. The example of a job requiring a marketing exercise to be completed in 12 months was cited by the ADB in the Pregnancy Report. If the requirement is reasonable but the pregnant woman cannot comply with this requirement because she requires time off around the birth, then the employer will not be breaching the ADA by refusing to hire the pregnant woman.<sup>33</sup>

5.29 However, this analysis assumes that the issue of pregnancy arises as a form of indirect discrimination. Given the express provisions that pregnancy is a characteristic appertaining generally to women,<sup>34</sup> that analysis must be wrong. On the other hand, the reasoning adopted suggests that a defence should be available where non-pregnancy is a genuine occupational qualification or that the ground of pregnancy should be subject to a requirement of reasonable accommodation, with a corresponding defence of undue hardship. Such a defence would be justifiable, but the current provision is not so limited.

5.30 There may also be circumstances where pregnancy discrimination is not sex discrimination within the current definition. For instance, it might be difficult to establish sex discrimination in a case where a woman who is not pregnant is chosen over a pregnant woman. On this issue one commentator observed:

There 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.<sup>35</sup>

5.31 The difficulty with this analysis is that it ignores the extensive definition given to each ground in the ADA, specifically to include characteristics appertaining generally to a person with the relevant attribute. As already noted, this concept itself gives rise to difficulties which require attention. Nevertheless, under the present Act it would be necessary to consider whether the woman not hired suffered on the basis of a characteristic generally appertaining to her sex. Pregnancy is certainly unique to the female sex, although it does not affect some women and affects only a few women at a particular time. An appropriate characteristic might more appropriately be defined in some circumstances as the capacity to become pregnant.

5.32 Further, the commentator assumes that, where a comparison is required under the present law and the comparison has in fact been made, a complainant cannot rely upon a hypothetical comparator. In other words, the commentator assumes that where the only applicants for the job are women, none can complain on the grounds of sex discrimination. However, where a woman is treated unfairly on the basis of a characteristic that appertains generally to her sex, there has been discrimination. The fact that other women may not share the characteristic is recognised by the current requirement that the characteristic appertains generally, rather than universally, to the identified grouping.

5.33 This issue was raised in the Commission's Discussion Paper, *Review of the Anti-Discrimination Act 1977 (NSW)* ("DP 30").<sup>36</sup> Many submissions received by the Commission were in favour of making pregnancy a separate ground of discrimination.<sup>37</sup> The ADB submitted that although there have been no significant problems with the inclusion of pregnancy discrimination within the definition of sex discrimination, it would be logical to include it as a separate ground.<sup>38</sup>

5.34 Anti-discrimination legislation in Victoria, Queensland, South Australia, Western Australia, the Australian Capital Territory and the Northern Territory provides that pregnancy is a separate ground of discrimination.<sup>39</sup> In Tasmania, pregnancy is considered one of the attributes of sex.<sup>40</sup>

5.35 The ADA currently provides that “the fact that a woman is or may become pregnant is a characteristic that appertains generally to women”.<sup>41</sup> This statement was inserted in 1994. Further, the Act expressly provides in s 24(2) that, for the purpose of direct discrimination under s 24(1), circumstances are not materially different for the purpose of the required comparison:

by reason of the fact that the persons between whom the discrimination occurs:

- (a) are a woman who is pregnant and a man; or
- (b) are not of the same marital status.

5.36 The identification of this particular situation in paragraph (a) gives support to an unfortunate view that the relevant comparison is between a woman and a man, even in the context of discrimination on the ground of a characteristic appertaining generally to one sex only. To suggest that the characteristic is to be ignored for the purposes of the comparison is to render the operation of the prohibition on direct discrimination on the basis of characteristics largely ineffective.<sup>42</sup> The inclusion of s 24(2)(a) is either declaratory or is intended to suggest that the particular circumstance it identifies would not otherwise constitute unlawful conduct. It is difficult to know which was intended.

5.37 This difficulty would not arise with the proposed new definition of discrimination. Further, the problem of the woman who is rejected on the grounds of pregnancy, if that is a characteristic appertaining generally to women, would also be avoided by the proposed new definition of discrimination. The woman in question is clearly being treated disadvantageously on the ground of a sex-based characteristic and, as no comparison with a man is required, the definition would be satisfied.

5.38 In late 1997 the government released an exposure draft of a bill to introduce a specific ground of pregnancy discrimination.<sup>43</sup> The proposed amendment would introduce a new prohibition against discrimination on the ground of pregnancy if the aggrieved person is or may become pregnant and, on that ground, is treated less favourably than the perpetrator treats or would treat a person who is not pregnant or cannot become pregnant.<sup>44</sup> This terminology includes not only pregnancy, but the capacity to become pregnant. As already noted, there may be a distinction between the fact of pregnancy and the capacity to become pregnant, the latter characteristic sometimes being referred to, perhaps inelegantly, as “potential pregnancy”.<sup>45</sup>

5.39 At the Federal level, the issue of potential pregnancy was explored at length by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its 1992 Report, *Halfway to Equal*.<sup>46</sup> As a consequence of the Committee’s recommendation, the SDA was amended to include potential pregnancy as a ground of discrimination.<sup>47</sup>

5.40 Whatever the correct analysis of the examples discussed above under the current law may be, it is clear that the law is in need of clarification and it appears to the Commission that, in accordance with the general consensus of the submissions, pregnancy should be dealt with as a separate ground. In part, the reason for this is that the circumstances of pregnancy, or even potential pregnancy, may not be entirely irrelevant considerations. To the extent that such considerations are relevant, that fact should be acknowledged and the next question should be addressed, namely whether the circumstances are such that an obligation of reasonable accommodation should apply. The concept of reasonable accommodation is dealt with in more detail in relation to the related grounds of disability and carer responsibility.<sup>48</sup> Pregnancy is a condition which is gender-based and should properly be the subject of all reasonable forms of support in a civil society. Accordingly, it is appropriate to treat pregnancy (and potential pregnancy) as a separate ground, impose an obligation of reasonable accommodation, subject to the usual limit that it not involve undue hardship. This will not extend the grounds significantly, nor will it affect the areas of their operation.



## **Breastfeeding**

5.41 A similar question arises in relation to breastfeeding. Again, the capacity to breastfeed may be a characteristic which appertains generally to women: it is certainly a characteristic which is unique to that sex. However, the fact of breastfeeding is a far less frequent characteristic than the capacity. This question differs from that of pregnancy and capacity to become pregnant in that the capacity to breastfeed is rarely treated as a consideration, whereas the capacity to become pregnant, not infrequently, is so treated. In Queensland, breastfeeding is considered an attribute for which discrimination is prohibited, but only in the area of the provision of goods and services.<sup>49</sup>

5.42 Despite the fact that it is less commonly the subject of controversy, the principles which apply to pregnancy have equal application in relation to breastfeeding. Accordingly, the Commission is satisfied that breastfeeding should also be identified as a ground and treated on the same basis as pregnancy.

### **Recommendation 31**

**Pregnancy (including potential pregnancy) and breastfeeding should form separate grounds of discrimination.**

Draft Anti-Discrimination Bill 1999: cl 16(2)

### **Marital status**

5.43 The ADA currently renders unlawful discrimination on the grounds of “marital status” which is defined in the following terms:

“Marital status” means 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.

5.44 The SDA has a similar definition, except that the last category is worded as follows:

“the de facto spouse of another person.”

The term “de facto spouse” is not defined in the SDA.

5.45 Submissions have suggested that the present definition is restrictive in two ways, each of which is inappropriate. The first relates to the omission of traditional marriages from the definition. In 1986, the Australian Law Reform Commission (“ALRC”) recommended that recognition be given to traditional Aboriginal marriages for a range of purposes.<sup>50</sup> For example, in the area of adoption the ALRC recommended that the concept of “married person” be extended to an Aboriginal person who is living in a relationship that is recognised as a marriage according to the traditions of an Aboriginal community or Aboriginal group to which the person belongs.<sup>51</sup>

5.46 In New South Wales, one area in which traditional Aboriginal marriages have been recognised by the law is that of adoption. In 1987 the *Adoption of Children Act 1965* (NSW) (“Adoption Act”) was amended to provide that the court may make adoption orders in favour of a couple in which:

- (i) the man and the woman are Aborigines (within the meaning of the *Aboriginal Land Rights Act 1983*) and are recognised as being married according to the traditions of an Aboriginal community or Aboriginal group to which they belong, and
- (ii) the child in respect of whom the application for the adoption order is made is an Aboriginal (within the meaning of that Act).<sup>52</sup>

5.47 Although not expressly providing for the circumstance of Torres Strait Islanders, the ALRC’s definition of a married person was believed to be wide enough to cover their traditional relationships in so far as they differed from those recognised elsewhere in Australia. In its Report, the ALRC noted:

In general it appears that Torres Strait Islander practices and customs are different from those even of North Queensland Aborigines, and more adaptable to the general law. Torres Strait Islanders are strictly monogamous, mostly church married. The most significant area of islander “customary” practice noted in the field report was that of adoption, especially of extra marital children, by grandparents or other members of the extended family.<sup>53</sup>

5.48 An issue also arises in relation to the inclusion of South Sea Islanders who are not within the specific terms of the Adoption Act. Although they have not in the past generally been treated as amongst the Indigenous people of Australia,<sup>54</sup> they have, more recently, received recognition from the Commonwealth as a special group in their own right.<sup>55</sup>

5.49 The Commission recommends that the definition of marital status be expanded in accordance with the ALRC Report to include traditional marriages amongst Indigenous Australians, which may include South Sea Islanders who are Australian citizens.

5.50 More generally, the concept of marriage will, inevitably, involve foreign marriages carried out in accordance with the laws and customs of other peoples and places. Whether they are recognised for Australian purposes will depend upon private international law principles. The difference in relation to Indigenous inhabitants is that they would otherwise be expected to comply with Australian laws and customs. There is no good reason, however, to decline to recognise traditional laws and customs in relation to marriage by Indigenous Australians in the same way that the common law recognises rights and interests arising under traditional laws and customs in relation to land tenure.

5.51 The second area in which it was suggested that the current definition was inappropriately restrictive concerned homosexual couples. It was seen as anomalous that the ADA proscribed discrimination on the grounds of homosexuality, yet defined marital status in a way which excluded same sex couples. A number of the submissions received by the Commission in response to DP 30 argued that the definition of “marital status” within the ADA should be amended to include same sex relationships.<sup>56</sup>

5.52 This issue arose in an early case before the EOT. In *Wilson v QANTAS Airways Limited*,<sup>57</sup> two homosexual male flight attendants complained of discrimination in that they were treated less favourably than either married flight attendants or those living in a heterosexual de facto relationship. The particular benefit in question was the ability to be granted coincident dates and places of travel, where both partners were employed by Qantas. The NSW EOT dismissed the complaint on the basis that the conduct did not fall within the ground of marital status. The circumstances which gave rise to the complaint were ultimately changed voluntarily by the employer so as to recognise that homosexual couples could enjoy the same benefits as their heterosexual counterparts.

5.53 The Commission accepts that this circumstance gives rise to an anomaly. If there are areas in which homosexual relationships should not be recognised on the same basis as heterosexual

relationships, those areas can be dealt with by way of appropriate exemptions. Accordingly, paragraph (f) of the current definition of marital status should refer to persons living in cohabitation with a person of the same or the opposite sex.

5.54 If protection is to be extended to cover homosexual relationships, the identification of the ground as “marital status” is inappropriate in the light of *Marriage Act 1961* (Cth). The Commission considers that a preferable term would be “domestic status”.

### **Identity of partner**

5.55 In *Boehringer Ingleheim Pty Ltd v Reddrop*,<sup>58</sup> the New South Wales Court of Appeal held that the term “marital status” was not broad enough to include the identity of a person’s spouse. The ADB subsequently recommended that the definition of marital status be amended to include “the identity of a person’s spouse, ex-spouse or a person with whom a person is cohabiting”.<sup>59</sup>

5.56 More recently, in *Waterhouse v Bell*,<sup>60</sup> the Court held that “corruptibility at the hands of one’s husband” was a characteristic imputed generally to married women. *Waterhouse* distinguished *Boehringer* on the basis that Mrs Reddrop may have disclosed confidences to her husband who worked in a rival firm, but that was a characteristic that was peculiar to her and not one generally imputed to married women. By way of contrast, in *Waterhouse*, the ground of adverse treatment was corruptibility being a characteristic generally imputed to married women.<sup>61</sup>

5.57 The question is whether any amendment is needed on account of the apparent gap in the law illustrated by *Reddrop*. Despite the recommendation of the ADB, the Commission is not satisfied that an amendment is required. The difficulty with the decision in *Reddrop* was that it appeared to reject the availability of the conclusion now confirmed by the Court of Appeal in *Waterhouse*. Mrs Reddrop ran her case on the basis that the identity of her spouse was taken into account purely because she was married. Had she not been married, the interviewers would not have known her circumstances, an inference sought to be derived from the fact that they did not ask about the circumstances of any person with whom the successful applicant cohabited. Accordingly, she claimed she was treated differently on account of her marital status and not merely because of the identity of her spouse. The reasoning of the Court in upholding her appeal was not clearly restricted in a manner now made clear in *Waterhouse*.

5.58 On the other hand, it is not clear that the identity of one’s partner is necessarily an irrelevant factor. For example, an employer may well wish to take account of the fact that a prospective employee, who will have access to highly confidential information as to the whereabouts of valuable property, not have, nor be in a close relationship with, a person with convictions for robbery and fraud. As that would not be an irrelevant circumstance in relation to the prospective employee personally, it could only be irrelevant in so far as it was a characteristic of a partner on the basis that a stereotyping judgement had been made as to the nature of the relationship. If such a judgement were made, it would fall within the present prohibition. Otherwise, the circumstances of the spouse or partner may well be accepted as relevant.

5.59 By comparison, the ADA has recently been extended so that not only the race, sex etc. of the complainant, but also the race, sex etc. of a relative or associate constitutes a prohibited ground. In other words, it is not the identity generally of a relative or associate which is an issue, but a characteristic of such a person which is itself a proscribed ground.

5.60 Accordingly, the Commission is not satisfied that it is appropriate to extend the ground as currently defined to include all aspects of the identity of a spouse.

### **Recommendation 32**

**“Marital status” should be re-named “domestic status”.**

### **Recommendation 33**

**Define “domestic status” as being:**

- (a) single;**
- (b) married (including Indigenous Australian customary marriages);**
- (c) married but living separately and apart from one’s spouse;**
- (d) divorced;**
- (e) widowed; or**
- (f) in cohabitation with another person in a domestic relationship other than marriage.**

### **Disability**

#### ***Existing ground***

5.61 In its original form, disability discrimination was dealt with under two separate heads of physical impairment and intellectual impairment. This gave rise to a number of definitional problems. Furthermore, the commencement of the *Disability Discrimination Act 1992* (Cth) (“DDA”) on 1 March 1993 gave rise to a number of inconsistencies as a result of disparate coverage. From August 1994, however, the ADA has included a definition of disability which mirrors the definition contained in the DDA.<sup>62</sup>

5.62 The definition of disability in the ADA includes “the presence in a person’s body of organisms causing or capable of causing disease or illness”, thus identifying a range of circumstances which may involve no present and identifiable disability in the normal sense of the word. It also makes clear that the definition includes a disability which the person will have in the future or it is thought that the person will have.<sup>63</sup> It is possible that this last element may differ from the DDA which refers to a disability that “may exist in the future”.<sup>64</sup>

5.63 The potential breadth of this definition is in one sense deceptive: its scope is ultimately limited by the response of others in the community. However, because of the potential scope, care must be taken in identifying relevant exceptions. This exercise must also be undertaken in the knowledge that if inconsistency arises between the State and Commonwealth laws, the Commonwealth law will prevail.

5.64 The ground of disability differs from most of the other prescribed grounds in that it identifies a circumstance which is not necessarily irrelevant in all circumstances. Two illustrations may be taken from the decision of President Kirby in *Jamal v Secretary, Department of Health*, a decision of the New South Wales Court of Appeal: a person who is totally blind cannot be an airline pilot and a person who has lost both hands in an industrial accident cannot carry out the work of a concert pianist.<sup>65</sup> As his Honour noted, these are extreme examples. They are necessarily extreme because the purposes of the ADA should make one wary of borderline cases. First, the legislative intention is to preclude decisions made on stereotyped assumptions. Individual assessment is required of the person’s capabilities. Secondly, the ADA requires a level of accommodation, even in circumstances where a disability may render it difficult for a particular person to carry out all the functions of a position. These purposes require analysis to determine whether the present legislation achieves the necessary effect.

### **Reasonable accommodation**

5.65 It is helpful to consider first the requirement of what is commonly referred to as “reasonable accommodation”. The test is identified in relation to employees in negative terms. To understand the precise nature of the test, it is necessary to consider the present wording in detail. The substantive provision in s 49D(4) reads as follows:

Nothing in subsection 1(b) or 2(c) renders unlawful discrimination by an employer against a person on the ground of the person’s disability if taking into account the person’s past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person’s performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:

- (a) would be unable to carry out the inherent requirements of the particular employment;  
or
- (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without that disability and the provision of which would impose an unjustifiable hardship on the employer.

5.66 The reference in the first line to “subsection (1)(b) or (2)(c)” is a reference to the prohibitions rendering it unlawful for an employer to discriminate against a person on the ground of disability in determining who should be offered employment or by dismissing the employee.

5.67 A number of issues arise from this provision. In particular, the drafting must be compared with its predecessor, which was considered by the Court of Appeal in *Jamal*. First, the previous provision identified the test as one where the relevant conclusion “appeared to the employer ... on such grounds as it was reasonable to rely”.<sup>66</sup> Although an element of reasonableness had to be fulfilled, the test ultimately turned on the view formed by the employer. The present terminology makes no reference to what appeared to the particular employer, thus allowing the Tribunal in a relevant case to make the assessment for itself.

5.68 Secondly, the earlier provision referred to whether the employee would be unable to carry out the “work required to be performed” in the course of the employment. The present provision, by contrast, refers to an inability to carry out “the inherent requirements of the particular employment”. In substance, the legislature has adopted the approach of the EOT which had drawn certain inferences as to “the essential nature of the job” considered in that case. Although that terminology has not been adopted, the present provision permits a distinction between the inherent requirements of the employment and a detailed job description.

5.69 Finally, paragraph (b) requires, by reference to the inherent requirements of the particular employment, consideration of whether, with services or facilities, the person could carry out those requirements. If so, the ADA then requires that consideration be given to whether the provision of such services or facilities would impose “an unjustifiable hardship” on the employer.

5.70 Although the intention is reasonably clear, the phraseology gives rise to two difficulties. First, while there is an intention to require reasonable accommodation for the particular disabilities of an individual, that obligation is imposed indirectly by way of an exception to a defence.<sup>67</sup> Secondly, the use of the disjunctive “or” between paragraphs (a) and (b) is confusing. Either paragraph (a) is identifying an inability even with services or facilities, or, more plausibly, it is only when one has identified the relevant inability that paragraph (b) comes into operation. Furthermore, one may ask why no provision is made for the situation where the disability makes it difficult or impossible to carry out rarely required or unimportant parts of the job, without impinging on the inherent requirements of the particular employment. Surely it is intended that reasonable accommodation of those disabilities should be provided.

5.71 These difficulties led the Commission to consider whether the provision should be substantially redrafted. The main argument against amendment arises from the fact that an identical provision is to be found in the DDA. Any variation to the ADA would give rise to a risk of inconsistency between the two laws.<sup>68</sup> However, the Commission is of the view that the risk of inconsistency is low and the need to clarify this provision is a matter of importance. Further, the provision needs to be addressed in this Chapter in relation to the ground, because it is an essential element of the prohibition and not merely a limited exception.

### ***Employment***

5.72 The general approach to be taken to disability discrimination is discussed in Chapter Three, where the Commission recommended that the requirement to provide reasonable accommodation for employees with disabilities should be formulated as a positive obligation rather than as an exception to a defence.<sup>69</sup> The discussion in that chapter concerned the particular area of employment, by way of example of the approach to be adopted. The following discussion does not attempt to repeat the matters set out there, but considers the general principles and how they should be adapted to areas other than employment.

5.73 The ADA is intended to ensure decisions are made on an individual basis, without reliance on stereotyped assumptions. This element of protection is particularly important in circumstances where an obligation to accommodate particular disabilities is imposed. It is for this reason that the defence with respect to inability to carry out the inherent requirements of the particular employment does not apply, in relation to applicants, to the arrangement the employer makes for the purpose of determining who should be offered employment, nor to the terms on which the employment is offered. By similar reasoning, in relation to employees, the provision does not permit discrimination in the terms or conditions of employment, access to opportunities for promotion, training or transfer or to any other benefits associated with employment, nor to the subjection of the employee to any other detriment.<sup>70</sup>

5.74 The distinctions drawn give rise to some internal inconsistencies and some results which may not be desirable in policy terms. For example, one may consider the position of an employee who can carry out the inherent requirements of the particular employment, so long as he or she is provided with facilities which do not impose an unjustifiable hardship on the employer. The person cannot be refused employment or dismissed in those circumstances, without contravening the ADA. However, the provision of the relevant facilities may require a variation of the standard terms and conditions of employment. Clearly that variation should be permissible. For example, a person with a back injury may need more frequent rests from work requiring standing or lifting. The submission of the Disability Discrimination Legal Centre identified this problem and pointed out that under the current provisions it may be easier to dismiss an employee who develops a disability during the course of their employment than it would be to alter the terms and conditions of employment to cater for the disability.<sup>71</sup> They argued that one way this problem may be resolved is "by extending the exceptions [in s 49D(4)] to all aspects of employment".<sup>72</sup>

5.75 However, the more difficult question is whether, given those circumstances, the employer should be entitled to provide employment at reduced wages which would reflect the reduced ability of the worker. Subject to protection from abuse, such a provision might actually increase the willingness of employers to take on people with disabilities and thus improve the position of people with disabilities. Such a provision should also take into account any obligation of employers to provide a workplace rehabilitation program for injured employees.<sup>73</sup>

5.76 The exception concerning ability to carry out the inherent requirements of the particular employment does not apply in relation to denial of access to promotion, transfer or training. This appears illogical. An employer should be able to take on an employee in a particular position for which he or she is capable (with or without reasonable facilities) but should also be able to reassess the ability of the employee in relation to a new position which may require different capabilities. Without unduly complicating the provision, it is illogical and unhelpful both to disabled people and potential employers to fail to provide expressly for these circumstances.

#### **Recommendation 34**

**Extend the defence of “unjustifiable hardship” to all areas currently covered by s 49D(1) and 49D(2).**

Draft Anti-Discrimination Bill 1999: cl 14, 25

#### **Recommendation 35**

**Provide that there is no contravention of the ADA where, in order to accommodate the disability of a person:**

**reasonable adjustments are made to the terms or conditions of employment;  
and**

**the person consents to the adjustments.**

Draft Anti-Discrimination Bill 1999: cl 14, 25

#### ***Provision of goods and services***

5.77 In relation to the general provision concerning discrimination in providing goods or services, an express exception is provided where the disability would result in an unjustifiable hardship to the provider.<sup>74</sup> This exception applies to both a refusal to provide goods or services and the terms on which they are provided. Again, the obligation to accommodate a disability is implicit and should be made express. On the other hand, there is no distinction between a refusal and the imposition of different terms or conditions.

5.78 Just as the changes necessary to accommodate a person with a disability may require radical alteration of the essential requirements of a position, so a service which must be differentially provided for a person with a disability may need to be defined with care in order to ensure that the relevant comparison is being made. Thus, in *Scott v Telstra Corporation Ltd*<sup>75</sup> the Human Rights and Equal Opportunity Commission (“HREOC”) was required to consider whether the failure of Telstra to supply a tele-typewriter to permit people with a profound hearing disability to have access to telephone services involved the provision of a different kind of service to that provided to persons without a hearing disability. Telstra argued that the services it provided consisted of two products, namely a telephone network and a standard handset. However, HREOC found that the service was properly described as access to a telecommunications service or network.<sup>76</sup> Although difficult questions of fact may arise in relation to such matters, the case does not illustrate any underlying ambiguity in the equivalent provisions of the DDA.

5.79 A similar issue had arisen in *Waters v Public Transport Corporation*.<sup>77</sup> That case had involved the introduction into Victorian Public Transport of a “scratch-ticket” system and the withdrawal of conductors from trams. In that case, some attention was given by the High Court as to the distinction between the definition of the service in question and the identification of a “requirement or condition” with which a person must comply in order to enjoy or have access to the service. Some of these questions will not arise as a result of the new definition of discrimination. Thus, the need identified by Chief Justice Mason and Justice Gaudron to identify in the notion of “‘requirement or condition’ something over and above that which is necessarily inherent in the goods or services provided” will no longer arise.<sup>78</sup> Even in that context, their Honours held:

It was open to the Board to identify the service provided by the corporation with more or less particularity. For example, in the context of the complaints with respect to the

removal of conductors, the Board might have identified the service as the provision of transport by trams, some of which had conductors and some of which did not. However it was for the Board to identify the service, and the complaints and the evidence permitted it to proceed on the basis that it did.<sup>79</sup>

That basis was that the service was “public transport as affected by the changes directed”.<sup>80</sup>

5.80 A number of the submissions received by the Commission have argued that there should be a specific requirement placed on service providers to consult with people with disabilities at the planning stage of any building or facility (such as shopping centres, schools and parks). The submission of the Disability Discrimination Legal Centre argued that:

The inability to complain about future indirect discrimination makes it more difficult for a complaint of indirect discrimination to be successful. This is because the respondent would have reasonable redress to a defence of unjustifiable hardship – particularly in relation to the built environment of services with costly infrastructure. Such a defence would not be as available if a complaint of future indirect discrimination could be made prior to the building being completed or the service implemented.<sup>81</sup>

Addressing the issue of future discrimination, the Commission has recommended that complaints in relation to apprehended contraventions of the ADA should be permitted and that the EO Division should be permitted to grant appropriate relief.<sup>82</sup>

### ***Education***

5.81 In accordance with the present structure of the ADA in relation to areas of operation, education is dealt with separately from the provisions of goods and services, although the provision of educational services is arguably within the terms of the broader area. The separation is important in the present context as the exception permitting or requiring reasonable accommodation does not apply in the same manner in relation to education as it applies to services generally. Thus, reflecting the exception concerning employment, the reasonable accommodation provision only applies in refusing an application for admission as a student, access to benefits provided by the educational authority, and in expelling the student. It does not apply to the terms on which a student is admitted nor to the subjection of a student to any other detriment. Both because of the inconsistency with the general section concerning provision of goods and services and for the reasons outlined above, this provision requires revision.

5.82 Further, it is necessary to consider the obligations on educational authorities with respect to children with disabilities. Parents of children with disabilities often argue that, wherever possible, such children should be kept within mainstream schools. Where an educational authority provides both mainstream and special schooling it may be argued that the additional resources required to keep a child at a mainstream school are not so very far in excess of the resources required by the same child in a special school. Nevertheless, such questions have led to complex litigation and difficult assessments of cost and benefit. It should be noted that there are also arguments in favour of main-streaming from the perspective of children without disabilities. The public interest in promoting understanding and tolerance of people with disabilities is advanced by retaining such children in ordinary schools. It is further argued that the decision as to whether a child with a disability, given reasonable facilities and services, benefits or suffers from main-streaming is a decision which should ultimately lie with the parents.

5.83 These arguments give rise to great difficulty for discrimination law. The resolution of differences of opinion in this area are not readily accommodated by precise legal rules, but where general principles must be applied, differences in their application may not be satisfactorily resolved by adversarial litigation.

5.84 The question for the Commission is whether the ADA should be amended so as to limit the scope for such disputes.



5.85 The Commission is not satisfied that amendment of the ADA would assist in this regard. In recent years there has been a change in philosophy with respect to children with disabilities. The benefits of keeping them in the mainstream education system have attracted increasing recognition and acceptance. The issue between those with differing views in the community is whether that process has gone far enough, either in principle or in its practical application. It is neither necessary nor appropriate for the law to determine the correct outcome of those differences of opinion. The changes to date have almost certainly been beneficial: determination of the proper balance will only be achieved over time and may involve further litigation. That process is inevitable and does not indicate a failing in the law.

5.86 Some of the material available to the Commission suggests that parents of children with disabilities have sought to use the ADA (and its equivalent in other jurisdictions) to achieve a greater level of access to and support within mainstream education for their children. On the whole, challenges to current practices have failed. However, the Commission is not satisfied that those failures indicate that the legal framework gives inadequate support to children with disabilities. The ADA properly requires that disabilities be accommodated, subject to the proper application of the undue hardship principle. Those concepts apply across a range of situations and there is no justification for treating education according to different principles.

#### **“Drug use” and appearance**

5.87 Amongst possible extensions to the grounds on which discrimination is prohibited, are categories generally identified as “drug use” and appearance. For reasons set out below, the Commission is of the view that no separate grounds should be introduced with respect to these matters, but that they are, so far as necessary, covered by the current definition of disability discrimination.

#### **“Drug use”**

5.88 The key issue for consideration is whether a decision to consume drugs is a personal choice, and if so, whether it is one which involves a basic human right and therefore requires protection. No assistance in this regard is obtained from international instruments with respect to human rights as none appear to deal with drug use.

5.89 Even if a more generous view is taken of the right to consume drugs, the right must presumably exist only in those who are consuming legal drugs. If the State wishes to proscribe the use of particular drugs, it would be inconsistent to expect its citizens to ignore illegal drug use in others in ordering their affairs.

5.90 Further, it is commonly argued that drug use may itself frequently give rise to relevant considerations. For example, consumption of cigarettes is now prohibited on health grounds in most workplaces. However, whilst this consideration is undoubtedly relevant and important, it may need to be dealt with by way of an exception if a relevant ground can otherwise be identified.

5.91 Two issues appear to be worthy of serious consideration. First, there is the issue of imputed or assumed drug use. For example, it may be inappropriate to refuse a person employment or the provision of goods or services or another relevant benefit on the basis that he or she is thought to be a drug user, when that is not the case. This argument does no more, however, than to assert that decisions based on irrelevant considerations are unfair. Unless the particular consideration in question affects a basic human right, it is not the function of the ADA to deal with such matters.

5.92 The second issue is whether drug consumption is indeed a personal choice. For some people who may be described as addicted to a particular substance, the drug use may not be a choice at all. Discrimination in such cases is inherently suspect because it is based on a characteristic which the individual is not reasonably able to change or avoid. However, the question then is whether an addiction constitutes a disability on the basis that it involves a partial loss of bodily or mental functions or a malfunction of a part of the person’s body. Alternatively, it may constitute a disorder of thought processes that results in disturbed behaviour. The answer to this question depends upon medical, psychological or psychiatric opinion to a significant extent. On one view, these difficult issues should be resolved by legislative clarification. On another view, it is the underlying facts which must be clarified

rather than the law. The Commission is inclined to the latter view. For example, it would be possible to define disability to include a form of addiction with a physiological cause. However, that does little to clarify what may constitute a relevant addiction; it also would not clarify the underlying factual question. On the other hand, simply to refer in the definition of disability to “addiction” or “addictive behaviour” would give rise to precisely the same problems, although the clarification might depend to a greater extent upon legal questions than on factual issues.<sup>83</sup>

5.93 Given these difficulties, the Commission has considered whether there is evidence to suggest that this question presents a practical problem in social terms for New South Wales. The Commission is aware of anecdotal material which suggests for example that smokers feel discriminated against. However, those concerns arise mostly in relation to smoking in the workplace, restaurants and other public places which would almost certainly be the subject of legitimate claims for exemption. Neither the submissions to the Commission nor inquiries of the ADB suggest that there is any identifiable level of adverse treatment based on drug use. Accordingly, the Commission does not propose any variation in the law in that respect.

### **Appearance**

5.94 There is no doubt that some questions of appearance readily fall within the present definition of disability, particularly, where there has been a partial loss of a part of the body or a malfunction, malformation or disfigurement of a part of the body. To a small extent, therefore, discrimination on the grounds of appearance is already covered.

5.95 As noted below, some aspects of appearance can fall within other heads of discrimination. For this reason, the need for a general ground identified as “appearance” or “physical features” is discussed separately below.<sup>84</sup>

### **Homosexuality**

5.96 As the ADA stands, it is unlawful to discriminate against someone on the ground of homosexuality or imputed homosexuality. It is not unlawful to discriminate against someone because they are heterosexual or bisexual to the extent that it is not in truth the element of homosexuality which gives rise to the adverse treatment.

5.97 In its report, *Discrimination and Homosexuality*,<sup>85</sup> the ADB recommended the adoption of the term “homosexuality” rather than “sexual preference” or “sexual orientation”.<sup>86</sup> This decision was based on two arguments:

firstly, the evidence is overwhelming that it is homosexuals and not heterosexuals, who are discriminated against; and secondly, the alternative terms suggested above are too vague, and could be interpreted to include other sexual preferences, such as incest or paedophilia, which the Board is not recommending should be made grounds of unlawful discrimination.

5.98 It has been noted that, with the possible exception of marital status and disability, this is the only ground where the “universal standard has been rejected in favour of the particular, non-normative standard”<sup>87</sup> displaying a certain “victim consciousness” in its language.

5.99 The ADB noted that “the level of discrimination against men and women who are homosexual is high and homophobic attitudes and behaviour persist within the general community”. However, the ADB also stated that it has received several inquiries in recent years from heterosexuals who claim to have been discriminated against because of their sexuality. A number of other submissions received by the Commission in response to DP 30, some citing personal experiences, also adverted to the problem of discrimination experienced by heterosexual people and expressed the view that “heterosexuality” should be included as a separate ground of discrimination under the ADA.<sup>88</sup>

5.100 A number of reasons have been advanced for extending coverage to heterosexuals and bisexuals. Foremost among them is the fact that the ADA aims to promote equal treatment for everyone regardless of their personal characteristics and status. Laws against sex discrimination protect men, although the vast majority of sex discrimination is directed against women. People from non-English speaking backgrounds and Aborigines are subjected to racist treatment far more than other Australians, and yet the race discrimination provisions protect everybody. The ADA is anomalous by not allowing a complaint by a heterosexual who complains of unfair treatment for that reason.

5.101 The level of heterosexual complaints is, at present, low. This may indicate a general awareness that heterosexuals do not have any entitlement to complain under the ADA. Alternatively, it may indicate that heterosexuals are not concerned to intrude generally in areas of gay dominance. However, it may be argued that there is no reason in principle why homosexual persons running general businesses should be entitled to give preference to homosexual persons in employment.

5.102 As regards bisexuals, it is argued that some people who are bisexual have difficulty in lodging a complaint on the ground of homosexuality as they do not identify themselves in this way.

5.103 Legislation in South Australia, the Australian Capital Territory and the Northern Territory prohibits discrimination on the basis of "sexuality", while Queensland legislation prohibits discrimination on the basis of "lawful sexual activity".

5.104 There are, however, reasons for not changing the current provisions. New South Wales is currently the only State that specifically covers the rights of homosexual people: this is of great symbolic importance. Changing the current definition so that homosexuality will not be a separate and distinct ground may create a public perception that a level playing field now exists and that it is time to remove special protection from gay men and lesbians. Given the level of discrimination against homosexual people, there is a need to focus on the disadvantaged group and heterosexuals, because they are the "majority", are able to tolerate isolated incidents of possible discrimination.

5.105 A powerful argument in favour of preferential treatment of homosexuals is that, unlike most other social groups who are protected by the Act, and certainly in distinction to heterosexuals, homosexuals tend to have a strong self-identification on the grounds of their sexuality. They are specifically protected at an international level as a result of numerous decisions in various countries according homosexuals the status of a particular social group for the purposes of the Refugee Convention.<sup>89</sup> Australian decisions are to like effect. This level of self-identification as a social group can best be protected by maintaining a ground specifically for homosexuals.

5.106 The Commission believes that the above are important concerns of the homosexual community and must be considered. However, they must be balanced against other factors. Given that coverage will not be denied or reduced by extending the ground, the Commission believes that coverage should be extended to heterosexuals and bisexuals. Other jurisdictions have adopted the definition of "sexuality" to cover all three, rather than refer to "homosexuality, bisexuality and heterosexuality".<sup>90</sup> Such a ground will continue to give due recognition to homosexuality as a ground of unlawful discrimination.

5.107 The ADA should also expressly recognise that homosexuality includes lesbianism.<sup>91</sup>

5.108 Transsexuality is not considered here as it has recently been included as a separate ground, and relates to gender orientation rather than sexuality.

### **Recommendation 36**

**Include "sexuality" as a ground of discrimination to be defined as heterosexuality, homosexuality, lesbianism and bisexuality.**

## Age

5.109 Age discrimination became unlawful in New South Wales in July 1994.<sup>92</sup> It covers chronological age so that people of all ages are covered. It aims at undermining entrenched attitudes where they are built on misconceptions. For instance, older workers are often presumed not to be skilled in modern technology, to be inflexible in their work practices, unable to acquire new skills and incapable of physically demanding work. Similarly, younger workers are sometimes considered immature, unreliable and inexperienced. That those judgements may be correct in particular cases does not mean that they are universally correct. Decisions should not be based on stereotyping assumptions.

5.110 The age discrimination provisions were preceded by compulsory retirement provisions which were introduced in 1990.<sup>93</sup> These provisions rendered it unlawful for a person to require another person to retire from employment on the ground of that person's age. The provisions applied to public sector employees from 1 January 1991, to local government employees from 1 January 1992 and to all other employees in New South Wales, whether or not employed under an award or agreement, from 1 January 1993.

5.111 The Commission is of the view that separate compulsory retirement provisions are superfluous now that the ADA prohibits age discrimination. The existing provisions on compulsory retirement should be integrated with the age discrimination provisions. This would avoid the anomalies that currently exist in the coverage of the compulsory retirement and age discrimination provisions. For instance, the compulsory retirement provisions cover employees but not partners, whereas the age discrimination provisions cover both. So also the definition of employee in the compulsory retirement provisions<sup>94</sup> does not specifically include someone who works under a contract for services, in contrast to the definition of employment in s 4 of the ADA which applies with respect to the age discrimination provisions. This issue arose for consideration in *Lorang v Mater Misericordiae Hospital*<sup>95</sup> where an anaesthetist contested the lawfulness of his forced retirement under s 49ZV of the ADA. The majority of the Court of Appeal dismissed the claim on the basis that he was not employed by the hospital, but rather had an arrangement with the hospital based on separate contracts for services with each of his patients and consequently did not have the requisite employment relationship. President Kirby delivered a compelling dissenting judgment, saying that the overall purpose of the ADA was to remove stereotypes based upon assumed characteristics. The proposed amendments would overcome the anomalous result identified by President Kirby.

5.112 Whilst the concept of prohibiting age discrimination is justifiable, as age discrimination often constitutes an impermissible form of stereotyping assumptions, there are difficulties in principle with the operation of the prohibition. First, there may be potential inconsistency with other grounds of discrimination. For example, in university employment, where there has traditionally been an imbalance in favour of men over women, especially amongst senior ranks of teaching staff, the abolition of retirement ages is likely to perpetuate that inequality. Thus, women who previously had a reasonable expectation of promotion upon the retirement of their senior male colleagues, may find that expectation is significantly delayed.

5.113 On the other hand, some women would argue that the abolition of compulsory retirement ages is a benefit to them in the long run. The fact that many women take time out from careers to raise families means that they tend to reach more rewarding levels of achievement later in life. The absence of compulsory retirement may assist such women in achieving their full career potential.

5.114 Secondly, stereotyping assumptions aside, there is little doubt that at some stage, depending on each individual's circumstances, intellectual and physical capabilities deteriorate. This has particular consequences in the area of employment. Although compulsory retirement had an air of arbitrariness, employers could avoid making harsh judgements about the individual capabilities of employees. The current scheme either requires the individual to retire voluntarily, with the possible implication that he or she accepts being no longer "up to the mark" or, invidiously, wait to be told so by the employer. On one view, the abolition of compulsory retirement may have been intended to reduce effective "life tenure" of

employees and to encourage in employers the practice of subjecting all staff to the scrutiny of merit review throughout their working lives. Again, this may have beneficial economic effects, but at potentially significant social costs to individuals.

5.115 Thirdly, in times of less than full employment, a compulsory retirement age may tend to open up more jobs to young people entering the work force.

5.116 Accordingly, there are a number of social and economic factors which must be balanced. It is by no means clear that the current prohibitions satisfactorily reflect an appropriate balance in this difficult area.

5.117 The difficulty with the general prohibition on age discrimination is demonstrated by the numerous exceptions contained in the current ADA. There are in practice many ways in which age legitimately shapes our lives. In many instances general rules are formulated which have a somewhat arbitrary effect. Thus age governs the time at which one can obtain a driving licence and purchase cigarettes or alcohol. Such general rules fail to take account of individual abilities and experience, but, where large numbers of decisions must be made on a routine basis, such rules also avoid the arbitrariness of subjective assessments.

5.118 Such considerations provide a pragmatic basis for doubting the value of a general prohibition on discrimination on the ground of age. As will be seen in Chapter Six, the current exceptions are so substantial that the ground cannot be said to have anything like the broad application of other grounds.

5.119 A further source of concern is the very broad potential scope of the indirect discrimination provisions. Many legitimate distinctions will affect people differentially depending on age. While it is recognised that indirect discrimination is not unlawful if it is justifiable, in relation to age particularly the need to justify can give rise to undesirable levels of uncertainty.

5.120 Against the background of these considerations, the Commission has given serious attention to the desirability of recommending repeal of the ground or to a restriction of the ground to the areas of the greatest legitimate concern. For example, the first specific legislation in English speaking countries dealing with age discrimination appears to have been the *Age Discrimination in Employment Act 1967* (US). Congress included a statement of the purpose of the new law in the following terms:

It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.<sup>96</sup>

5.121 As originally enacted, this US law provided protection for employees between the ages of 40 and 65 years. The age group was expanded in 1978 to include those between 40 and 70 years. Since 1986, the protected group extends, with limited exceptions, to all persons over 40 years of age.

5.122 If presented with a clean legislative slate, the Commission would recommend restricting prohibitions with respect to age discrimination to the area of employment and to the age group identified in the US legislation. Such an approach is justifiable because there is a volume of evidence to support the view that older workers are not routinely treated on their merits, but, as a class, suffer from prejudice and stereotyped assumptions. As age is an immutable human characteristic, it should not be permissible to treat people detrimentally on that ground. On the other hand, the evidence to suggest that age is inappropriately used as a basis of discrimination in other areas is limited and equivocal. The ADB provided the Commission with some material which suggested inappropriate discrimination, particularly directed against young people, in the provision of services (including insurance and car rental) and in access to accommodation. The material did not suggest that such problems were so widespread as to justify legislative intervention and was often equivocal, in part because it was not necessarily clear that age should be treated as an irrelevant consideration in the circumstances of particular cases, nor that judgments were being made on a stereotyped basis.

5.123 On the other hand, the legislative slate is not clean and to restrict the ground of age discrimination to those over 40 years of age and to limit its operation to the area of employment would require a major reduction in the scope of the present Act. To remove or limit the scope of the current regime would tend to undermine the legitimate effect of the current provisions in concentrating attention on the inappropriateness of stereotyped assumptions about people on the basis of age, where individual decision making is required. This factor has satisfied the Commission that, on balance, the ground should be retained.<sup>97</sup> Nevertheless, its main area of operation should be treated as that of work and it should not be permitted to override statutory requirements in specific areas.

5.124 One consequence of this approach may be that specific exemptions will need to be sought from the President of the ADB in relation to conduct which is difficult to exclude by way of a general exception, but which should not be caught by the prohibition. One example may be the policy adopted by some university medical faculties of not accepting students who are over a particular age. Such a policy should reflect a careful assessment of the resources available to the university and the appropriate basis for their allocation. Thus it may be considered that the public resources devoted to educating a medical student should be directed towards those applicants who are likely to give a significant level of service to the community after obtaining the necessary qualification. The Commission considers that decisions in that regard should appropriately be made by the relevant university authority. On the other hand, it can be argued that the safeguard of having to justify the decision to a body with particular experience in discrimination matters, namely the ADB or the President, provides a useful check on the appropriateness of the end result.

### **Recommendation 37**

**Repeal the compulsory retirement provisions and integrate them with the provisions relating to age discrimination.**

**Draft Anti-Discrimination Bill 1999: cl 31, 33**

### **Transgender**

5.125 The ADA was recently amended to proscribe discrimination on the ground of transgender status.<sup>98</sup> The Commission had raised the issue in DP 30, following a series of reports which had brought to light the need for protecting transgender persons from discrimination.<sup>99</sup> The Commission received a number of submissions in support of adding transgender status as a ground of discrimination under the ADA.<sup>100</sup> In 1996, the Government introduced a new Part 3A, which prohibits discrimination on transgender grounds.

5.126 A “transgender person” is defined as one who identifies or has identified as a person of the opposite sex by living or seeking to live as a member of that sex, or who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex. The person may or may not have had gender reassignment surgery.<sup>101</sup>

5.127 The ADA does, however, distinguish a sub-category of transgender persons. It identifies a “recognised transgender person” as one who has had his or her birth certificate altered under the *Births, Deaths and Marriages Registration Act 1995* (NSW) (“BDMR Act”) or under the corresponding law of another Australian jurisdiction.<sup>102</sup> A person becomes a recognised transgender person when their birth certificate has been altered and a new birth certificate showing their new sex is issued.

5.128 A birth certificate cannot be altered under the BDMR Act unless the person making the application is 18 or over,<sup>103</sup> has their birth registered in New South Wales, has undergone gender reassignment surgery and is not married.<sup>104</sup> Declarations by two medical practitioners verifying that the person has undergone reassignment surgery must be attached to the application. Once approved and the register altered, the Registrar may issue a new birth certificate recording the sex as altered, with

no reference to the person's previous sex. A person whose sex is altered under the BDMR Act is "for the purposes of, but subject to, any law of New South Wales, a person of the sex as so altered".<sup>105</sup>

### ***What constitutes discrimination on transgender grounds?***

5.129 Under the ADA, it is discrimination on transgender grounds to:

treat a transgender person less favourably than a non-transgender person;

require a transgender person to comply with a policy or condition with which a substantially higher proportion of non-transgender people can comply, which is unreasonable and with which the aggrieved person cannot comply;<sup>106</sup>

treat a *recognised transgender person* as a member of that person's former sex; and/or

require a *recognised transgender person* to comply with a policy or condition with which a substantially higher proportion of the person's former sex can comply, which is unreasonable and with which the aggrieved person cannot comply.<sup>107</sup>

5.130 As for other grounds of discrimination under the ADA, something that is done because of a characteristic that appertains generally to transgender persons or a characteristic which is generally imputed to transgender people constitutes discrimination on transgender grounds. It is also unlawful to discriminate against a person because of their association with a person who is or is thought to be a transgender person.

### ***Major issues facing transgender persons***

5.131 Two major issues face transgender persons: the first is the need for effective protection from discrimination suffered because their gender orientation is different from their sex at birth. The second issue is to be recognised under the law as members of the sex with which they identify.

5.132 The ADA attempts to deal with both these issues mindful of the changes to the BDMR Act which give legal recognition to post-operative transgender persons only. The amendments to the BDMR Act are consistent with the rejection of older case law which held that, at law, one's sex is decided at birth<sup>108</sup> and the adoption of the more recently accepted view that legal recognition of their new sex may be accorded to transgender persons who have undergone, or expressed an intention to undergo, gender reassignment surgery.<sup>109</sup>

5.133 The prohibition on treating transgender persons less favourably than non-transgender persons reflects the fact that, in the majority of cases, transgender persons are discriminated against because they are transgender rather than because of their gender as such. It is for this reason that transgender persons are not effectively protected under the sex discrimination provisions. Further, once a post-operative transgender person has had a new birth certificate issued in his or her new sex and is legally recognised as a person of that sex, treating that person as a member of the former sex is inappropriate. The fact that such protection is restricted to persons falling within the category of "recognised transgender persons" indicates Parliament's intention to distinguish between transgender persons who have undergone gender reassignment surgery and those who have not.<sup>110</sup>

### ***Interpretation of the new provisions***

5.134 The ADB argues that, unless it is unreasonable in the circumstances, transgender persons should be treated as members of the sex with which they identify, whether or not they have undergone gender reassignment surgery.<sup>111</sup> A number of other submissions received by the Commission in response to DP 30 also argued that pre-operative transsexuals should receive the same protection under the ADA as that received by those who have undergone gender re-assignment surgery.<sup>112</sup> While it would appear that the treatment of someone who is not a recognised transgender person as a member of their former sex would not constitute direct discrimination, the ADB argues that such

treatment may be indirectly discriminatory. The example it provides is where, in a gymnasium which provides separate saunas for women and men, a person who has not undergone an operation but identifies as female is not permitted to use the women's sauna. It may be argued that the rule or requirement imposed by the gymnasium is that only people with the physical characteristics of the particular sex are allowed to use those sex-specific facilities. However, in practice it is most unlikely that such a requirement would be seen as unreasonable.

5.135 The ADA also requires that the imposition of such a requirement will be unlawful if "a substantially higher proportion of persons who are not transgender persons ... are able to comply" than the proportion of transgender persons.<sup>113</sup> The proportionality test gives rise to some difficulties of application which, in general terms, are discussed elsewhere.<sup>114</sup> There are specific difficulties of application in the present context. For example, if the use of a specific facility were limited to persons with the biological characteristics of women, it may be said that approximately 52% of the population at large could comply. However, as it has been suggested that approximately 90% of all transgender persons were born as males and that only about 20% undergo surgical intervention, 28% of the transgender population could comply with the condition.<sup>115</sup> On the other hand, if the pool were identified as members of a particular club which ran single sex facilities, quite different calculations might be required, depending on the membership of the club.

5.136 The Commission believes that these difficulties of application will be avoided by the new definition of what constitutes discriminatory treatment and acts which cause discriminatory effects.

5.137 Some commentators have suggested that the present provisions provide inadequate protection to the persons who identify as members of the opposite sex from their biological sex. While in practice that protection, except in the case of recognised transgender persons being persons who have undergone surgical intervention, is obtained via the indirect discrimination provisions, which are limited by the concept of reasonableness, the Commission is satisfied that that is nevertheless the most practical method of achieving appropriate protection. There are many respects in which the community at large is reasonably entitled to treat people differently depending on their biological sex. This should not be permitted where such treatment is unreasonable. However, it is not possible in practical terms to abandon the indeterminacy of the reasonableness test in favour of specific exemptions from an absolute rule. Accordingly, the Commission is satisfied that the approach adopted in the present ADA achieves the correct balance of legitimate protection for a particular social status.

#### **new grounds of discrimination**

5.138 In DP 30, the Commission canvassed the inclusion of a number of new grounds of discrimination. They were:

transsexuality;

religion;

political conviction and trade union membership;

mental illness/psychiatric disability;

age;

unborn children;

family status/family responsibilities/parenthood;

prisoners/ex-prisoners;

physical appearance;



accent; and

geographical location and social status.

5.139 Some of the grounds canvassed have since been included in the ADA.<sup>116</sup> The ADB has also raised criminal record, social origin or status and drug use as possible new grounds for inclusion. Discrimination on the basis of drug use has been dealt with in relation to disability at para 5.88-5.93 above.

5.140 The Commission proposes the inclusion of the following new grounds:

religion;

political opinion; and

carer responsibilities.

The justification for including these grounds and excluding others is set out below.

### **Religion**

5.141 Australia shares the inheritance of a legal culture of religious liberty, and of the general separation between Church and State. There is limited constitutional recognition of this in s 116 of the Commonwealth *Constitution*. Nevertheless, freedom of religion has not been specifically protected by State laws.

5.142 As Justice Kirby noted in 1993:

With the changing nature of Australian society, new tensions manifest themselves. They are present in the form of minority groups, with strong religious convictions, which tend to challenge the core of values of the nascent Christian religions which remain an integral part of "official" Australian life. Most of the concerns of these minority groups are governed by State laws. Thus they are not given much protection by the Federal constitutional provision ... The fact remains that specific protection for religious freedom by way of prohibition of discrimination on religious grounds has not found favour in State laws despite the powerful arguments for it.<sup>117</sup>

### ***International instruments***

5.143 The right to freedom of religion and belief has been proclaimed in the *Universal Declaration on Human Rights* ("UDHR") which is the cornerstone of modern international human rights law. It has also been proclaimed in the *International Covenant on Civil and Political Rights* ("ICCPR"), the *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief*, the *Declaration of the Rights of Children* and *International Labour Organisation Convention 111* ("ILO Convention 111"). The *Convention Relating to the Status of Refugees* requires that signatories provide refuge to persons fleeing persecution in their country of nationality for reasons of "race, religion, nationality, membership of a particular social group or political opinion".<sup>118</sup>

5.144 It is perhaps ironic, given the importance attached, both in our Constitution and in international instruments to which Australia is a party, to protection from religious persecution, that discrimination on the grounds of religious belief is not covered by the ADA. The anomaly is accentuated by the prohibitions which exist in other Australian jurisdictions.<sup>119</sup>

### ***Other considerations***

5.145 The definition of "race" in the ADA now includes ethno-religious origin as part of its definition<sup>120</sup> but this is unsatisfactory, as it excludes a large proportion of religious discrimination which

is not necessarily based upon the ethnicity of the individual. It seems anomalous and also discriminatory against non-ethno-religious groups to provide an avenue of redress for a religious group purely because they are “ethnic”. A separate ground for religion would allow protection for those instances of religious discrimination which have no racial or ethnic basis.

5.146 Other New South Wales laws also prohibit religious discrimination: the *Education Reform Act 1990* (NSW), and the various Acts incorporating universities in New South Wales, for example, all proscribe religious and political discrimination in relation to the admission of students into public educational institutions. Also, the *Co-operation Act 1923* (NSW) states that membership of a co-operative should be free from social, political, racial, or religious discrimination.

### **Submissions**

5.147 The majority of submissions received by the Commission related to the issue of religion and the scope of religious exceptions. These submissions reveal a polarisation of views amongst religious groups as to whether religion should be included as a ground of discrimination. The large or mainstream religious institutions argued against the inclusion of religion as a ground of discrimination<sup>121</sup> while religions and denominations with fewer adherents have argued for the inclusion of such a ground.<sup>122</sup>

5.148 Objections to the inclusion of religion as a ground under the ADA have largely been based on a misapprehension about the basis of the proposed inclusion of religion. The concerns of institutional and individual objectors have not been borne out by the experiences in other States where laws prohibiting religious discrimination operate.<sup>123</sup> The Board of the Ahmadiyya Anjuman Ishaat-I-Islamm (Lahore), the Church of Scientology, individual scientologists and the Seventh Day Adventists were all in support of such a ground.<sup>124</sup> A representative view is quoted below:

The UN Declaration on religion ... is a valuable document intended to help protect religious freedom, the rights of minority religions and to combat intolerance and discrimination. In our view therefore, the Act needs to be widened to include religion as a ground of discrimination. We perceive that instances of religious discrimination against persons of minority beliefs such as Mormons, Jehovah's Witnesses, Scientologists and non-Christian faiths such as Jews, Buddhists or Muslims would be discouraged.<sup>125</sup>

5.149 In its comprehensive 1984 Report, *Discrimination and Religious Conviction*,<sup>126</sup> the ADB recommended that the ADA be amended to cover discrimination on the ground of religious conviction. It still supports this course of action.

5.150 Some submissions argued that the autonomy of religious bodies should be considered paramount, and that a move to add discrimination on the ground of religion would both infringe the rights of religious groups to discriminate in matters relating to their beliefs<sup>127</sup> and disturb the traditional approach of separation between Church and State in Australia.<sup>128</sup> It was also suggested that allowing a secular body to intervene in religious matters would be inappropriate.<sup>129</sup>

5.151 The Sydney Diocese of the Anglican Church objected to the introduction of religion as a ground of prohibited discrimination. The Diocese objected to the ADB's recommendations in its 1984 Report because it promoted a definition of religion which only recognised individualistic, personal religious belief. The Diocese claimed that the Board failed to recognise adequately that religion is often not practised individually but communally. A religious body is the outward manifestation of the communal practice of religion since a religious body is comprised of adherents with the same or substantially the same beliefs. A failure to recognise the communal aspect of religious practice meant, in the view of the Standing Committee of the Diocese, that the Board came down on the side of protecting individual rights without adequately considering the rights of those persons who practise their religious beliefs as a group.<sup>130</sup>

5.152 The Diocese submitted that if religion were to be included as a ground of prohibited discrimination “the definition of religion must recognise and protect the interests of a religious body and its members”. The Diocese supported the retention of the present s 56 exception to determine the

circumstances in which the rights of a religious body are to prevail over the religious beliefs of an individual.

5.153 The Commission accepts the force of these concerns, but believes that the majority of the arguments can be dealt with by ensuring an appropriate definition of religious belief and by the application of appropriate exceptions and accordingly should not be considered as compelling reasons against the inclusion of the ground.

5.154 In so far as religion involves deeply held personal beliefs, there may be a danger in allowing bodies like the ADB or Equal Opportunity Division ("EO Division") of the Administrative Decisions Tribunal ("ADT") to determine issues of conscience, as the results may be seen to vindicate one person's beliefs over those of another. Some believe that the ADA could thus be seen as a legal means of enforcing the "rightness" of particular beliefs, and as such create divisiveness instead of promoting tolerance, accommodation and acceptance. While other grounds under the ADA can be said to be value-neutral, in that they reflect physical attributes or attributes which are able to be objectively determined, religion by its very nature has a subjective element, and as such could prove difficult to assess. While the Commission notes the potential difficulty, the operation of similar legislation in other jurisdictions suggests that experience does not give support to these concerns.

5.155 The close relationship between religious beliefs and ethnicity and race, as recognised in the ADA as presently drafted, tends strongly in favour of express recognition of religion as a prohibited ground of discriminatory conduct in the public sphere. Tolerance of religious diversity and cultural differences tends to go hand in hand.<sup>131</sup> Further, the importance of recognising Indigenous land rights as a basis for the survival of Aboriginal people is more widely understood now than in the past. The close spiritual connections between Indigenous people and land is a further example of the close connection between religious belief and race. Substantive equality of treatment requires recognition and protection of those beliefs.

5.156 In so far as the tenets of a particular religion require recognition of communal activities and the protection of religious organisations, those matters must be recognised by the law as much as any other aspect of religious belief. The proposed amendment to the ADA must inevitably reflect the breadth of such views. To protect the rights of individual members of the community from religious intolerance involves no element of rejection of the communal nature of worship.

5.157 Accordingly, the Commission favours the inclusion of religion as a prohibited ground of discrimination. The need to delimit carefully the scope of the ground is recognised and addressed below.

#### **Definition of ground**

5.158 Assuming that such a ground is appropriate for inclusion, it is necessary to consider how the ground may properly be defined.

5.159 Providing a legally workable and non-discriminatory definition of the term "religion" has posed a significant problem in the past. The ADB's Report *Discrimination and Religious Conviction* noted both the broad scope of areas that religion covers, and the range of opinions, crossing historical, cultural and academic ranks when it comes to defining religion.<sup>132</sup> Most commentators accept that "religion" denotes some form of transcendental concept, with some allusion to an ideal life.<sup>133</sup>

5.160 The High Court has twice considered the legal definition of religion. In *Adelaide Company of Jehovah's Witnesses v The Commonwealth*,<sup>134</sup> the Court considered the question of religious protection under s 116 of the *Constitution*. Chief Justice Latham alluded to the difficulties of defining religion:

It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions that exist, or have existed, in the world. There are those who regard religion as consisting principally in a system of beliefs

or statement of doctrine. So viewed religion may be true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance ... What is religion to one is superstition to another. Some religions are regarded as morally evil by other creeds. ... Indeed, it is not an exaggeration to say that each person chooses the content of his own religion. It is not for the court, upon some *a priori* basis, to disqualify certain beliefs as incapable of being religious in character.<sup>135</sup>

5.161 The High Court held that the constitutional freedom to exercise one's religion is not absolute and that the individual's freedom to exercise and act upon religious beliefs is constrained by the right of other members of society to protection against "unsocial actions or actions subversive of the community itself".<sup>136</sup>

5.162 The other significant case on the meaning of religion was a taxation case, brought by the Church of Scientology.<sup>137</sup> Three judgments were delivered, each taking a different view of the meaning of religion. Chief Justice Mason and Justice Brennan identified two criteria for a legal definition of religion: first, that there be "belief in a supernatural Being, Thing or Principle" and, secondly, acceptance of canons of conduct in order to give effect to that belief.<sup>138</sup> They held that religious belief was not necessarily theistic<sup>139</sup> but will generally be concerned with ethical beliefs (or some sort of moral code) and a degree of faith shown in the rituals, practices and observances of the religion by its members.

5.163 Justice Murphy preferred a broader approach, adopting a line similar to the view on religion taken in United States jurisdictions. He stated:

The better approach is to state what is sufficient, even if not necessary, to bring a body which claims to be religious within this category ... On this approach, any body which claims to be religious, whose beliefs or practices are a revival of, or resemble, earlier cults, is religious ... Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious. The Aboriginal religion of Australia and of other countries must be included. The list is not exhaustive; the categories of religion are not closed.<sup>140</sup>

5.164 Justices Wilson and Deane were also cautious of notions of criteria, accepting that notions of what elements make a religion are subject to changing social conditions and should be considered in context. They preferred to view the question on a case by case basis, using guidelines of what is considered religious as indicative, but not persuasive, for answering the question.

#### ***A definition for anti-discrimination law***

5.165 In the context of anti-discrimination law, there exists not only the same conceptual difficulty with a precise legal definition of religion, but also the problem that there are, arguably, two types of discrimination that it would wish to cover. One would be where discrimination occurs because of the person's association with a particular religious group or denomination; the second, when a manifestation of belief (or non-belief) in the tenets of a religion leads to a discriminatory act. The ADB, in its report *Discrimination and Religious Conviction*, favoured an inclusive definition of "religious belief" covering:

religious practice as well as belief;

theistic and non-theistic, Christian and non-Christian beliefs;

a particular religion or religions, or all religions; and

a comparable deeply-held belief that can broadly be conceived as religious.<sup>141</sup>

5.166 The ADB's current stance, however, is that any attempt to define religion in the context of anti-discrimination law is undesirable "because of the difficulty of doing so without introducing criteria which are discriminatory in themselves."<sup>142</sup>

5.167 The opposing dangers are that an excessively broad definition may encourage fraudulent claims and that a definition which is too narrow may inappropriately exclude certain groups. The problem with avoiding a definition is that without some way of determining what is a religious belief under the ADA, there is both uncertainty as to the extent of its coverage and the risk that conservative definitions may be adopted regardless, thus unduly restricting the scope of the ground.

5.168 In Victoria the proscribed ground is identified as

"a religious belief or activity".<sup>143</sup> That phrase is in turn defined to mean:

- (a) holding or not holding a lawful religious belief or view; or
- (b) engaging in, not engaging in or refusing to engage in a lawful religious activity.

5.169 The Queensland Act refers to 'religion' without defining it.<sup>144</sup> Western Australia<sup>145</sup> and the Australian Capital Territory<sup>146</sup> use the term "religious or political conviction", but like Queensland fail to provide a definition. The Northern Territory adopts the Victorian phrase "religious belief or activity" which is defined to include "Aboriginal spiritual belief or activity".<sup>147</sup> The *Human Rights Commission Act 1993* (NZ) identifies separately religious belief which is not defined, and "ethical belief" which is defined to mean "the lack of a religious belief whether in respect of a particular religion or religions or all religions". Although the terminology is not identical, this would appear to achieve a similar coverage to that provided under the Victorian Act.

5.170 As a matter of principle, the Victorian and New Zealand positions appear to be logical and soundly based. If it be correct that there are many aspects of public life in which religious beliefs are irrelevant, so, in a relatively secular society, there must be areas of public life in which the absence of any religious belief, and indeed opposition to religion, must be irrelevant.

5.171 While the Commission is aware of the dangers involved in a definition of religion and religious belief, there is a need for parameters to be set to provide judicial guidance on the extent and scope of the ground. The Commission believes that it is useful to define the ground of religion to accommodate both religious belief and religious practice, as these can arguably be distinguished from each other. With this in mind, the Commission proposes a definition in the following recommendation:

### **Recommendation 38**

**Include religion as a ground of discrimination and define it as follows:**

**"Religion" includes both religious beliefs and practices which do not contravene the criminal law.**

**"Religious practice" means a practice related to the holding of a religious belief. This may include communal practices such as membership or association with a particular religious institution or church, or a ritual, custom or observance related to the holding of a religious belief.**

**"Religion" includes the traditional spiritual beliefs and practices of Indigenous Australians and Indigenous people from other countries.**

## Political opinion

5.172 The ADB's Report on *Discrimination and Political Conviction* suggested that employment was the only area in which discrimination of this kind was a problem serious enough to warrant public concern. The ADB's view was that discrimination in other areas was either not substantial or of a kind inappropriately dealt with under anti-discrimination legislation.<sup>148</sup> However, the ADB's submission to the Commission in response to DP 30 suggested that, as political freedom was a fundamental socio-economic right, it should extend to all areas of operation.<sup>149</sup>

5.173 In other parts of Australia there have been cases of political discrimination in areas other than employment. In *Williams v Council of the Shire of Exmouth*<sup>150</sup> discrimination was found in the provision of services by a local council, who refused to allow a protest group to use a community hall for a meeting. Two days earlier, the same hall had been used by parliamentarians to support the issue against which the complainants were protesting. The Western Australian Equal Opportunity Tribunal found that the reasons supplied by the council, of risks to safety and property damage, were largely unsubstantiated, and that the political beliefs of the protesters were a substantial reason for the failure to provide the hall for their use.

5.174 The arguments against the inclusion of the proposed ground tend to flow from fears concerning inappropriate coverage or uncertainty as to an appropriate definition. Although some comfort may be taken from the fact that the ground has not given rise to major problems in other jurisdictions, it may also be argued that the lack of reliance upon it, as demonstrated in the available case law, suggests that such an addition to the ADA is unnecessary.

5.175 The Commission takes the view that the absence of a broad-ranging concern about discrimination on the grounds of political conviction flows largely from the robustness of open political traditions in this country and the high level of tolerance that has resulted. On the other hand, freedom of speech, particularly in the area of political beliefs, is demonstrably a fragile phenomenon which may require protection from time to time. The time to introduce such protection is, ideally, when there is no specific public controversy occurring. Once opinions are inflamed, the chance for rational debate is greatly reduced and the opportunity to introduce appropriate protection is likely to be lost.

### Definition

5.176 Legislation in other Australian jurisdictions does not purport to define "political belief" nor, where it is used, "political activity". Although it is possible that, in a general sense, the terminology is well understood, it seems undoubted that the precise scope of the ground is difficult to define.

5.177 The ADB, in its Report *Discrimination and Political Conviction*, stated that a political belief includes:

any belief or opinion concerning the nature and purpose of the State, or the distribution and utilisation of State power, or the interactions between the State and organisations, movements, groups and individuals as they affect, and are affected by, the exercise of State power; or any belief or opinion concerning the distribution and utilisation of economic, social and cultural power in a society.<sup>151</sup>

5.178 The ADB acknowledged that determinations of what was a political conviction under this definition would be difficult, as the distinction between political beliefs which relate to the internal politics of a group, as opposed to those which relate to the State itself, was said to be "paper-thin". Even more problematic was the relationship between industrial activities and political activity, where industrial demands can often be linked to a political view.

5.179 The case law, especially in Victoria, has been illustrative of the difficulties inherent in deciding what is to be covered by political activity, especially in areas concerning trade union activity and industrial relations. Victorian cases have generally considered that for an activity to be covered, it must be shown that the belief or activity "bears on government"; that is, that the political activity must be

related to the “form, role, structure, feature, purpose, obligations, duties or some other aspect of government”.<sup>152</sup>

5.180 Thus, in *Nestle Australia Ltd v The Equal Opportunity Board*<sup>153</sup> the Supreme Court of Victoria held that a discrimination claim brought because of refusal to hire staff due to previous active union involvement, while being of a “political character”, was concerned with industrial activity and not government, and therefore was considered not to be grounded in a political belief under the Act.<sup>154</sup> In *Hein v Jacques Ltd*<sup>155</sup> it was found that a refusal to join a union whose activities were both political and industrial in character was a sufficiently political, rather than industrial, activity under the Act. However, this was qualified by the Board, which stated:

We consider that if union membership involves only minor participation in political activity, membership alone may not amount to engaging in political activity within the meaning of the Act. Nor would membership necessarily involve engaging in political activities if a union made provision for members to limit their involvement to industrial matters only so that, for example, such members were not included in determining political party affiliation fees.<sup>156</sup>

5.181 The 1995 amendments to the *Equal Opportunity Act 1995* (Vic) (“EOA (Vic)”) have helped to ameliorate this specific difficulty, by including a separate ground of industrial activity.

5.182 Although there tends to be a close relationship between some political views and industrial activity, because trade union and other industrial activity is entitled to be considered (if at all) as a ground in its own right, the Commission takes the view that there should be a ground of political conviction but that it should be narrowly defined to exclude predominantly industrial issues. The Commission has considered adopting the approach suggested by the ADB in its report *Discrimination and Political Conviction*, quoted above, but excluding the last limb of the definition referring to “economic, and social and cultural power”.

5.183 The Commission was concerned that this definition might be both imprecise and too broad. Accordingly, the Commission considered whether to refer to discrimination based upon membership of or affiliation with a political party registered under the *Electoral Act 1918* (Cth) or a belief that a person has such membership or affiliation. Such a definition would have the advantage of allowing for relatively precise exceptions to the ground. On the other hand, the concept of political affiliation is not the same as political opinion. Strenuous disagreements can arise among those having an identical affiliation. The Commission was not satisfied that the objective element thereby introduced did not undermine the purpose sought to be achieved.

5.184 In the end, there is no clear solution to this problem. The Commission recommends that the ground be identified as “political opinion” and that it be defined as clearly as possible by reference to the narrower concept of state power and its distribution.

### **Recommendation 39**

**Include political opinion as a ground of discrimination and define it as follows:**

**“political opinion” means a belief or opinion concerning:**

- (a) the nature and purpose of the state, or**
- (b) the distribution and use of state power, or**
- (c) interactions between the state and individuals, bodies or groups in the community.**

**Draft Anti-Discrimination Bill 1999: cl 16(1)(g), 18(1)**

## **Carer responsibilities**

5.185 There has been considerable debate in recent years as to the level of protection which can be accorded to persons attempting to accommodate conflicting obligations, including family responsibilities, especially in the area of employment. The pressure to accommodate such needs is partly a reflection of the growing recognition that many of those with primary responsibility for dependent children and elderly or disabled family members are also in the work force. For example, in October 1997, women comprised 43% of the Australian labour force and just over a third of them had dependent children.<sup>157</sup> Traditionally, such women would have primary responsibility for caring for the children at home and in dealing with emergencies. Further, the parent in half of all sole parent families is in the work force. Looked at from the other perspective, only one in three of two parent families conform to the traditional model of male bread winner and female non-employed carer.

5.186 Given the level of female participation in the work force, it may be thought that the rising concern as to the allocation of family responsibilities is partly a result of increasing pressure on men to exercise such functions. However, such evidence as there is suggests that the average male contribution to family care has increased only marginally.

5.187 Given the primary role of women to care for children and elderly or disabled dependants, recognition of the need to accommodate those with family responsibilities may also be seen as recognition of the existence of a form of indirect discrimination based on sex. From that conclusion it may be argued that family responsibilities protection is not a significant extension of the concept of sex discrimination. However, as with many examples of indirect discrimination, it is arguable that it will only be properly addressed in practice if it is specifically dealt with in the ADA.

5.188 While the Commission accepts that protection of those with family responsibilities will largely benefit women, the availability of such protection may itself help to break down the traditional division of responsibility on male/female lines. In any event, it would be quite inappropriate to provide protection to women (as a form of sex discrimination) and not to men who undertake such responsibilities.

5.189 A number of submissions received by the Commission in response to DP 30 expressed the view that "family responsibilities" should form a separate ground of discrimination under the ADA rather than relying on the existing grounds of sex or marital status.<sup>158</sup>

5.190 Further, in March 1990 Australia ratified the *International Labour Organisation Convention No 156 – Workers with Family Responsibilities*. This Convention applies to men and women workers with family responsibilities for their "dependent children" and for "other members of their immediate family who need their care and support". The aim of the Convention is to avoid restricting such workers in "preparing for, entering, participating in or advancing in economic activity", while leaving the mode of fulfilling these aims to each adopting country. Article 3, in particular, sets out that important first principles should be to remove discrimination against workers with family responsibilities, and, as far as possible, reduce the conflict between work and family responsibilities. Discrimination here means discrimination in employment as defined in ILO Convention 111.

### **Existing coverage**

5.191 At the Federal level, there is a limited recognition of the need to protect people on the ground of family responsibilities in the SDA. In that Act, "family responsibilities" is defined to mean:

responsibilities of the employee to care for or support –

- (a) a dependent child of the employee; or
- (b) any other immediate family member who is in need of care and support.<sup>159</sup>

5.192 The phrase "immediate family member" is also defined to include:



- (a) a spouse of the employee; and
- (b) an adult child, parent, grand parent, grand-child or sibling of the employee or of a spouse of the employee.<sup>160</sup>

5.193 Whereas de facto relationships are expressly recognised in the definition of “spouse” there is no express recognition of same sex relationships. However, as the definition of immediate family member is inclusive and not exclusive, it is arguable that same sex relationships may be covered.<sup>161</sup>

5.194 The protection given under the SDA is, as the definition of family responsibilities indicates, limited to the area of employment. The definition of discrimination on the grounds of family responsibilities is limited to direct discrimination. The area of operation of the prohibition is in turn restricted to the conduct of an employer in dismissing the employee.<sup>162</sup>

5.195 Apart from coverage in discrimination law, family responsibilities is also dealt with in industrial law. One of the objects of the *Workplace Relations Act 1996* (Cth) is to ensure the prevention and elimination of discrimination on the basis of family responsibilities. The Act also provides that employment should not be terminated on the basis of family responsibilities.<sup>163</sup> In addition, the Australian Industrial Relations Commission (“IRC”) granted certain concessions<sup>164</sup> to workers with responsibilities in the *Personal/Carer’s Leave Test Case*<sup>165</sup> and the *Family Leave Test Case*.<sup>166</sup>

5.196 Most jurisdictions in Australia have some form of prohibition of discrimination on the ground of family responsibilities. In Western Australia the ground is referred to as “family responsibility or family status” and is defined to mean:

- (a) having responsibility for the care of another person, whether or not that person is a dependent, other than in the course of paid employment;
- (b) the status of being a particular relative; or
- (c) the status of being a relative of a particular person.

5.197 The term “relative” is also defined to mean:

a person who is related to the first mentioned person by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first mentioned person.

5.198 The definition of discrimination includes both direct and indirect discrimination.<sup>167</sup> The areas of operation are restricted to employment and related areas and to education. Thus, unlike sex discrimination, the areas of access to places and vehicles, the provision of goods services and facilities, the provision of accommodation, the disposal or sale of land and membership of clubs are not included.

5.199 In Queensland,<sup>168</sup> Victoria,<sup>169</sup> and the two Territories<sup>170</sup> coverage is more restricted, the ground being identified in terms of parental status or a derivation thereof. In Tasmania reference is made to parental status and family responsibilities.<sup>171</sup>

5.200 South Australia and New South Wales are the only two States that do not specifically cover family responsibilities or parental status although the Commission understands that plans are afoot to include this ground in South Australia and a Bill is currently being considered in New South Wales.

### ***The Commission’s approach***

5.201 Recognition of the need for protection from discrimination for people with family responsibilities has evolved through an awareness of changes in the roles and responsibilities within families and the impact of those roles on employment and, to a lesser extent, in areas of services and facilities,

accommodation and other needs. Consequently there appears to be a valid case that family and carer responsibilities should be covered in the ADA.

5.202 On the other hand, family and carer responsibilities and employment obligations may conflict. For example, a need to collect young children from school may conflict with the terms of employment which require an employee to remain at work until 5.00 pm. In some respects, family responsibilities and disability have similar characteristics. Neither is necessarily irrelevant to employment decisions and each may properly require an obligation to take reasonable steps to accommodate the circumstances of the applicant or employee.

5.203 Similarly, the coverage of any such ground must reflect an awareness of the diversity of family and caring relationships. Thus, while the term family responsibilities is commonly understood to refer to the caring obligations relating to spouse and dependent children, other categories of relationships may be equally relevant. These may include the care of elderly and disabled parents, siblings, foster relationships, non-cohabiting long term companions, and long term 'adoptive families' common to Indigenous kinship systems.

5.204 The ADB in its Discussion Paper on *Discrimination and Family Responsibilities*<sup>172</sup> canvassed various options ranging from a narrow definition limited to the traditional nuclear family "blood" relationships to the broader definitions covering extra familial care responsibilities, if a test of dependency could be satisfied. This definition was based on the ADA's current definition of relative<sup>173</sup> but extended to include "a person who is wholly or principally dependent on, or is a member of the household including same sex households of the first mentioned person".<sup>174</sup>

5.205 The definition of family responsibilities was also considered in the Federal *Personal Carers Leave Test Case*<sup>175</sup> and the New South Wales *State Family Leave Case*.<sup>176</sup> In the former, the IRC provided coverage to a member of the employee's immediate family or a member of the employee's household where the employee is responsible for the care of the person concerned. The decision of the IRC changed the leave from "family" to "personal/carer's" leave thus extending coverage beyond caring responsibilities for immediate family members. In the New South Wales *State Family Leave Test Case*, the IRC employed the household criterion, but specifically referred to particular relationships within the household of the employee.<sup>177</sup>

5.206 In defining family responsibilities, consideration must also be given to whether the definition should be category-based or whether it should satisfy a care and support test within a dependent relationship, or both. Legal, blood and domestic relationships do not always correlate with caring ones. In keeping with these approaches, the Commission is satisfied that the ground should be identified as covering "responsibilities to care for or support another person in a significant relationship involving dependency, commitment, care and support." The significant relationship should be based on the existing definition of "relative" in the ADA. Such a definition would cover the dependent child, any other family member and any other person who is clearly dependent on the employee for care, support and attention.

5.207 Caring responsibilities are not limited to illness, but include attending important school functions of a dependent child, attending medical appointments and religious, spiritual, traditional and cultural observances. Dependency should therefore be defined to include financial, personal, physical and or emotional reliance.

#### ***Inter-relationship with marital status***

5.208 The main reason for including family and carer responsibilities as a ground of discrimination is in recognition of the changing structure of work and family life. The failure to recognise that the "public" and "private" areas of life overlap and conflict has resulted in disadvantage and unfair treatment. Consequently it is not intended that people who are discriminated against because they have no family responsibilities be protected.

5.209 This single sided approach can however give rise to difficulties that may create some tension with the ground of marital status. A case in point is *Dopking v Department of Defence*.<sup>178</sup> The issue for consideration was whether the provision of a “Home Purchase and Sale Expense Allowance” by the Department of Defence Force personnel with “family” discriminated against the complainant, Mr Dopking, who was a single person with no dependants, on the basis of marital status. HREOC found that Mr Dopking had been discriminated against on the basis that:

- (a) being without family is a characteristic that appertains generally to persons of the marital status of the aggrieved person, and
- (b) Mr Dopking was treated less favourably than, in the circumstances that were the same or not materially different, married persons were treated.

5.210 The Federal Court disagreed with this decision on the basis that the causal relationship between the marital status of the complainant and the less favourable treatment was not satisfied.<sup>179</sup> However the case illustrates the tension that could arise, particularly in the context of shift work, where people with family responsibilities are given preference over those without family responsibilities in the choice of shifts.

5.211 There are two methods of addressing this issue: first, in the area of employment, it may be necessary to extend the exception in relation to “undue hardship” to cover the circumstances of fellow employees, as well as those of the employer. Secondly, it will be necessary to include a provision excluding steps taken for the purpose of accommodating family and carer responsibilities from the prohibition on marital status discrimination.

#### ***Nature of prohibition***

5.212 The real difficulty in this area is to identify the extent of the prohibition. If an employer treats a person detrimentally on the ground of family responsibilities, for example, by refusing to interview for a position where the applicant has dependent children, the scope of the prohibition will be relatively limited. Further, even within that area, there may need to be an exception for a genuine occupation qualification. For example, if an applicant says that he or she is not available between the hours of 6.00 pm and 9.00 am, because of the need to care for young children, that person is simply ineligible for a job (say) at a bakery which, by law, must operate only during those hours, or for milk deliveries which are required early in the morning. However, these are extreme cases. In other situations flexibility may be available. A principle of equality of treatment alone will not impose an obligation on an employer to improve the flexibility or otherwise vary the conditions attaching to a particular position. Accordingly, this ground will have little effect in practice if it does not include an obligation to make reasonable accommodation, subject to the defence of undue hardship. This is because actual or potential availability for work at particular hours may be a relevant consideration in relation to some employment. Rather than disregard this fact, it is necessary to acknowledge its force and impose reasonable requirements to achieve the underlying social policy.

5.213 One argument against the “reasonable accommodation” approach is that it imposes a burden on employers, and in particular small business. There are two answers to this objection. First, it is necessary to assess the strength of the objection in general terms. Secondly, if it is seen to have merit, then consideration must be given to limiting unreasonable effects, preferably with a carefully formulated exception.

5.214 In the first place, the objection bears the hallmarks of the objections historically raised in relation to regulation of anti-social conduct in many areas. The suggestion of unacceptable costs if women were provided with equal opportunities, due to the need to make additional toilet facilities available, and the fears accompanying the requirement to accommodate people with disabilities provide examples. In practice, the overriding social policy contained in anti-discrimination principles was given effect and the adverse economic consequences proved to be exaggerated. In the present case, it may be conceded that the proportion of the work force affected by family responsibilities will greatly exceed the proportion subject to significant disabilities, but on the other hand, will be less than the numbers

affected by the prohibition on sex discrimination. More importantly, the appropriate balance is achieved through the “undue hardship” defence which provides a degree of flexibility in the application of this principle.

5.215 The second aspect of the objection really focuses upon the uncertainty which is said to flow from the “undue hardship” defence. However, this uncertainty has not proved a significant difficulty in relation to the area of disability discrimination. In practice, it seems that commonsense has prevailed and that relatively few cases have been brought in the marginal areas where outcomes will be difficult to predict. To the extent that new situations give rise to novel complaints, the usual course is likely to follow: namely that the ADB and the EO Division of the ADT will develop principles and guidelines which will give rise to increasing levels of understanding and certainty.

### **Conclusions**

5.216 The Commission has given careful consideration to the objections that have been raised, which are somewhat briefly summarised above. It has also given consideration to the evidence of changing practices on the part of employers, flowing in large part from a growing awareness of the social problem and from the increasing willingness of industrial laws to seek solutions consistent with anti-discrimination principles.

5.217 Further, the Commission has given weight to the importance of the underlying social principle, as reflected in the ratification by Australia of *ILO Convention No. 156*. It is the firm view of the Commission that the proposed ground of family and carer responsibilities should include a prohibition on treatment based directly on this ground and should include a requirement that such responsibilities be the subject of reasonable accommodation.

### **Other areas of operation**

5.218 The foregoing discussion is directed to the question of discrimination in employment and work. The next question is whether the protection should be provided in other areas of activity.

5.219 The concept of “family and carer responsibility” does not seem directly relevant in other areas. In particular, the examples which have been provided to the Commission do not illustrate a problem beyond the work area. For example, concern has been expressed about the refusal to allow access to a particular place or to provide a particular service to a mother with a young child in a stroller. Further, a similar issue has been raised in relation to accommodation where a landlord has declined to let premises to a family with young children. However, in each case, the real complaint is that the person concerned has a dependent physically present, rather than that he or she has responsibilities towards a dependent child. Thus, larger families require more room, whether in a cinema, an aeroplane or in accommodation. It should not be unlawful to impose an additional charge reflecting that fact. No doubt the burden in each case will fall upon the parent. Indirectly, it may be that the burden is related to the obligation of the parent to care for the child. Any protection given in such circumstances would need to be tightly worded, to avoid inappropriate consequences. However, the examples given do not illustrate irrational prejudice based on the existence of family responsibilities, nor do they necessarily illustrate stereotyped responses on this ground. Given the difficulties in formulating an appropriate prohibition and relevant exceptions, the Commission does not consider it necessary to extend the scope of this ground beyond that of employment.

5.220 If further evidence of a broader social problem comes to light, this conclusion may need to be revisited. However, the Commission is conscious of the need to avoid extending the ADA unnecessarily, particularly in circumstances which are not well documented and analysed.

### **Recommendation 40**

**Include carer responsibilities as a ground of discrimination in the area of employment.**

#### **Recommendation 41**

**Carer responsibilities should be defined as responsibilities to care for or support another person in a significant relationship involving dependency, commitment, care or support.**

Draft Anti-Discrimination Bill 1999: cl 18(1)

#### **Recommendation 42**

**“Dependency” includes financial, physical or emotional reliance.**

Draft Anti-Discrimination Bill 1999: cl 18(1)

### **GROUNDS NOT TO BE INCLUDED**

#### **Industrial activity**

5.221 Industrial activity may refer to any workplace activity confined within the terms and conditions of employment, in the broadest sense, and the organisation for such activity, primarily through trade union membership. Trade union activities tend to cover both industrial activity and political activity. In so far as political activities are concerned, the Commission has dealt separately with these matters under the heading “political conviction”. As far as industrial activities are concerned, the main area of potential discrimination is in employment. This, however, is an area which is covered by industrial laws in a considered and appropriate manner.<sup>180</sup>

5.222 Further, the appropriate protection of trade unionists and the regulation of trade union activities in the employment context is, on balance, better left to the jurisdiction of the industrial commissions and courts. Accordingly, whilst recognising “industrial activity”, defined as membership or otherwise of an industrial organisation and participation or otherwise in the activities of an industrial organisation as a possible area needing protection, the Commission is not persuaded that such protection should be included in the ADA. Indeed, to do so would duplicate existing protections, lead to public confusion and might well lead to undesirable jurisdictional competition. The ADA should therefore not be extended to cover “industrial activity” or “trade union membership”.

#### **Appearance**

5.223 Appearance can mean various things and can impact on various existing grounds. For instance, it can be associated with race in relation to customary forms of dress, disability in relation to height and weight, homosexuality or transsexuality because of stereotypical assumptions. It can also simply mean the way one dresses or wears one’s hair and can include aversive features. In some cases such discrimination may be covered in relation to existing grounds as a characteristic appertaining to or generally imputed to the particular group or as a form of indirect discrimination.

5.224 As a specific ground of discrimination, it is identified as discrimination on the ground of physical features only in Victoria.<sup>181</sup> The phrase “physical features” is defined to mean a person’s height, weight, size or other bodily characteristics. The prohibition applies in all areas of operation but is subject to exceptions on the basis of genuine occupational qualifications, authenticity and in relation to modelling, artistic, photography, dramatic or similar work.

5.225 There have been few cases where the issue of appearance has been raised. In *Russell v Director General, Department of Juvenile Justice*<sup>182</sup> the complainant, a female, was refused employment in a juvenile male detention centre because it was alleged her attractiveness could cause problems with detainees. She alleged discrimination on the ground of sex, saying that questions about attractiveness would not have been asked of a male applicant. Her action failed, the EOT finding that “attractiveness” could not be inferred to be a characteristic appertaining generally to sex, or a characteristic imputed to women generally. As such, discrimination on the ground of sex could not be found. The reasoning of the EOT is, however, difficult to support. The issue had nothing to do with characteristics but simply whether sexual attractiveness would have been considered at all in relation to a male applicant.

5.226 The issue also arose in *Cope v Girton Grammar School*,<sup>183</sup> a sex discrimination case in Victoria. In that case the complainant, a student at the school, alleged discrimination because the school’s uniform code required him to keep his hair short, but allowed female students to have long hair. He refused to cut his hair, and as a consequence was excluded from classes. Discrimination was found on the ground of sex, as the rules specifically stated a requirement of hair length for boys, without a corresponding rule for girls. However, the court was careful to point out that their decision was based on sex, and not appearance.<sup>184</sup>

5.227 The case of *Daniels v Hunter Water Board*<sup>185</sup> also raised issues about appearance, this time in the context of discrimination on the grounds of perceived homosexuality. The complainant alleged he was discriminated against because he wore an earring and had a “trendy” haircut. The EOT found that he was discriminated against and harassed, because these attributes were different from the norm. The EOT stated:

In a free society, a person’s individuality and right to freedom of expression must be cherished. If the cost of freedom of expression is conformity and the price of non-conformity is harassment, then society has accepted unacceptable restrictions.<sup>186</sup>

Those comments were made in the context of a complaint of hostile behaviour at a workplace, based on a perception that the complainant was homosexual. The complaint was upheld.

5.228 The question for the Commission, however, is whether appearance should be a ground of prohibited discrimination, independently of existing grounds. Where appearance is a matter of choice, this proposition is difficult to maintain. Appearance by choice may reflect beliefs or opinions of the individual, but the ADA identifies those which are appropriate grounds and those which are not. There is no good basis for prohibiting discrimination in relation to conduct which reveals one facet of opinion or belief where the opinions or beliefs themselves are not otherwise protected.

5.229 There remains that aspect of appearance which may properly be described as an inherent characteristic or physical feature of the individual, namely a feature which cannot be changed by reasonable choice. In some cases, features will constitute a disability and will be covered by that ground. The question is whether those features which are not properly described as a “malfunction, malformation or disfigurement of a part of a person’s body” should be the subject of protection in their own right.

5.230 It may be argued that if an employer, for example, cannot discriminate on the grounds of disfigurement, it should not be entitled to discriminate on the basis of a less significant physical feature. Against that proposition, three points may be made: first, a disability is not necessarily presumed to be irrelevant, but rather is subject to a requirement of reasonable accommodation. Secondly, a disfigurement may be established with a reasonable level of certainty, whereas a physical feature is a much vaguer concept which cannot be identified with adequate precision. Finally, employment decisions are frequently made on the basis of largely intuitive choices between people with adequate levels of competence and skill. The choice may reflect an assessment of any one of a number of characteristics which the employer may consider relevant in particular circumstances. Sometimes decisions will reflect conscious or unconscious prejudice on prohibited grounds. Such a case may be hard to prove, but, on the other hand, the standard can be clearly articulated. The concept of “physical features” or

“appearance” is not one which can be articulated with any level of precision. Accordingly, in the absence of clear evidence that there is a significant social problem reflected in this proposed ground, the Commission is not inclined to adopt it as a further prohibition.

5.231 Beyond these matters, the Commission is not satisfied that there is a significant issue of human rights and fundamental freedoms raised by these concerns. The right of an individual to explore his or her personality in particular ways must be accepted: but such matters are not necessarily irrelevant to decisions made by employers and others. Indeed the choice of appearance is often intended to be noticed, not ignored. Consequently, the ADA should not be extended to cover this ground.

### **Criminal record**

5.232 Discrimination because of one’s criminal record can affect many aspects of life and can be extremely wide ranging. It impedes the positive aspects of rehabilitation for the ex-offender and impacts on the family and associates as well. The ADB has indicated that it receives many telephone inquiries about such discrimination from persons who have a criminal record, or have been assumed to have a criminal record, because of an arrest or charge, even if the charge is dismissed. Consequently, the ADB has suggested that this ground is worthy of consideration by the Commission.

### ***Existing provisions in anti-discrimination law***

5.233 There are currently limited laws that deal with decision-making based on irrelevant criminal records. In the Federal sphere, such discrimination is not unlawful, but the HREOC has the power to conciliate such complaints.<sup>187</sup>

5.234 The Northern Territory, on the other hand, makes discrimination because of irrelevant criminal record unlawful. “Irrelevant criminal record” is defined to include a spent record in terms of the *Criminal Record (Spent Convictions) Act 1992* (NT) and a series of other circumstances.<sup>188</sup>

### ***Lapsed criminal convictions***

5.235 New South Wales, Queensland, the Northern Territory and Western Australia all have legislation that deal with spent convictions. In New South Wales, the *Criminal Record Act 1991* specifies the conditions under which an ex-offender may not need to disclose the existence of a former conviction. In Queensland, the *Criminal Law (Rehabilitation of Offenders) Act 1986* provides that a conviction against a person will lapse after a “rehabilitation” period. In Western Australia, the *Spent Convictions Act 1988* makes discrimination on the basis of a spent conviction unlawful in the area of employment.

5.236 The Commission is conscious that the legislature has addressed the problem of spent convictions in specific legislation. While it accepts that having a conviction may cause adverse responses, in, for example, the area of employment, such responses are not always irrational or unjustifiable. Besides, given that the problems to which such circumstances give rise are properly addressed in specific legislation, there is no compelling reason to address them separately in the ADA.

5.237 While the provisions in relation to spent convictions are useful, they are limited in application to those who have had convictions. As stated above, there are other instances where people are discriminated against on the basis of their involvement with the police, although they may not have been convicted of an offence: for example, where a charge has not been laid or has been withdrawn, and where a person has been discharged without a conviction. While there is a potential for unfairness in relying upon an arrest, criminal charge or acquittal, it may not be irrational or unjustifiable to take into account the conduct which may have led to such a consequence. Nor is it usual to say that a person acquires a particular status in such circumstances. As already noted, there are dangers in seeking to apply the statutory prohibitions in the ADA too broadly. Again, in the absence of a compelling case for extension to such a new ground, the Commission does not support its introduction to the Act.

## Unborn children

5.238 Many international covenants and declarations ratified or endorsed by Australia recognise the rights of unborn children. In particular, the Preamble to the United Nations *Declaration of the Rights of the Child* recognises the need for “appropriate legal protection, before as well as after birth”. The Commission received submissions for<sup>189</sup> and against<sup>190</sup> inclusion of a ground giving effect to these principles in the ADA. Given that the major concern in relation to unborn children is their right to life and safety, the Commission is not satisfied that the ADA is the appropriate forum for dealing with this issue. As one submission noted, the Act seeks to protect people against unjust treatment but cannot be required to provide the protection that a Bill of Rights may give.<sup>191</sup> It is also noteworthy that no other Australian jurisdiction includes such a ground in anti-discrimination legislation.

5.239 Because the “unborn child” has no independent existence outside the mother’s body, there are few circumstances in which the question of discrimination could arise, other than life and safety. In relation to protection of life as such, the question is when, and in what manner, the law should determine that the foetus is entitled to protection and abortion is not permitted. In our legal system, that question is determined by the criminal law: there is neither a need nor room for anti-discrimination law to operate in that field.

5.240 In relation to safety, there is no doubt that relevant considerations can arise, for example in relation to the employment of the mother in an industry which involves use of chemicals or other products (including tobacco smoke) which can be present in the workplace and can have a deleterious effect on the foetus. These questions usually arise in relation to the employment of the mother or the provision of services, including in restaurants, to the mother. However, it is not the role of anti-discrimination law to prescribe particular standards of health and safety whether at work or elsewhere. The purpose of the ADA is to ensure that irrelevant considerations are not taken into account in areas such as the provision of employment or other services. This approach does not require the provision of particular protection to the unborn child, as it is not being offered employment or services. Accordingly, the situation which applies in all Australian jurisdictions should be maintained and the ADA should not be extended in some manner to prohibit discrimination against unborn children.

## Accent discrimination

5.241 A particular accent may be a characteristic appertaining to a particular race and can also be indicative of social status, although that is more difficult to define. The Commission received no submissions on whether accent discrimination should be a specific ground of discrimination. It is not a ground in any other Australian jurisdiction.

5.242 As noted above, a particular case brought before the Australian Capital Territory Human Rights Office sought to establish discrimination on the basis of accent.<sup>192</sup> The complainant in that case was a woman of Dutch origin. She was passed over for a position as a television newsreader and complained that the adverse decision was on account of her accent and therefore her race. The Commissioner held:

In my view, accent, in some cases, may quite distinctively mark a person as being of a distinctive race, that is, of a certain national or ethnic origin or extraction. Accordingly, in such situations, if a person treats or proposes to treat another person unfavourably on the basis of that person’s accent, such treatment or proposed treatment would amount to racial discrimination within the terms of the Act.<sup>193</sup>

5.243 The Commission accepts that analysis: to the extent that it has application in a particular case, there is accordingly no need to identify accent as a separate ground under the ADA.

5.244 Where an accent is not characteristic of a particular racial group, it is not obvious that accent may not be a relevant consideration for some forms of employment. Further, if indications of social status are also not appropriate grounds to be included in the ADA, no sufficient case had been made out to include accent discrimination as a separate ground.



## Geographical location, social status and occupation

5.245 Although DP 30 raised the question of geographical location and social status as a possible further ground, the Commission received no submissions in relation to the issue. Further, there is no equivalent ground in any other Australian jurisdiction.

5.246 One reason that the matter was raised for discussion was the availability of statistical material which suggests that some community resources, such as university education, may be distributed disproportionately in favour of people of higher social status or living in favoured geographical areas. The statistics in themselves may not indicate any relevant area of concern. For example, if people from rural areas are under-represented in professional faculties at universities, that may depend upon a number of social factors which may determine academic achievement or choice of career path. It may also depend upon a failure by secondary educational institutions to provide equal resources in rural and urban areas. On the other hand, the latter result does not necessarily follow.

5.247 The suggestion that the ground of “profession, trade, occupation or calling” should be included as a ground of discrimination was made to the Commission in a submission<sup>194</sup> on the basis that workers in the sex industry are discriminated against by banking institutions, health service providers etc. The DA (ACT) contains a similar provision,<sup>195</sup> and the Human Rights Office (ACT) has received a few complaints on this ground from persons in various occupations.<sup>196</sup>

5.248 In the absence of some compelling evidence to suggest that geographical location, social status or occupation is being treated inappropriately as a basis for decision making, the Commission does not consider that any separate grounds should be formulated in these terms.

## Footnotes

1. *Anti-Discrimination (Amendment) Act 1994* (NSW).
2. *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW).
3. *Anti-Discrimination (Amendment) Act 1994* (NSW).
4. *O’Callaghan v Loder* [1983] 3 NSWLR 89; *Hill v Water Resources Commission* [1985] EOC 92-127.
5. *Anti-Discrimination (Amendment) Act 1997* (NSW).
6. *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW). See ADA Pt 3A.
7. See ADA Pt 3A Div 5.
8. *Anti-Discrimination (Amendment) Act 1981* (NSW) and *Anti-Discrimination (Amendment) Act 1982* (NSW).
9. *Anti-Discrimination (Amendment) Act 1994* (NSW).
10. *Anti-Discrimination (Amendment) Act 1982* (NSW) and *Anti-Discrimination (Amendment) Act 1994* (NSW).
11. *Anti-Discrimination (Amendment) Act 1994* (NSW).
12. *Anti-Discrimination (Compulsory Retirement) Amendment Act 1990* (NSW).

13. *Anti-Discrimination (Amendment) Act 1994* (NSW).
14. See *Ealing London Borough Council v Race Relations Board* [1972] AC 342.
15. L Lustgarten, *Legal Control of Racial Discrimination* (MacMillan, London, 1980) at 67.
16. *King-Ansell v Police* (1979) 2 NZLR 531.
17. See *Mandla v Dowell Lee* [1983] AC 458.
18. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 4 May 1994, at 1827.
19. See below at para 5.141.
20. See *Gerhardy v Brown* (1985) 159 CLR 70 at 122, per Brennan J.
21. *Campos v Tempo Cleaning Service* [1994] EOC 92-648 and [1995] EOC 92-720; *Lyffyt v Capital Television* [1994] EOC 92-557 (ACT); *Oset v Ministry of the Cabinet* [1990] EOC 92-322 (WA).
22. [1994] EOC 92-648.
23. As defined in s 7(1) of the ADA.
24. [1990] EOC 92-322 (WA).
25. [1994] EOC 92-557 (ACT).
26. See below at para 5.185.
27. New South Wales, Anti-Discrimination Board, "*Why don't you ever see a pregnant waitress?*" *Summary of Report of the Findings of the Inquiry into Pregnancy Related Discrimination* (Sydney, September 1993).
28. [1994] QB 718.
29. The ruling was sought on the following question:

Is it discrimination on the grounds of sex contrary to Council Directive 76/207 for an employer to dismiss a female employee (the appellant)

  - (a) whom he engaged for the specific purpose of replacing (after training) another female employee during the latter's forthcoming maternity leave,
  - (b) when, very shortly after appointment, the employer discovers the appellant herself will be absent on maternity leave during the maternity leave of the other employee, and the employer dismisses her because he needs the job holder to be at work during that period,
  - (c) had the employer known of the pregnancy of the appellant at the date of the appointment, she would not have been appointed, and
  - (d) the employer would similarly have dismissed a male employee engaged for this purpose who required leave of absence at the relevant time for medical or other reasons?
30. ADA s 25(1A) and (2A).
31. New South Wales, Anti-Discrimination Board, "*Why don't you ever see a pregnant waitress?*" *Report of the Inquiry into Pregnancy Related Discrimination* (Sydney, 1993).

32. New South Wales, Department for Women and Attorney General's Department, *Gender Bias and the Law: Women Working in the Legal Profession: Report of the Implementation Committee* (Sydney, 1996).
33. A number of the submissions to the Commission in response to DP 30 also argued that the provision was unnecessary and anachronistic and advocated its repeal: Anti-Discrimination Board, *Submission 1* at 63; Gay and Lesbian Rights Lobby, *Submission* at 6; NSW Ministry for the Status and Advancement of Women, *Submission* at 21; National Pay Equity Coalition, *Submission* at 2.
34. ADA s 24(1B).
35. B Napier, "Fertile Ground for Discrimination" (1992) 18 *Law Society's Gazette* at 19.
36. DP 30 at 93.
37. Anti-Discrimination Board, *Submission 1* at 62; Commissioner for Equal Opportunity (SA), *Submission* at 4; NSW Ministry for the Status and Advancement of Women, *Submission* at 21; NSW Independent Teachers' Association, *Submission* at 5; NSW Women's Advisory Council, *Submission* at 8.
38. Anti-Discrimination Board, *Submission 1* at 62.
39. EOA (Vic) s 6(h); ADA (Qld) s 7(c); EOA (SA) s 29(6); EOA (WA) s 10; DA (ACT) s 7(f); ADA (NT) s 19(1)(f).
40. SDA (Tas) s 16.
41. ADA s 24(1B).
42. This approach was rejected by the two members of the High Court who considered the issue in *IW v City of Perth* (1997) 71 ALJR 943 at 959-960, per Toohey J and 979-981, per Kirby J. The following comment in the judgment of Kirby J is apposite in the present context:
 

No reference is made in the description of the comparator to a characteristic appertaining generally to, or generally imputed to, persons having the same impairment. It would have been simple for Parliament to have defined the comparator in terms both of the impairment and the characteristics generally appertaining or imputed to impaired persons. But it did not do so.

The Commission recommends a remedy for this omission in the definition of discrimination: see Chapter 3.
43. *Anti-discrimination Amendment (Pregnancy and Carers' Responsibilities) Bill 1997* (NSW) – Exposure Draft for Discussion Purposes.
44. See proposed s 38AA.
45. A number of the submissions to the Commission in response to DP 30 specifically argued that "potential pregnancy" should be a separate ground of discrimination under the ADA: Commissioner for Equal Opportunity (SA), *Submission* at 4; NSW Women's Advisory Council, *Submission* at 8.
46. Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (AGPS, Canberra, 1992) ("Lavarch Report").
47. SDA s 7.

48. See below at para 5.65, 5.212. See also Chapter 3 at para 3.65-3.85.
49. ADA (Qld) s 7(2).
50. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) Vol 1 ch 12 and 13.
51. ALRC 31 at para 278.
52. Section 19(1A)(c) inserted by *Adoption of Children Amendment Act 1987* (NSW).
53. ALRC 31 at para 96.
54. ALRC 31 at para 97.
55. Australia, Human Rights and Equal Opportunity Commission, *The Call for Recognition: A Report on the Situation of Australian South Sea Islanders* (AGPS, Canberra, 1992).
56. Anti-Discrimination Board, *Submission 1* at 69-70; Combined Community Legal Centre Group NSW, *Submission* at 7; Gay and Lesbian Rights Lobby, *Submission* at 7; NSW Women's Advisory Council, *Submission* at 8. However, it should also be noted that two submissions received by the Commission specifically opposed the inclusion of same sex couples under the definition of "marital status": J McEvoy, *Submission* at 2; D Robertson, *Submission* at 14.
57. [1985] EOC 92-141.
58. [1984] 2 NSWLR 13 (CA).
59. New South Wales, Anti-Discrimination Board, *Annual Report 1983/1984* at 99-100.
60. [1991] 25 NSWLR 99 (CA).
61. Considered by the EOT in *Williams v Regional Publishers Pty Ltd* (NSW, EOT 25/97, 19 March 1997, unreported).
62. *Anti-Discrimination (Amendment) Act 1994* (NSW).
63. ADA s 49A(d).
64. DDA s 4(1) "disability".
65. (1988) 14 NSWLR 252 at 262A-262B.
66. ADA s 49I(1).
67. The submission of the Disability Council of NSW argued that a positive obligation of "reasonable accommodation" should be introduced into the Act: Disability Council of NSW, *Submission* at 2.
68. A number of the submissions received by the Commission, before the 1994 amendments of the ADA, also argued that the disability discrimination provisions in the ADA should be amended to mirror those in the Commonwealth DDA: Disability Council of NSW, *Submission* at 3; P Jenkin, *Submission* at 1; People with Disabilities, *Submission* at 1; D Robertson, *Submission* at 13; A Stucken, *Submission* at 3.
69. See Chapter 3 at para 3.65-3.85.
70. Note that the defence in s 49D(4) only applies in relation to determining who should be offered employment and dismissing the employee.

71. This is because the “unjustifiable hardship” defence only applies to dismissal (and determining who should be offered employment) and not to altering the terms and conditions of employment.
72. Disability Discrimination Legal Centre, *Submission* at 5.
73. *Workers Compensation Act 1987* (NSW) s 152 and 152A.
74. ADA s 49M.
75. [1995] EOC 92-717.
76. *Scott v Telstra* at 78,398-78,400.
77. (1991) 173 CLR 349.
78. *Waters v Public Transport* at 361.
79. *Waters v Public Transport* at 361.
80. Only McHugh J appears to have taken a different approach to this question, but the whole Court treated the matter essentially as a question of fact for the Tribunal.
81. Disability Discrimination Legal Centre, *Submission* at 2.
82. See Chapter 3 para 3.58 and recommendation 4.
83. The submission of the NSW Users and AIDS Association to the ADB’s Discussion Paper *Drugs and Discrimination: Do They Mix?* specifically argued that medical and disease models of drug use were inappropriate to explain the reality of drug dependence within contemporary society: NSW Users and AIDS Association, *Submission to Anti-Discrimination Board* (1 December 1995).
84. See below at para 5.223.
85. New South Wales, Anti-Discrimination Board, *Discrimination and Homosexuality* (Sydney, 1982) at 11.
86. The submission of the Gay and Lesbian Rights Lobby also argued against the inclusion of “sexuality” or “sexual orientation” as a new ground of discrimination under the Act on the basis that heterosexual people do not experience the same level of discrimination as that experienced in the homosexual community: Gay and Lesbian Rights Lobby, *Submission* at 9.
87. M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne 1990) at 83.
88. Call to Australia, *Submission 1* at 6; G Higgins, *Submission* at 1; B Rieneck, *Submission* at 1. It should also be noted that two of the submissions received by the Commission argued that “homosexuality” should not be included as a ground of discrimination under the ADA at all: Call to Australia, *Submission 2* at 6; R Gibbs, *Submission* at 1.
89. *Convention Relating to the Status of Refugees 1951*.
90. Victoria and Queensland refer to “lawful sexual activity”; SA and NT refer to “sexuality” but include transsexuality in addition to the others; ACT as per above recommendation.
91. A number of submissions to the Commission in response to DP 30 supported this view: Commissioner for Equal Opportunity (SA), *Submission*; Gay and Lesbian Rights Lobby, *Submission* at 8; NSW Ministry for the Status and Advancement of Women, *Submission* at 19; NSW Women’s Advisory Council, *Submission* at 8.

92. *Anti-Discrimination (Amendment) Act 1994* (NSW). A number of submissions expressed support for the inclusion of “age” as a separate ground of discrimination under the Act: National Children’s and Youth Law Centre, *Submission* at 2; National Pay Equity Coalition, *Submission* at 3; NSW Independent Teachers’ Association, *Submission* at 7; NSW Women’s Advisory Council, *Submission* at 10.
93. *Anti-Discrimination (Compulsory Retirement) Amendment Act 1990* (NSW).
94. ADA s 49ZU(3).
95. [1994] EOC 92-602.
96. United States Code Title 29 s 621(b). The history of the legislation is discussed in K Lindsay, “Age Discrimination and the Academic Work Place” (unpublished LLM thesis, University of Newcastle, January 1996).
97. In a 1996 Report to the Federal Attorney General, the Human Rights Commissioner recommended that “the Commonwealth legislate to provide a comprehensive national prohibition of age discrimination”. See Australia, HREOC, *Report of Inquiry into Complaints of Discrimination in Employment and Occupation: Compulsory Age Retirement* (AGPS 1996) at 11.
98. *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW).
99. DP 30 at para 5.11; see also New South Wales, Anti-Discrimination Board, *Annual Report 1985*; New South Wales, Anti-Discrimination Board, *Discrimination the Other Epidemic: Report of the Inquiry into HIV and AIDS Related Discrimination* (Sydney, 1992) and New South Wales, Attorney General’s Committee, *Fighting the Other Epidemic: Report of the NSW Attorney General’s Committee on Monitoring and Implementation of the Anti-Discrimination Board’s Recommendations on HIV AIDS Related Discrimination* (Sydney, 1993).
100. Anti-Discrimination Board, *Submission 1* at 131-134; Australian Transgenderist Support Association of Queensland, *Submission*; Commissioner for Equal Opportunity (SA), *Submission* at 8; K Cummings, *Submission* at 1; Gay and Lesbian Rights Lobby, *Submission* at 12; National Pay Equity Coalition, *Submission* at 3; NSW Women’s Advisory Council, *Submission* at 9; St John’s Anglican Church, *Submission* at 1; Transgender Liberation Coalition, *Submission* at 1-2; Transsexual Action Group, *Submission* at 1.
101. ADA s 38A.
102. ADA s 4(1). South Australia, the ACT and the Northern Territory allow transgender persons who have undergone a sexual reassignment procedure to alter the record of their birth: *Sexual Reassignment Act 1988* (SA). See also *Sexual Reassignment Regulations 1988* (SA); *Births, Deaths and Marriages Registration Regulations 1997* (NT); *Births, Deaths and Marriages Act 1997* (ACT).
103. Or, for persons under 18 years, application may be made by a parent or guardian of a child whose birth is registered in this State.
104. BDMR Act s 32B. It is the opinion of the Crown Solicitor expressed in an advice to the ADB of 14 November 1996 that the requirement of not being married in order to apply to have a birth certificate altered amounts to a breach of s 6(1) of the SDA which prohibits discrimination based on marital status. The Second Reading Speech in the Legislative Council indicates that the reason for this is that the legislation is not intended to overturn the provisions of the Commonwealth *Marriage Act 1961*(Cth): New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 30 May 1996 at 1795. Nevertheless it is unlikely that such a requirement would conflict with the Commonwealth marriage laws.
105. BDMR Act s 32I(1).

106. ADA s 38B(1)(a) and (b).
107. ADA s 38B.
108. *Corbett v Corbett* [1970] 2 WLR 1306.
109. See, for example, *R v Harris* (1989) 17 NSWLR 158; *Secretary Department of Social Security v HH* [1991] 14 ALD 58; *Secretary Department of Social Security v SRA* (1993) 118 ALR 467; *R v Cogley* [1989] VR 799.
110. New South Wales, Anti-Discrimination Board, *Transgender Discrimination Policy Guidelines* (September, 1996) at 5.
111. Anti-Discrimination Board, *Transgender Discrimination Policy Guidelines* at 6-7.
112. S Else, *Submission* at 1; St John's Anglican Church, *Submission* at 1; Transgender Liberation Coalition, *Submission* at 1-2; Transsexual Action Group, *Submission* at 1.
113. ADA s 38B(1)(b).
114. See Chapter 3 at para 3.91.
115. NSW Crown Solicitor's Office, *Advice to the Anti-Discrimination Board* (30 January 1997).
116. Transgender status was added in 1996 and age in 1994. See *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW) and *Anti-Discrimination (Amendment) Act 1994* (NSW). The substance of mental illness/psychiatric disability was included in the revised definition of disability in 1994; although these specific terms were not used reference is now made to "a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour" (ADA s 4).
117. M Kirby, "Religious Liberty in Multicultural Australia: Past Tolerance – Present Indifference – Future Problems", paper presented at the International Religious Liberty Association, South Pacific Division, Pacific Congress (Suva, Fiji, 9 June 1993) at 18.
118. *Convention Relating to the Status of Refugees 1951* Art 1A(2).
119. Religious discrimination is prohibited in discrimination legislation in most other states. See EOA (Vic) s 4; ADA (Qld) s 7(1); EOA (WA) s 53; DA (ACT) s 7 and ADA (NT) s 19(1)(m). These prohibit religious discrimination but do not guarantee freedom of religion as a right. At the Federal level, the Human Rights Commissioner may attempt to conciliate acts of discrimination based on religion, political opinion or trade union activity. However, discrimination on these grounds is not unlawful under the HREOC Act. The RDA provides some limited protection if a religious group can also be classified as an ethnic group. It can also cover religious discrimination in some circumstances as indirect race discrimination.
120. ADA s 4. This was raised as an issue in DP 30, and has since been enacted in the 1994 amendments to the ADA.
121. Anglican Church of Australia (Diocese of Sydney), *Submission* at 7; Catholic Education Commission NSW, *Submission* at 3; NSW Council of Churches, *Submission* at 2; Wesley Mission, *Submission* at 1. The Law Society of NSW also put forward the view that a Bill of Rights approach would preferable to adding more grounds of discrimination to the Act: Law Society of NSW, *Submission* at 5.
122. Ahmadiyya Anjuman Ishaat-I-Islam (Lahore) Sydney, *Submission* at 1; The Brethren (Universal Christian Fellowship), *Submission* at 2; Church of Scientology Australia, *Submission* at 1;

Seventh Day Adventist Church, *Submission* at 2. See also P Fitzgerald, *Submission* at 10; J Hollier, *Submission* at 2; M Kirby, *Submission* at 11; K & M McKenzie & Co, *Submission* at 2; L Solomon, *Submission* at 1. See also R Leece, *Letter* (18 August 1997).

123. See, for example, *Marett v Petroleum Refineries (Australia) Pty Ltd* [1987] EOC 92-206; *Petroleum Refineries (Australia) v Marett* [1988] EOC 92-237; *Christian Family Schools Association of Australia v Public Transport Corporation* [1990] EOC 92-300; *Marrett v Accelerated Christian Education* [1993] EOC 92-481.
124. Ahmadiyya Anjuman Ishaat-I-Islam (Lahore) Sydney, *Submission* at 1; Church of Scientology Australia, *Submission* at 1; Seventh Day Adventist Church, *Submission* at 2.
125. Seventh-Day Adventist Church, *Submission* at 2.
126. New South Wales, Anti-Discrimination Board, *Discrimination and Religious Conviction* (Sydney, 1984).
127. The Anglican Church of Australia (Diocese of Sydney) submitted that, "freedom of religion necessarily requires that a religious body and its adherents be able to discriminate". See Anglican Church of Australia (Diocese of Sydney), *Submission* at 2. See also Catholic Education Commission NSW, *Submission* at 2; NSW Council of Churches, *Submission* at 2.
128. Wesley Mission, *Submission* at 1; Catholic Education Commission NSW, *Submission* at 1.
129. NSW Council of Churches, *Submission* at 3.
130. Anglican Church of Australia (Diocese of Sydney), *Submission* at 4.
131. See *Metwally v University of Wollongong* [1984] EOC 92-030.
132. Anti-Discrimination Board, *Discrimination and Religious Conviction* at 7-18.
133. Consider, for example, the theistic notion of religion as a concept of relationship between man and a Deity. While this is true for many religions, there are significant strands of Buddhism and other Eastern faiths which even this broad definition would omit. However, this definition of religion has existed, both legally and in dictionaries, until quite recently.
134. *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116.
135. *Adelaide Company of Jehovah's Witnesses* at 123-124.
136. *Adelaide Company of Jehovah's Witnesses* at 155, per Sparke J.
137. *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120.
138. *The Church of the New Faith* at 136.
139. *The Church of the New Faith* at 140.
140. *The Church of the New Faith* at 151.
141. Anti-Discrimination Board, *Discrimination and Religious Conviction* at 26-7.
142. Anti-Discrimination Board, *Submission 1* at 135.
143. EOA (Vic) s 6(j).



144. ADA (Qld) s (71)(i).
145. EOA (WA) s 53.
146. DA (ACT) s 7(1)(h).
147. ADA (NT) s 4(4).
148. New South Wales, Anti-Discrimination Board, *Discrimination and Political Conviction* (Sydney, 1980) at 156.
149. Anti-Discrimination Board, *Submission 1* at 145.
150. [1990] EOC 92-296 (WA).
151. Anti-Discrimination Board, *Discrimination and Political Conviction* at 8.
152. *CPS Management Pty Ltd v Equal Opportunity Board* [1991] EOC 92-332 at 78,290.
153. [1990] EOC 92-281.
154. In this case Vincent J stated at 77,849:

I find it very difficult to accept the proposition that the legislature intended by the use of words 'political belief' to bypass the entire body of law and the structures which have been established at both the Federal and State level to deal with the type of purely industrial relations questions which have arisen in the present matter.
155. [1987] EOC 92-188.
156. *Hein v Jaques* at 76,795.
157. Australian Bureau of Statistics, *Labour Force Australia* (October 1997, Cat No 6203.0) Table 35. The total number of employed women for this period was 3,512,200, of whom 1,182,900 had dependents.
158. Anti-Discrimination Board, *Submission 1* at 150; NSW Ministry for the Status and Advancement of Women, *Submission* at 24; National Pay Equity Coalition, *Submission* at 3; NSW Independent Teachers' Association, *Submission* at 7; NSW Women's Advisory Council, *Submission* at 10.
159. SDA s 4A(1).
160. SDA s 4A(2)
161. This arrangement would need to take account of the constitutional basis for the various provisions in the Act.
162. SDA s 14(3A).
163. WRA s 170CK(1) and (2).
164. Sick/bereavement leave to provide care or support for a member of their family or household and facilitative provisions in awards to negotiate flexible working arrangements with employers.
165. (1995) 62 IR 48.
166. (1994) 57 IR 121.

167. EOA (WA) s 35A.
168. ADA (Qld) s 7(1) identifies as parental status.
169. EOA (Vic) s 6 identifies as status as a parent or carer.
170. DA (ACT) s 7(1) identifies as status as a parent or carer and ADA (NT) s 4(1) identifies as parenthood.
171. SDA (Tas) s 16.
172. New South Wales, Anti-Discrimination Board, *Discrimination and Family Responsibilities* (Sydney, 1995).
173. Relative means a person related by blood, marriage, affinity or adoption. The Act also defines near relative to mean spouse, parent, child, grandparent, grandchild, brother or sister.
174. New South Wales, Anti-Discrimination Board, *Discrimination and Family Responsibilities* (Sydney, 1995) at 14.
175. (1995) 62 IR 48.
176. (1995) 59 IR 1.
177. The NSW definition refers to responsibilities of the employee to care for:
  - (a) a spouse of the employee;
  - (b) a de facto spouse, who in relation to a person is a person of the opposite sex to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person; or
  - (c) a child or an adult child (including an adopted child, a step child, a foster child or an ex-nuptial child), parent (including a foster parent and legal guardian), grandparent, grandchild or sibling of the employee or spouse or de facto spouse of the employee; or
  - (d) a same sex partner who lives with the employee as the de facto partner of that employee on a bona fide domestic basis; or
  - (e) a relative of the employee who is a member of the same household, where for the purposes of this paragraph:
    1. "relative" means a person related by blood, marriage or affinity;
    2. "affinity" means a relationship that one spouse because of marriage has to blood relatives of the other.
    3. "household" means a family group living in the same domestic dwelling.
178. [1995] EOC 92-669.
179. *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191.
180. Section 209 of the IRA makes provision for freedom of association, s 210 states that employees or prospective employees must not be victimised for reasons such as their trade union membership or non-membership. Section 211 forbids an industrial instrument to confer a right of preference of employment in favour of trade union members over non-members. In the Federal sphere, the WRA provides that freedom of association, including the rights of employees and

employers to join an organisation or association of their choice, or not to join an organisation or association is one of its objects (See WRA s 3(f) and s 298A, Pt 10A). WRA s 170CK(2)(b) provides that employment must not be terminated because of trade union membership or non-membership.

181. EOA (Vic) s 6(f) and (m).
182. [1994] EOC 92-632.
183. [1995] EOC 92-680.
184. [1995] EOC 92-680 at 78,155.
185. [1994] EOC 92-626.
186. [1994] EOC 92-626 at 77,335.
187. HREOC Act s 31(b). Note also that the *Crimes Act 1914* (Cth) provides that an organisation cannot take into account or disclose an individual's past criminal convictions if they have lapsed. A conviction "lapses" when an adult conviction is more than ten years old and a juvenile conviction is more than five years old.
188. ADA (NT) s 19(1). The *Criminal Records Spent Convictions Act 1992* (NT) applies to convictions where the offence was not punishable by imprisonment.
189. Right to Life Association, *Submission*; J Anderson, *Submission*; Australian Catholics Pro-Life Association, *Submission*; C Rice, *Submission*; Catholic Education Commission NSW, *Submission*. The main thrust of these submissions was that unborn children are the most defenceless members of human society and are frequently discriminated against by being denied the right to life. The Right to Life Association also stated that the criminal law has failed to remedy the problem.
190. National Pay Equity Coalition, *Submission*; NSW Women's Advisory Council, *Submission*; J McEvoy, *Submission*.
191. J McEvoy, *Submission*.
192. *Lyffyt v Capital Television (Pty) Ltd* [1994] EOC 92-557; also see para 5.19 above.
193. *Lyffyt v Capital Television (Pty) Ltd* [1994] EOC 92-557 at 77,067.
194. Sex Workers' Outreach Project, *Submission*.
195. DA (ACT) s 7.
196. In 1996/97, the Human Rights Office (ACT) received 4 complaints and in 1997/98 it received 7 complaints: Human Rights Office (ACT) Annual Reports 1996/97; 1997/98.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 6. Exceptions and Exemptions

#### INTRODUCTION

6.1 The philosophy underlying anti-discrimination law is that the proscribed grounds should be irrelevant considerations in relation to any activity occurring within defined areas. However, that proposition may not be universally correct: where a ground is a legitimate consideration, that fact should be identified as an exception to the general proscription. Such exceptions may be classified into general exceptions that apply to all grounds and special exceptions that apply to some grounds or in relation to particular areas of operation only. In addition, the *Anti-Discrimination Act 1977* (NSW) ("ADA") also makes provision for the granting of exemptions in respect of a person or class of persons or activity or class of activities on a case by case basis. This chapter deals with all the general exceptions, the power to grant exemptions and the special exceptions that have not been previously considered in relation to particular areas. Those "exceptions" that arise in defining the areas of operation have been dealt with in Chapter Four.

6.2 The present exceptions are both too limited and inflexible in some areas and too broad or simply inappropriate in others. Because discrimination law protects fundamental human rights, the prohibitions should not be lightly displaced. There must be good justification for any genuine exception. Many of the original exceptions included in the ADA in 1977 reflected the prevailing social attitudes at the time of its introduction, and reflected caution and a desire to minimise disruption to public life at a time when the legislation was seen as radical and innovative. Many derogate from the international conventions which Australia has ratified. For instance, Article 11 of the *Convention on the Elimination of All Forms of Discrimination Against Women* ("CEDAW") declares that the right to work is an inalienable right of all human beings, and parties are called upon to prohibit dismissal because of pregnancy, maternity leave and marital status. The exceptions in the ADA for private educational authorities and small businesses find no equivalent in international covenants nor in the Federal legislation.

6.3 With the passage of time, there has been a general acceptance in the community of the need for anti-discrimination legislation.<sup>1</sup> In fact, of the submissions which the Commission received, only two did not support the overall concept of anti-discrimination legislation.<sup>2</sup> Many of the exceptions seem anachronistic after almost two decades of anti-discrimination legislation in Australia. The Federal discrimination legislation in the areas of race, sex and disability contain fewer exceptions and reflect the growing acceptance of the need for anti-discrimination legislation with broad application.

6.4 While general exceptions will be justified in some circumstances, there are other situations where it would be more appropriate to deal with the matter by way of a specific exception. Some submissions supported the lifting of all specific and general exceptions to the ADA, with the President of the Anti-Discrimination Board ("ADB") retaining the power to grant exemptions on individual application. The ADB itself preferred to retain some exceptions, but to limit the scope of operation of the existing provisions.

#### General Exceptions

6.5 Apart from the exceptions provided in relation to specific grounds, some of which apply to a number of grounds, the ADA provides for general exceptions in Part 6. As presently defined, the general exceptions cover:

acts done under statutory authority;<sup>3</sup>

the conferral of charitable benefits;<sup>4</sup>

religious bodies;<sup>5</sup>

voluntary bodies;<sup>6</sup> and

establishments providing housing accommodation for aged persons.<sup>7</sup>

Each of these is dealt with in this part of the chapter.

### **Statutory authority**

#### ***Definition***

6.6 Section 54 of the ADA provides an exception in the following terms:

s 54(1) Nothing in this Act renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of –

- (a) any other Act, whether passed before or after this Act;
- (b) any regulation, ordinance, by-law, rule or other instrument made under any such other Act;
- (c) an order of the Tribunal;
- (d) an order of any court, not including an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment.

6.7 Thus the general exception for acts done under statutory authority importantly excepts anything that is “necessary” to be done in order to comply with other legislation and with orders of the previous Equal Opportunity Tribunal (“EOT”) which is now the Equal Opportunity Division (“EO Division”) of the Administrative Decisions Tribunal (“ADT”) and the courts.<sup>8</sup>

#### ***Legislative history***

6.8 An exception in similar form was included in the ADA from the first stages of drafting. However, it is clear from the parliamentary debates on the *Anti-Discrimination Bill 1976* (NSW) that it was only meant to be a temporary measure pending a review of other legislation to identify discriminatory provisions. The then Premier, the Hon Neville Wran QC, in his Second Reading Speech, said:

Many of the statutes in their present form are discriminatory. It is, therefore, proposed in clause 130 [see s 119(d) of the ADA] that the Anti-Discrimination Board be established to undertake a review of the legislation of the State, and of governmental policies and practices, to identify discriminatory provisions, and to report these matters to the Government. Clause 65 [see s 54 of the ADA] provides that in the meantime this Act shall not apply to provisions of other Acts, or to instruments made or approved under any other Act.<sup>9</sup>

6.9 Accordingly, in 1978, the ADB conducted an analysis of legislation and government policies and practices which were inconsistent with the ADA. A three-part report in five volumes was produced which identified numerous potential conflicts.<sup>10</sup> Although it was intended to be a temporary measure and despite the reviews and submissions done by the ADB, almost 20 years later the provision still exists, albeit in an amended form.

#### ***Scope of the exception***

6.10 In its original form, the exception provided that “nothing in this Act affects anything done by a person *in compliance with ... any other Act*”. This wording was clearly too wide and could virtually negate the purported operation of the ADA altogether, since it could be argued that all public activity is, to some extent, legislatively regulated.<sup>11</sup> This problem was exemplified in *Director General of Education v Breen*<sup>12</sup> where it was held that discretionary action done in compliance with an instrument was sufficient to bring an impugned activity within the section. Consequently, following repeated

submissions by the ADB, the words “if it was necessary for the person to do it” were inserted in 1982 in place of the phrase “in compliance with”.<sup>13</sup> The EOT has since applied the exception more narrowly,<sup>14</sup> and has held that the mere exercise of a discretion<sup>15</sup> or policy<sup>16</sup> is no longer protected. Although it is now limited to acts that are necessary, rather than merely convenient or within the operation of a statutory discretion, the exception still has considerable breadth. That fact is partly recognised by the provision that the s 54 exception itself does not apply to compulsory retirement under the ADA.<sup>17</sup>

### **Other jurisdictions**

6.11 Other jurisdictions in Australia and overseas adopt different approaches to acts done in compliance with other statutes. Some overseas and Australian anti-discrimination legislation, including the *Racial Discrimination Act 1975* (Cth) (“RDA”), provide no equivalent exception.<sup>18</sup>

6.12 The *Sex Discrimination Act 1984* (Cth) (“SDA”), *Disability Discrimination Act 1992* (Cth) (“DDA”) and the *Equal Opportunity Act 1984* (WA) (“EOA (WA)”), on the other hand, have partial exceptions, insofar as legislation which is specifically stipulated in the Act or in regulations is exempt.<sup>19</sup> The DDA allowed a three year sunset period that has now lapsed. All legislation is now subject to the DDA without exception unless it is prescribed under s 47(2).

6.13 The Queensland *Anti-Discrimination Act 1991* (“ADA (Qld)”) exempts acts done in compliance with provisions of other Acts, awards or individual agreements which were in existence when the section commenced, court orders and orders of the Anti-Discrimination Tribunal.<sup>20</sup>

6.14 Sections 69 and 70 of the *Equal Opportunity Act 1995* (Vic) (“EOA (Vic)”) exempt any act done by a person if it was necessary in order to comply with any statute, or an instrument made by or approved under any other statute, or an order of the Equal Opportunity Board or any other court or tribunal.<sup>21</sup> However, the legislation provides that the Minister must undertake a review of all Victorian legislation to identify discriminatory provisions in that State’s legislation.<sup>22</sup>

### **Submissions**

6.15 Many submissions expressed concern at the breadth of the s 54 exception and the status which it accords anti-discrimination legislation in the overall framework of legislative regulation.<sup>23</sup> The generality of this exemption was said to undermine the integrity of the legislation:

Not only has anti-discrimination legislation not been given an entrenched status, as is the case with constitutional guarantees, but the usual principle of statutory construction in which the most recent enactment overrules the former has been waived in some legislation.<sup>24</sup>

6.16 The submission of the National Pay Equity Coalition argued that:

All other legislation still prevails over the Anti-Discrimination Act – this should not continue. There should now be a final review of what can be addressed and a sunset provision put in place to ensure that discriminatory legislation becomes invalid, to the extent that it is discriminatory, by a particular date.<sup>25</sup>

This view was representative of that expressed in a number of submissions received by the Commission in response to Discussion Paper 30 (“DP 30”).

6.17 The effect of s 54(1) is that the usual tenets of statutory interpretation are overturned:

the ADA does not impliedly repeal the earlier Acts;

regulations can override the ADA; and

other general laws can override the specific provisions of the ADA.

6.18 Referring to the then equivalent exception in the SDA, the Sex Discrimination Commissioner noted in 1992 that:

Section 40 throws into sharp relief the debate about whether an Act protecting human rights legislation is an Act that can be overridden by another Act of Parliament because of the supremacy of Parliament, or whether it is different in that it sets a standard with which other legislation should comply.<sup>26</sup>

6.19 Since its enactment in 1984, s 40 of the SDA has been amended on several occasions.<sup>27</sup> In the original version of the section, the anti-discriminatory provisions did not apply for two years after the commencement of the SDA to anything done by a person in direct compliance with *any* other Act in force at the commencement of the SDA. Five Acts, however, were made exempt from this time limit, and thus anything done in compliance with these Acts would be exempt from the prohibitions contained in the SDA on an ongoing basis. The current version of the section has expanded the number of Acts contained within the ongoing statutory exception, but they all involve taxation or welfare payments.<sup>28</sup>

6.20 In 1991 a new s 40A was added which provides for mandatory Ministerial review of the operation of the exceptions contained in subsections 40(2) and (3) and for recommendations as to whether the subsections should be repealed.<sup>29</sup>

6.21 The ADB has submitted that the ADA should set a standard with which other legislation should comply and has, on several occasions, recommended that all State legislation should be consistent with the ADA unless an exemption can be justified on policy grounds.<sup>30</sup> To add to its 1978 review, the ADB has also identified many areas of life where gay and lesbian people are discriminated against under various Acts. This review was included in its submission to the Commission.<sup>31</sup>

6.22 As the Victorian Law Reform Commission and the Victorian Scrutiny of Acts and Regulations Committee have argued, a law should only be exempt if a clear decision has been taken that it should be exempt. This view was also supported by many submissions, including those from the ADB and the Law Society.<sup>32</sup>

### ***Operation of the s 54 exception***

6.23 ***Impact of s 54(1)(a) and (b).*** The equivalent provision in the EOC (Vic) was considered by the High Court in *Waters v Public Transport Corporation*.<sup>33</sup> The Court adopted a narrow interpretation providing no protection of the exercise of discretionary powers by way of ministerial directives which did not constitute formal instruments made under an Act. As noted by Chief Justice Mason and Justice Gaudron:

Anything that it is necessary to do in order to comply with an exercise of statutory power can, as a matter of language, be said to be necessary “in order to comply with” the legislative “provision” conferring (and expressly and impliedly requiring obedience to) the statutory power. On the other hand, and depending upon context, a reference to what is necessary to comply with “a provision of ... any other Act” can be construed as referring only to what it is necessary to do in order to comply with a specific requirement directly imposed by the relevant provision as distinct from a requirement imposed by some person in the exercise of some power conferred by the provision ... If the relevant words fell to be construed in isolation, we would favour the wide construction of them. When par (e)(ii) is construed in its context in the Act, however, it appears to us that the narrow construction is the preferable one.<sup>34</sup>

6.24 There have been a number of cases in New South Wales in which s 54 has been judicially considered. A similar approach to that adopted by the High Court was applied in relation to the ADA in *Clinch v Commissioner of Police*<sup>35</sup> where it was found that the exercise of a discretion in legislation was not sufficient to bring automatically into operation the statutory exemption. An actual requirement

must be contained in the legislation. This was followed in *Burrows v NSW Commissioner of Police*<sup>36</sup> where the EOT stated that the defence was available only if it was necessary for the respondent to comply with a specific requirement directly imposed by the relevant legislation as distinct from a requirement imposed by a person in the exercise of power conferred by the provision.

6.25 The cases suggest that s 54 operates principally in the area of employment on the ground of disability, where employers have sought to rely upon s 54 on the basis that their action was necessary in order to comply with the provisions of the *Occupational Health and Safety Act 1983* (NSW) ("OH&SA"), in particular s 15 and 16. For example, in *Kitt v Tourism Commission*,<sup>37</sup> the complainant suffered from epilepsy. He argued that his employer, the Tourism Commission, discriminated against him because of his physical impairment by refusing to give him a permanent job as a guide in the Jenolan Caves. The employer argued that if the complainant suffered an epileptic seizure at work, the safety of visitors and other employees would be endangered. The EOT looked at the likelihood of the complainant suffering from a seizure at work and the likely consequences if he did so and decided that in the circumstances of the case, there was no objective evidence that continuing to employ Mr Kitt would expose visitors to the caves to any safety risks.

6.26 In *Hawes v NSW Ambulance Service*,<sup>38</sup> the complainant was an ambulance officer whose employment was terminated on medical grounds after he suffered an epileptic seizure. The EOT found that the complainant was subject to an "unacceptably high risk of further seizures" and because of the nature of his work, the consequences could be severe not only for himself but also for fellow employees and the community at large. Accordingly, the EOT found that it was necessary for the Ambulance Service to discriminate in order to comply with the requirements of the OH&SA.

6.27 In *Burrows v Commissioner of Police*,<sup>39</sup> the complainant, a Transit Police Officer who suffered from insulin dependent diabetes, was denied a transfer to the New South Wales Police Service on the basis of his illness. The respondent contended that it was obliged not to employ a person with a congenital but foreseeable risk of suffering impaired cognitive function while engaged in dangerous activities. Rejecting this argument, the EOT stated:

such a strict interpretation of the consequences of the sections is not the intention of the legislation. Were such a narrow and restrictive interpretation given, then effectively any employee who was not physically perfect, working in the police force would effectively be covered... These sections impose only a general obligation on an employer and not a specific requirement which would authorise conduct which would otherwise be unlawful under the Act.<sup>40</sup>

6.28 However, complainants who have failed medical tests required by legislation have not always been successful. For example, in *Kitt v Tourism Commission*,<sup>41</sup> Justice Mathews found that a medical examination authorised by s 66 of the *Public Service Act 1979* (NSW) constituted a complete defence under s 54 of the ADA. Those examples, however, do not give rise to any requirement for a general exception: the specific elements should properly be dealt with in relation to disability discrimination and employment.<sup>42</sup>

6.29 Finally, broad statutory exemptions have been relied upon in relation to protective legislation. Insofar as age discrimination provisions may now impact on legislation designed to protect children, this matter will be dealt with below.<sup>43</sup> The other major area of protective legislation has been in relation to women in employment. For example, there is currently a provision in force in New South Wales which prohibits the employment of women (and males under 18 years of age) in certain areas of the lead processing industry.<sup>44</sup> There has for decades been legislation which "protected" women from engagement in jobs which involved lifting more than 16 kg.<sup>45</sup>

6.30 The history of such protective provisions suggests that they are frequently the product of social circumstances which may reflect discriminatory practices or policies. If such laws are to have continued operation, they should be the subject of careful justification in relation to the circumstances in which they purport to operate. Consideration of such justifications is properly the function of the body responsible for considering an exemption under s 126. A case study of the benefits of adopting this approach may



be found in relation to the employment of women in the lead industry in South Australia. An exemption was granted by the EOT for a three year period on the basis that the company required time to develop its programs and facilities for women at its plant. In particular, the effect of the exemption was to identify areas where there was a significant risk of lead contamination and adopt programs designed to restrict or minimise the risks and, in particular, identify job classifications which were not subject to significant risk.<sup>46</sup> The matter was further considered at the expiration of the three year period of the first exemption. A further application was made on a more restricted basis. In considering the application, the EOT noted that:

the applicant is to be congratulated on its efforts to make its plant a safer workplace for all its workers and, in particular, a safer and more accessible workplace for potential and existing women employees.<sup>47</sup>

6.31 However, in granting the exemption, the EOT made the following comments:

The granting of the various exemptions is not to be taken as an acceptance of the status quo but rather as an opportunity for the continuation of the well-ordered and safe introduction of women into this particular industry. We are concerned that, unless the relevant parties are diligent in their efforts, progress towards the employment of women in the industry may continue to be slow.<sup>48</sup>

6.32 The experience provides, however, an instructive example as to an appropriate mechanism for ensuring that exceptions and exemptions from the operation of anti-discrimination legislation do not continue for longer than is necessary to achieve their legitimate purposes.

6.33 **Impact of s 54(1)(c) and (d).** In relation to s 54(1)(c) and (d), neither the cases nor the submissions indicate a need to preserve them. There is no equivalent provision in any of the Commonwealth legislation and, in other Australian jurisdictions, only the EOA (Vic) has a similar provision.<sup>49</sup>

### **Conclusion**

6.34 In relation to Acts, delegated legislation and statutory instruments, there appears to be no justification for a universal overriding exception. Accordingly, s 54, in its present form, should be repealed. As a matter of principle, the law should define with specificity its area of operation and whether its application is universal or otherwise. The key policy considerations were clearly enunciated by Justice McHugh in *Waters*. Discussing the power given to the Minister under s 31(1) of the *Transport Act 1983* (Vic), his Honour stated:

The power of the Minister to give directions under s 31(1) is subject to the operation of the general law. By the general law, I mean the body of common law and equitable rules which are supplemented or amended by statutes and regulations and other instruments having the force of law. Section 31(1) therefore, would not authorise a direction that the corporation commit a crime or a tort or breach a contract or by-law. Nor would it authorise a direction that the corporation commit a breach of a statute such as the Act. These propositions, though not directly expressed in the Transport Act are self-evident. They are self-evident because, under a Government of laws and not of men and women it is axiomatic that, in the absence of express words or necessary intendment, Parliament does not intend the recipient of the power to authorise a Minister, statutory body or Government official to break the general law of the land.<sup>50</sup>

6.35 In relation to subsequent legislation, there will always be a question as to whether a specific provision was intended to impliedly repeal a prohibition in the ADA, in the absence of any direct recognition by Parliament of an inconsistency. So far as possible, steps should be taken to ensure that subsequent legislation does not unintentionally weaken the protections given by the Act to basic human rights. The Commission recommends that steps should be taken to guard against this possibility. The

repeal of s 54(1) would not, of course, prevent either express or implied repeal by later legislation: an ordinary Act of Parliament cannot entrench itself.

6.36 The ADB has proposed that agencies responsible for various Acts of Parliament should be given a period of time, between six months and two years, in which to make a submission to a parliamentary committee as to why any Act or regulation which breaches the ADA should be preserved. The committee would then determine on the basis of arguments put by the agency concerned and the ADB and other concerned organisations, whether the discriminatory provision should remain or be repealed or amended. Any provisions of Acts or regulations which the committee decides should be exempt from the ADA could then be contained in a schedule to the ADA or, alternatively, a s 126 exemption be granted in respect of those provisions.<sup>51</sup>

6.37 The Commission has given careful consideration to the possibility that unintended consequences may flow from the proposed repeal of s 54. However, there are grounds for thinking that this would be unlikely. First, the legislation has now been in force for almost two decades and there are only a handful of cases in which s 54 has been relied upon successfully.<sup>52</sup> Secondly, the Act has been amended to remove the exception in relation to awards and industrial agreements<sup>53</sup> and current industrial legislation seeks to ensure that all such instruments comply with the principles of the ADA.<sup>54</sup>

6.38 Thirdly, the exception in relation to an order of a court or tribunal seems to be unnecessary. Again, so far as the Commission is aware, it has never been relied on in the EOT, is not available in all jurisdictions and has never, to the Commission's knowledge, given rise to any serious issue. It is difficult in principle to see that any real issue could arise where conduct was undertaken in order to comply with a court order: the necessary preconditions for a contravention of the ADA would simply not be satisfied.

6.39 Finally, administrative arrangements can be made to ensure that offending provisions, if any, are identified after publication of this Report.

6.40 **Operation of s 54(3).** This provision is curiously worded:

(3) Except as provided by this section, this Act has effect notwithstanding anything contained in:

- (a) the Co-operation Act 1923;
- (b) the Financial Institutions (New South Wales) Act 1992;
- (c) the Friendly Societies Act 1989;
- (c1) the Co-operatives Act 1992;
- (d) the Gaming and Betting Act 1912;
- (e) (Omitted by No 9 of 1997 Sch 1(20));
- (f) the Registered Clubs Act 1976; or

any instrument of whatever nature made or approved thereunder.

6.41 Were it not for the opening words, it might be inferred that the ADA was intended to take effect despite anything contained in the listed legislation, thus providing an exception to s 54(1). However, the opening words appear to contradict that interpretation, but then leave the subsection with no work to do. This conundrum need not be resolved: if subsection (1) is repealed, subsection (3) should be repealed also.

6.42 **Impact of proposed repeal of s 54 on particular grounds under the ADA.** As mentioned above, a number of reviews of State legislation have been undertaken by the ADB to identify legislative

provisions which are inconsistent with the ADA. The 1978 review covered race, sex and marital status discrimination. In 1994, a number of Acts which appear to discriminate against persons in a homosexual relationship were identified. Also, as part of the moratorium provided under the DDA, the Attorney General's Department conducted a review of New South Wales legislation which was inconsistent with the DDA. Reviews have not been undertaken in respect of the new grounds of age and transgender status discrimination, but it is proposed below that an equivalent exception apply in relation to age. The Commission does not believe that any separate issues arise in relation to transgender status, as that ground is currently defined.

6.43 In relation to sex discrimination, the exception is used most frequently to protect discriminatory provisions contained in laws relating to occupational health and safety and insurance and superannuation. The Commission believes that legislation should generally be drafted with principles of gender equality in mind, and only in special circumstances should legislation treat one sex differently from the other. There are examples in the area of health and safety laws which seek to use sex as an excuse for poor workplace practices and show how stereotyping and discriminatory legislation can be detrimental, not only to those discriminated against, but also to other people.

6.44 Exceptions may, however, need to be made in some circumstances, particularly in relation to disability discrimination. For example, it has been suggested that forms of HIV/AIDS-related discrimination are made necessary by the operation of other Acts, such as occupational health and safety laws.<sup>55</sup> While such discrimination should not be arbitrary, there may be situations, particularly in certain kinds of employment, where being HIV positive may expose others to risks. These circumstances justify a public health exception and are discussed further below.<sup>56</sup>

6.45 The repeal of s 54 will have only a limited impact on the discriminatory treatment of persons in a gay or lesbian relationship whilst such relationships are not recognised at law in the same way as heterosexual relationships. If, however, the Commission's recommendation to extend the definition of "marital status" to cover homosexual relationships is approved, the repeal of s 54 may have a potential impact in a variety of areas. Although there may be some areas where exemptions on this ground can be justified, it is important that these areas should be dealt with on an individual basis, if not already covered by a specific exception in the ADA, rather than by a general exception as is currently the case. The same principle should apply in relation to other grounds under the ADA.

6.46 Because the effect of the proposed repeal of the universal exception could have unintended consequences, its operation should be delayed for 12 months. The intention is not that further amendments be made, but that, if considered necessary, exemptions be granted under s 126 (as to which see below) in relation to specific activity.

#### **Recommendation 43**

**Repeal s 54 (general exception for acts done under statutory authority) with effect from 12 months after the commencement of the new Act.**

Draft Anti-Discrimination Bill 1999: cl 63

#### **Recommendation 44**

**All new legislation should be scrutinised to ensure compliance with the ADA.**

## **Charitable benefits**

### **Definition**

6.47 Section 55 of the ADA is in the following terms:

(1) Nothing in this Act affects –

- (a) a provision of a deed, will or other instrument, whether made before or after the day appointed and notified under section 2(2), that confers charitable benefits or enables charitable benefits to be conferred on persons of a class identified by reference to any one or more of the grounds of discrimination referred to in this Act; or
- (b) an act which is done in order to give effect to such a provision.

(2) In this section “charitable benefits” means benefits for purposes that are exclusively charitable according to the law in force in any part of Australia.

6.48 This section was included in the ADA from the outset and has never been amended. The example given in the Second Reading Speech to explain the reason for the exception was that “a will which set up a trust for the Aboriginal children of New South Wales ... shall not be struck down by this Act”.<sup>57</sup>

### **Other jurisdictions**

6.49 The RDA,<sup>58</sup> SDA<sup>59</sup> and DDA<sup>60</sup> provide exceptions for charitable benefits, which mirror the ADA provision. All States<sup>61</sup> and the Northern Territory<sup>62</sup> provide an exception for charitable benefits in similar terms.

### **Submissions**

6.50 The ADB submitted that this provision has not caused any difficulties and supported the retention of s 55 on the basis that individuals should have the right to leave their property or bestow a gift on whomever they see fit.<sup>63</sup> Other submissions suggested the repeal of this exception.<sup>64</sup> It has been suggested that this exception is unnecessary because it is unlikely that a deed or will which establishes a charitable trust will not have a beneficial public purpose. A trust which furthered a racist, sexist or other such purpose is unlikely to be charitable or lawful.

### **Discussion**

6.51 Section 55 is conceptually inappropriate. It refers to provisions in instruments and activities which occur to give effect to a deed, will or other instrument: this is not in itself an area of proscribed conduct. Similarly, it envisages the conferral of “charitable benefits”, a phrase which is defined as “benefits for purposes that are exclusively charitable”. Again, the criterion does not mesh readily with the conceptual framework of the ADA.

6.52 However, the exemption is important for two reasons. First, it seeks to ensure that the scope of the legislation does not extend into the private sphere; secondly, the exemption provided is of greater relevance in the light of the recommendation in Chapter Four that the ADA be extended to cover disposal of land. However, in its present form, the exemption appears to be both too wide and too narrow.

6.53 Further, it is not clear what relevant consequences the provision could have. For example, a body which provides services which are beneficial to a disadvantaged group in the community will not contravene the ADA. Accordingly, a gift to such a body for its purposes, which may well be charitable, would not contravene the ADA either. On the other hand, if there were charitable purposes which were otherwise discriminatory, and therefore unlawful under the ADA, it is not clear why a person should be

allowed to make a bequest to a body for a purpose which would be unlawful and could not therefore be carried out by the recipient. It is difficult to understand what policy would support the right of the body to carry out that purpose in so far as it received a bequest under will or other instrument, but not otherwise. On the other hand, since any purpose could be carried out pursuant to an instrument, if there are charitable purposes which contravene the ADA, this provision could allow the ADA to be avoided.

6.54 Looked at from a different perspective, bequests may be made for otherwise charitable purposes, but subject to an unlawful condition. Sophisticated rules have been developed to deal with these circumstances. There is no reason why those rules should not apply to conduct rendered unlawful by the ADA. For example, a bequest may be made to a Roman Catholic school to employ a gardener on condition that the gardener is a practising Catholic. If, in accordance with the provisions of the ADA, the school is not entitled to require a particular religious conviction in respect of the employment of gardeners, it should not be able to avoid that consequence by obtaining the necessary funds pursuant to an "instrument". It does not follow that the bequest will fail, but merely that the unlawful element of the condition will be severed. This is the appropriate result.

6.55 Accordingly, the Commission is not satisfied that s 55 in its present form serves any useful purpose, but to the contrary, considers that, if it has any effect, it is subversive of the protection of fundamental human rights which is the primary purpose of the ADA.

6.56 On the one hand, the legitimate scope of the provision is to preclude a challenge to a will which leaves property to a charity or for charitable purposes, on the basis that the selection of the charitable purposes involved a distinction based on a prohibited ground. For example, it should not be unlawful for an individual to leave property to benefit one ethnic group, rather than another, so long as the means of providing the benefit is otherwise lawful. A school which provided educational services solely for the benefit of Aboriginal children or for blind children would not, by excluding other children, be acting unlawfully because the service provision would almost certainly constitute a special measure. Accordingly, a bequest for such a purpose should also be permitted.

6.57 On the other hand, there is no particular reason to limit the exemption to charitable purposes: the exemption should extend to any purpose which does not contravene the ADA. The concept of charitable purpose is only indirectly relevant and should be abandoned.

6.58 Further, the provision of a benefit by way of a gift under a will should be excepted more generally. The devolution of property by will is generally a matter which operates in the private sphere and not the public sphere. A parent should be entitled to leave property by will to a daughter to the exclusion of a son, without fear of contravening the ADA. (Such a disposal of property may be challengeable under the *Family Provisions Act 1982*, but on entirely separate grounds). The purpose of the prohibition on discrimination in relation to disposal of land is intended to cover disposal by way of sale, which is an activity in the public sphere of life. Accordingly, a sale of land by trustees under a will should be covered by the ADA, but not a transfer pursuant to a specific device.

6.59 This conclusion leads to a further question, namely, whether gifts provided otherwise than pursuant to a will should be covered by the ADA. Although the problem is likely to be raised in relation to the disposal of land, it could theoretically have arisen in the past in relation to the provision of goods. For example, if a parent gave a motor vehicle to a daughter, but not to a son, the gift would arguably have been a provision of goods within the prohibition contained in the current ADA. For similar reasons, the gift should not be caught by the prohibitions on discrimination. While s 55 presently exempts an inter vivos gift where it is made by instrument for a charitable purpose, it does not cover the provision of cash or other forms of gift. Again, there is no reason to limit the restriction in this way.

#### **Recommendation 45**

**Replace s 55 (general exception for charities) with an exception covering the provision of goods or disposal of property by inter vivos gift or by will to a specific recipient or recipients.**

## Religious bodies

### Definition

6.60 Section 56 of the ADA provides an exception in the following terms:

Nothing in this Act affects –

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- (c) the appointment of any other person in any capacity by a body established to propagate religion; or
- (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

6.61 This exception needs to be considered in the light of the Commission's recommendation to add religion as a ground of discrimination in the ADA.

6.62 In 1994 paragraph (d) was amended to cover one-off acts which conform to religious doctrine. Previously, practices in accordance with religious doctrine were covered, but it was not clear whether a single act was covered.

### Other jurisdictions

6.63 Victoria, Queensland, Western Australia, the Australian Capital Territory and the Northern Territory all prohibit discrimination on the ground of religious belief or activity and provide a general exception in relation to religious bodies.<sup>65</sup> The exception in each of these Acts is couched in similar terms to the ADA exception, except that it covers selection and appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice. To this extent it appears to be more limited than the corresponding provision in the ADA, which excepts the appointment of a person "in any capacity".

6.64 The *Equal Opportunity Act 1984* (SA) ("EOA (SA)") excepts religious bodies but only in relation to the grounds of sex, sexuality, marital status or pregnancy.<sup>66</sup> The provision is drafted along the lines of the ADA exception, but does not extend to the appointment of any other person apart from priests and ministers.

### Submissions

6.65 The Commission received many submissions from religious organisations which stated that anti-discrimination law has no place in regulating the appointment of religious personnel.<sup>67</sup> The United Nations *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* specifically affirms the right to appoint religious personnel as one of the freedoms of belief covered by the Charter.<sup>68</sup>

6.66 However, as the ADB submitted, that principle is narrower than s 56, which covers all appointments, whether or not the appointment involves the performance of functions in relation to religious observance or practice. Most other jurisdictions cover selection and appointment, but limit the exception to the performance of functions in relation to a religious observance or practice.

6.67 The ADB submitted that:

This exception is excessively broad. A “body established to propagate religion” is not defined in the Act. It is conceivable that a body of people who practised a religion with doctrines that support the superiority of particular races or the sexual harassment of women would have practices based on these doctrines excepted from the Act. The Board does not accept that this was the intent of the legislature when it included this section... The Board submits that the exception should be narrowed so that harassment on any ground under the Act will not be excepted, even if the harassment does conform to the doctrines of a body established to propagate religion or would be necessary to avoid offending the religious susceptibilities of people of that religion.<sup>69</sup>

6.68 Furthermore, the submission of Justice Michael Kirby argued that:

It is obviously wholly acceptable to most Australians that churches and religious communities should be entitled to discriminate on religious grounds where religion is relevant, eg in the choice of their personnel, the establishment of colleges and the provision of instruction to their members. But it is equally obvious that discrimination on religious grounds should not be tolerated where the conduct impugned is irrelevant to the practice or propagation of a religion ... it scarcely seems justifiable to confine staff in the college kitchen to members of the religion, unless they are obliged to observe religious rituals in the preparation of food.<sup>70</sup>

6.69 However, the submission of the Wesley Mission argued that “people providing even menial tasks come into contact with the general public” and it therefore may be desirable that such people are holders of the particular faith concerned.<sup>71</sup>

### **Conclusion**

6.70 The Commission is satisfied that s 56 (a) and (b) should be retained, but that the terminology of these sections should be appropriate to the religious personnel of other faiths and not focus on the Christian faith alone. If the recommendation to include religion as a ground of discrimination is accepted, the selection and appointment of non-religious personnel can be dealt with by way of a genuine occupational qualification exception. In this way, only those positions properly requiring a commitment to the tenets of the particular religion concerned will be covered by the exception.

6.71 While this section guarantees the right of religious groups to practise their beliefs, and to that extent should be retained, this protection should not be something which religious groups are allowed to hide behind in cases where harassment or vilification of a particular group occurs, and it should be narrowed to reflect this principle. Religion should not be able to be used as an excuse for unlawful conduct. In the words of Chief Justice Mason and Justice Brennan of the High Court:

The freedom to act in accordance with one’s religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them. Religious conviction is not a solvent of legal obligation.<sup>72</sup>

6.72 In relation to paragraph (c) the exception should be narrowed, so that it only covers positions requiring a commitment to the tenets of the particular religion concerned. In relation to paragraph (d) the Commission concludes that, consistent with the positive protection to be provided in relation to religious beliefs and practices in the areas of employment and education, this paragraph is no longer necessary.

### **Recommendation 46**

**Amend s 56 (general exception for religious bodies) to:**

**refer to the religious personnel of all faiths;**

**provide that the exception only covers positions requiring a commitment to the tenets of the particular religion concerned; and**

**repeal s 56(d).**

#### Draft Anti-Discrimination Bill 1999: cl 66

### **Voluntary bodies**

#### **Definition**

6.73 Section 57 provides a general exception for certain bodies in terms of admission to membership and the benefits, facilities or services they offer to members. There is no exception in the area of employment, nor as to the provision of goods and services to non-members.

6.74 To come within the definition of “voluntary body” in s 57(1), the activities of the body must be carried on otherwise than for profit and the body must not be established by an Act. Registered clubs, credit unions, building societies and financial institutions which are registered under the *Co-operation Act 1923* (NSW) or the *Friendly Societies Act 1989* (NSW) are specifically excluded.<sup>73</sup>

#### **Legislative history**

6.75 When originally enacted, the ADA contained a general exception for both voluntary bodies and registered clubs in relation to the admission of members and the benefits, facilities and services available to members. At the time, there was limited debate in Parliament over whether these bodies should be made subject to the ADA. But following many inquiries and complaints to the ADB about discrimination by clubs and associations, and despite industry opposition, the exception for registered clubs was removed in 1981.

6.76 The exception in relation to voluntary bodies was retained for a number of reasons which were summarised by the ADB in 1981 as:

principally because they have no legal status and there are legal difficulties associated with instituting and enforcing any form of legal action against an association or its members. Also, many unincorporated associations are small, local organisations and their activities are such as not to be the concern of anti-discrimination legislation, which is quite properly principally concerned with the major areas of public life.<sup>74</sup>

6.77 Unlike registered clubs, which were considered to be in the mainstream of community life,<sup>75</sup> voluntary bodies were considered to fall within the private arena, and thus not within an area in which it was appropriate for the law to apply. To attempt to regulate such bodies may have been considered an encroachment on a person’s right to associate freely for a lawful purpose. Another reason for retaining the exception for voluntary bodies was to exclude those non-profit associations, such as Lions and Rotary, which are perceived as worthy, concerned and altruistic organisations.<sup>76</sup> Casting the exemption broadly in order to spare these organisations, however, meant that other non-profit bodies, such as sporting clubs, also benefit from the exception from the ADA.<sup>77</sup>

6.78 It should be noted that the exception covers bodies which may be incorporated *under* an Act so long as they are not “established by” an Act.

#### **Other jurisdictions**

6.79 **Federal laws.** The SDA provides a broad exception for non-profit associations, whether incorporated or not, in scope and terms similar to, though not identical with, s 57 of the ADA.<sup>78</sup> Such associations remain subject to the prohibitions in relation to employment and the provision of goods and



services. By contrast, there is no exception for voluntary bodies in the RDA<sup>79</sup> or in the DDA.<sup>80</sup> While the RDA does not contain a specific area of operation pertaining to clubs and associations as such, it is framed broadly to prohibit any form of racial discrimination in public life. The DDA, on the other hand, specifically prohibits discrimination in membership and access to benefits by clubs and incorporated associations.<sup>81</sup> It defines a club as:

an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association.<sup>82</sup>

6.80 Both the RDA and DDA provide much greater coverage of clubs and associations than the ADA. For example, non-profit associations which are incorporated are automatically covered by the DDA under s 27. Even unincorporated associations which fit within the definition of a club, such as a poetry reading club, would be subject to disability discrimination laws.

6.81 **State and Territory laws.** Only Western Australia and the Australian Capital Territory provide an exception for voluntary bodies.<sup>83</sup> No other State law provides a general exception for voluntary bodies as such. However, most non-profit bodies are excluded from the operation of the relevant statutes because of the defined areas in which the various Acts operate. For example, the EOA (Vic) makes it unlawful for a club to discriminate in the admission to membership and access to benefits by members, but it excepts private clubs. These are any social, recreational, sporting and community service clubs or organisations that do not occupy Crown land or receive public funding. Similarly, Queensland anti-discrimination law is confined to profit-making clubs thus impliedly excepting all non-profit bodies.

6.82 The Northern Territory law covers only those clubs, whether incorporated or not, of 30 persons or more which are established for a lawful purpose, provide and maintain facilities from their own funds and sell or supply liquor for consumption on their premises. The EOA (SA) prohibits discrimination by associations but does not define the term. It specifically excepts non-profit associations from the provisions prohibiting sex and marital status discrimination in accommodation, presumably to protect accommodation services which are established to meet the special needs of women, such as women's refuges.<sup>84</sup>

### **Submissions**

6.83 The majority of submissions received by the Commission in response to DP 30 have questioned the continued need for this exception.<sup>85</sup> The Ministry for the Advancement and Status of Women submitted:

The exception for ... voluntary organisations on the basis that they are part of the private sphere does not stand close scrutiny since they often receive substantial government funds or financial benefits such as exemptions from full taxes, charges or rates and may themselves generate profits.

As with other Commonwealth funded bodies who provide a service to the community, there is an expectation that the service will be done in a manner which is consistent with community standards of practice.<sup>86</sup>

6.84 Similarly, the National Pay Equity Coalition argued that because many voluntary bodies are publicly funded, they should, as a matter of public policy, comply with the generally accepted standards:

They are now required to comply with the Affirmative Action (Equal Opportunity for Women) Act. Often, these bodies are insufficiently careful about their responsibilities as employers and there is no basis for their employees having a lesser level of social and human rights than employees of other organisations.<sup>87</sup>

6.85 The ADB argued that it is unclear whether the exception, which applies to bodies which are “not established by an Act”, covers bodies which are *registered* under an Act such as an association incorporated under the *Associations Incorporation Act 1984* (NSW):

The fact that these bodies are not specifically created by an Act, but are registered under particular Acts makes it confusing. Because of the wording “not established by an Act” in section 57(1), it is not clear whether an organisation will be outside the definition of voluntary if it is registered pursuant to an Act or only if it is specifically constituted by an Act.<sup>88</sup>

6.86 The ADB also claims that the exception is confusing in that it uses language which is inconsistent with other parts of the ADA. For instance, it uses the phrase “benefits, facilities or services” which does not correspond with the area of goods and services under the ADA. Furthermore, the ADB argues that an exception for voluntary bodies is redundant as membership of a body is not an area which is covered by the ADA.<sup>89</sup>

### **Conclusion**

6.87 In the light of these submissions, it was clear that the liability of voluntary bodies under the ADA requires reassessment. A threshold issue is whether and to what extent these bodies should be allowed to discriminate in deciding who can join, the kind of membership they can have, and the terms and conditions which apply to the benefits, services or facilities it provides.

6.88 The Commission has considered this issue in detail in Chapter Four, where it concluded that the area in which the law operates, presently confined to registered clubs, is too narrow and needs to be redefined.<sup>90</sup> The Commission has recommended that the ADA specifically prohibit discrimination in relation to membership and access to benefits by all incorporated associations whose membership is open to the public or to a section of the public.<sup>91</sup> Any club or association that does not fall within the redefined area would clearly not be liable under the ADA. The retention of an exception for voluntary bodies is therefore unnecessary and inappropriate. Accordingly, the Commission recommends its repeal.

### **Recommendation 47**

#### **Repeal s 57 (general exception for voluntary bodies).**

### **Aged persons’ accommodation**

#### **Definition**

6.89 Section 59 of the ADA provides an exception for:

any rule or practice of an establishment which provides housing accommodation for aged persons, whether by statute or otherwise, whereby admission is restricted to persons of a particular sex, marital status or race.

The exception, though classified under the general exceptions to the ADA, applies only to three grounds, namely sex, marital status and race.

#### **Legislative history**

6.90 This exception did not exist in the original Bill and was added to the ADA after much debate. It was argued that protection should be provided so that the atmosphere and living environment for aged persons would be safeguarded, and that aged people had a right to spend their final days in an environment where their backgrounds, beliefs and identity were not threatened.<sup>92</sup> The government had

envisaged that bodies wishing to discriminate in their rules, practices or admission criteria would apply for an exemption under s 126.

6.91 The exception as enacted in 1977 covered housing accommodation and ancillary services for aged persons and applied to any rule or practice of an institution which restricted admission to any class, type, sex, race or age of applicant and the provision of benefits, facilities or services to such persons. This section was criticised by the ADB in its reports on both age and religious discrimination, both of which recommended its repeal.<sup>93</sup> In its Report on age discrimination, the ADB stated that:

there could be no justification for rendering [aged] people even more powerless by denying them the protection of a law which is available to others.<sup>94</sup>

6.92 Section 59 was amended in 1994 in an attempt to address these concerns. The amended section still provides a blanket exception for “any rule or practice” of the establishment whereby admission to accommodation is restricted to persons on the grounds of race, sex and marital status. However, the exceptions for “class” and “age” were removed as was the exception for the provision of services in aged persons’ accommodation.

### ***Other jurisdictions***

6.93 Federal legislation has no specific corresponding provision, thereby rendering the current section inoperative.

6.94 The only other jurisdiction that provides an exception for housing accommodation for the aged is Western Australia.<sup>95</sup> It also covers applicants of any religious or political conviction. Persons with an impairment are specifically excluded and discrimination on the ground of age in the provision of benefits, facilities or services is not allowed.

### ***Conclusion***

6.95 The Commission accepts that the process of moving into accommodation for the aged can be traumatic and difficult, and that an environment where individuals are surrounded by persons of similar cultural and racial background can be helpful. War widows, people of various cultural or linguistic groups and some religious groups are examples of people who may be said to benefit from such protection. At the same time, the arbitrary exclusion of a person from accommodation because of a person’s race, sex or marital status should not be allowed. A distinction may need to be drawn between a facility open to the general public, which seeks to exclude individuals from one or more selected groups, and a facility which provides services to a particular group and wishes to exclude all others. The latter approach may be justifiable, whereas the former, in principle, is not. Measures other than a wide-ranging general exception are appropriate to achieve this end.<sup>96</sup>

6.96 Clearly, if the concept of housing specifically for the aged is to be retained, there must be an exception in relation to age as a condition of admission. The “special measures” exception should be available wherever necessary to accommodate the needs of particular groups.<sup>97</sup> Further, the original idea of permitting specific exemptions for aged person homes under s 126 remains. This would allow for a general non-discriminatory policy for aged housing, but still allow those who wish to cater for special groups to provide for the benefit of that group, whilst being accountable for and being required to justify the bases of exclusion or preference.

### **Recommendation 48**

**Repeal s 59 (general exception for establishments providing housing accommodation for aged persons).**

## SPECIAL MEASURES

6.97 There are provisions relating to “special measures” in most Australian and New Zealand equal opportunity legislation.<sup>98</sup> In all legislation, except the SDA, special measures are couched in the form of an exception to the provisions prohibiting discrimination. This is because of the tension created by the purpose of special measures with the concept of direct discrimination. On the one hand, the direct discrimination provisions based on formal equality would preclude the specified grounds of unlawful discrimination being used as bases for differential treatment. On the other hand, special measures aimed at achieving substantive equality provide for differential treatment on those very grounds. The resulting situation in most jurisdictions is that special measures are considered discriminatory, but exempt. This was considered an unsatisfactory situation by the Sex Discrimination Commissioner, as it has resulted in narrow interpretations by courts and restricted the achievement of substantive equality.<sup>99</sup> A similar query has been raised as to the appropriateness of treating the RDA’s special measures provision as an exception.<sup>100</sup>

6.98 *Gerhardy v Brown*<sup>101</sup> and *Proudfoot v ACT Board of Health*<sup>102</sup> are examples of cases where the special measures exceptions in the RDA and SDA were relied on. Although the decisions reached are accepted as correct, a number of commentators have criticised the conceptual basis of the High Court’s understanding of equality in *Gerhardy*<sup>103</sup> and the Human Rights and Equal Opportunity Commission’s (“HREOC”) reasoning in *Proudfoot*<sup>104</sup> on the basis that special measures should be considered not to involve discrimination, rather than being considered as an exception to a general prohibition of discrimination on the assumption that any distinction is discriminatory and therefore invalid.

6.99 The SDA has been amended to ensure that special measures are understood as non-discriminatory. The amendment recognises that measures which aim to achieve equality between a disadvantaged group and those who are not disadvantaged do not constitute discrimination, but rather are a crucial means of preventing and eliminating it.<sup>105</sup> The new provision has been relocated from the exemptions division of the SDA to the definitions division and is found in s 7D. This provision states that special measures taken to achieve substantive equality are not discriminatory and that such measures include, but are not limited to, measures taken to achieve equality of opportunity, equality of treatment and equality of outcomes. A special measure ceases to be protected by s 7D after substantive equality between the relevant groups has been achieved.

6.100 As already noted, the ADA is not limited to the protection of disadvantaged groups in the community. Nevertheless, the ADA should not constitute an impediment to attempts to achieve substantial equality for disadvantaged groups, and should allow for practices and programs which have that purpose. Accordingly, where special needs are identified, conduct which is designed to cater for such needs, which does so in a manner which is appropriate to the need identified and which is reasonably designed to achieve that effect, should not be unlawful. In keeping with the proposed definition of discrimination, such conduct will not constitute unlawful discrimination in relation to the class intended to benefit. However, because the provision of benefits to one class may be seen as excluding others from those benefits, the conduct may constitute adverse discrimination against the other class or classes. Accordingly, such provisions need to be expressly excluded from the prohibition.

6.101 The appropriateness of such an exception in relation to race seems undoubted. For example, the effect of the dispossession of Aboriginal people from their traditional lands is well documented and is now widely accepted in the Australian community. There is a question, however, whether the special needs of the Aboriginal people constitute an example of a more general principle, or should be treated as a special case.

6.102 The view of the Commission is that the disadvantage suffered by Aboriginal people, although perhaps the most dramatic instance of disadvantage based on race in our community, is not unique. At various times in the history of New South Wales, and for a variety of reasons, other racial groups have also suffered disadvantage and discrimination. The ethnic composition of our community, the social attitudes in relation to various ethnic groups and their perceived needs vary over time. The appropriateness of a general exception based on special needs can readily be justified, although the

conduct which may fall within its scope may vary. This flexibility seems desirable rather than inappropriate.

6.103 On the basis that such an exception is appropriate, should there be temporal limits in relation to its operation? For example, the “special measures” exception found in s 8 of the RDA picks up the terminology of the *Convention on the Elimination of Racial Discrimination* (“CERD”) on which the RDA is based. According to Article 1(4) of CERD, special measures should not:

lead to the maintenance of separate rights for different racial groups and ... shall not be continued after the objectives for which they were taken have been achieved.

6.104 Accordingly, the RDA appears to provide only for special measures of a temporary kind. By contrast, the particular needs of Aboriginal and Torres Strait Islander peoples and other ethnic groups may require permanent measures. A temporary measure may be appropriate where a particular group suffers educational disadvantage and special steps are needed to provide members of the group with a well grounded education. Such measures may well serve their purpose within a generation or less. By contrast, where a particular ethnic group requires a special measure to preserve its own particular cultural identity, the success of the measure may be reflected in a continuing need. The need may only disappear where the special cultural identity has disappeared; where, in other words, the measure has been ineffective.<sup>106</sup>

6.105 However, it is necessary to accept that some purposes may be satisfied within a time frame and it is appropriate to make express the limitation that a special measure is not authorised once its legitimate purpose is achieved.<sup>107</sup>

6.106 A further concern is how the purpose of a particular act should be identified. The SDA identifies the relevant purpose as that of “achieving substantive equality” between groups defined on a prohibited ground. Further, it is sufficient that the act is done “for that purpose as well as other purposes”.<sup>108</sup> These provisions have the great benefit of simplicity, but are potentially unsatisfactory, depending upon how they are interpreted by the Courts, for three reasons.

6.107 First, where the purpose of achieving substantive equality is not the sole purpose, any other purpose must be a non-discriminatory purpose. For example, an employer who puts into place a scheme for considering applications for a position which gives preference to Indigenous people should not be allowed, on one view, to adopt such an approach if one of his or her purposes is to exclude women, homosexuals or persons with some other protected attribute. That she or he may of course have another legitimate purpose, such as the maintenance of a competent work-force, is entirely acceptable.

6.108 Secondly, the test of “purpose” appears to be a subjective one. As a result, it is not necessary as a matter of law for the person pursuing the purpose to establish that there was a need for the measure nor, if the burden of proof be otherwise on the complainant, does it assist the complainant to establish that objectively there was no need requiring such a measure. As a matter of evidence, such material might help to cast doubt on the bona fides of the purpose, but it is at least arguable that a person pursuing a measure, which would otherwise be considered unlawful, should establish at least reasonable grounds for believing that the measure was necessary. For example, it is important that discriminatory employment practices, which may be partly motivated by “customer preference” cannot be dressed up as special measures. A stronger approach would require the employer, if challenged, to justify the measure on objective grounds.

6.109 Thirdly, there is a danger that the operation of a special measures exception may permit an inappropriate level of paternalism. Thus, in some circumstances, one might be entitled to query why a particular employer, who was not a member of the disadvantaged group, should be able to adjust practices, which may possibly be beneficial to his or her personal or commercial interests, to make judgments as to what is needed or for the benefit of a particular group. As noted by Justice Brennan in *Gerhardy v Brown*:

The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.<sup>109</sup>

6.110 As his Honour noted in a colourful example of contemporary relevance:

The difference between land rights and apartheid is the difference between a home and a prison. Land rights are capable of ensuring that people exercise and enjoy equally with others their human rights and fundamental freedoms: apartheid destroys that possibility.<sup>110</sup>

6.111 What then is the appropriate resolution of these dilemmas?

6.112 One course is to limit the exception to those cases where an appropriate body has approved or certified the special measure. This is similar to the approach adopted under the current ADA in relation to exemptions.<sup>111</sup> However, in the absence of abuse, such an approach appears unduly bureaucratic. Further, on the basis that unlawful discrimination will not cover what is sometimes known as “benign discrimination”, the requirement of approval or certification in advance is inconsistent with the principles on which the legislation is based. It is in accordance with the policy underlying the ADA to encourage the achievement of substantive equality: the need for an exception for special measures is simply a working out of that policy. So long as the preconditions are clearly defined, and can be subject to appropriate review by the EO Division where complaints are lodged and reliance is placed upon the exception, the need for a specific power of exemption in advance is negated.

6.113 The issue is then narrowed to consideration of the appropriate preconditions for the exception to operate.

6.114 The first requirement of the SDA is that the measure be directed to “achieving substantive equality”. The simplicity of this phrase is, as noted above, attractive. It recognises that “in order to treat some persons equally, we must treat them differently”.<sup>112</sup> However, differential treatment must be squarely based on factual differences of circumstance. In other words, difference must be based on sound judgment, as must the measures conducive to achieving equality in the circumstances. One question which then arises is whether the group sought to be benefited must be limited to those persons who have suffered unlawful discrimination in the past or can otherwise establish a level of relative social disadvantage.

6.115 The Commission is of the view that victims of past discrimination are legitimate beneficiaries of special measures, but that they should not be the sole beneficiaries. Where a particular group has been excluded from employment in a particular area, it should not be necessary for the beneficiaries of the measure to be limited to those who had made application for employment in that area in the past.

6.116 The response should be proportional to the circumstances: this requires identification of the relevant need and adoption of a measure which is capable of removing the inequality which has been identified. To satisfy these tests, the measure should be justifiable in objective terms.

6.117 Finally, as noted above, the Commission is conscious that some measures may be justifiable on a permanent basis. However, the dangers implicit in such circumstances require that they be defined with relative precision. The examples which readily come to mind are those which involve the maintenance of a distinctive culture or social identity of a particular minority group. In those circumstances, there is merit in the approach adopted by Justice Brennan in his interpretation of the CERD, that the group itself must seek or wish to have the benefit provided.

6.118 Particular problems can arise when such provisions are used to protect adherents to particular religious sects which hold to doctrines inconsistent with general human rights reflected in the ADA. Generally speaking, such balancing exercises can only be undertaken on a case by case basis. Once the criteria have been specified with reasonable precision, the task of determining complaints in relation to such measures must be left to the EO Division.

6.119 Once it is accepted that special measures should be a general exception to the prohibition against discrimination, it is appropriate to permit that where particular welfare services are required, they should be capable of provision by members of the particular group, if that is the most effective means of delivering them.

#### **Recommendation 49**

**Insert a general exception for special measures.**

**Draft Anti-Discrimination Bill 1999: cl 68**

#### **Exemptions**

6.120 The ADA presently provides for exemptions in two circumstances:

granted by the Minister on the recommendation of the ADB; and

by way of special needs programs and activities certified by the Minister.

6.121 The desirability of retaining a power of exemption is not in doubt: the real issues concern the person in whom the power is vested and the manner of its exercise. The second basis should no longer be required as a separate head of exemption for reasons discussed above.

#### **Exemptions granted by the Minister**

6.122 The Ministerial power to grant exemptions was included in the ADA when it was enacted in 1977 and is found in s 126. Subsection 126(1) provides that:

The Minister, on the recommendation of the Board, may, by order published in the Gazette, grant an exemption from this Act, or the regulations or such parts of this Act or the regulations as are specified in the order in respect of –

- (a) a person or class of persons;
- (b) an activity or class of activities; or
- (c) any other matter or circumstance specified in the order.

6.123 Such exemptions were originally granted for a maximum period of five years with the possibility of extending for a further five years.<sup>113</sup> However, this provision was recently amended<sup>114</sup> to extend the period of an exemption to a maximum of ten years renewable on the recommendation of the ADB for a further ten years.

6.124 The provision was designed to allow a specified period of time within which persons would be able to make the necessary arrangements before being compelled to comply with the ADA, where compelling such compliance immediately would be unreasonable.<sup>115</sup> It was on this basis that, for example, the Attorney General granted the New South Wales Fire Brigade an exemption from the compulsory retirement provisions of the ADA for nine months. During this period, the Fire Brigade

intended to develop a non-discriminatory method of assessing performance so that there would be no automatic assumption that at age 65 people are unable to do their job.

6.125 While it seems that this provision was introduced merely as a means of easing the legislation in and covering transitional situations, it has been retained for twenty years and operates in other circumstances. For instance, this power is regularly used “where a program seeks to discriminate in a positive fashion on any ground covered by the ADA which is not covered by the special needs program and activities exceptions”.<sup>116</sup> Thus, organisations administering programs involving employment opportunities have sought exemptions under s 126, on the basis that the special measures provisions may not cover particular employment opportunities.<sup>117</sup> Examples include the designation of positions at various universities and in various government departments for Aboriginal and Torres Strait Islander employees.<sup>118</sup>

6.126 According to the ADB, applications for exemptions fall into three main categories:

those from organisations wanting to provide programs or initiatives which are designed to help a particular disadvantaged group in the community;

those from individuals or organisations that argue they cannot comply with the discrimination law at this stage because they do not have the necessary programs in place; and

those where, as a matter of policy, the ADA should not apply.<sup>119</sup>

6.127 A number of the submissions received by the Commission in response to DP 30 argued that all general exceptions should be removed from the ADA, allowing only for a grant of exemption by the Minister or the President of the ADB on application from the relevant party.<sup>120</sup>

### ***Other jurisdictions***

6.128 The SDA provides that the HREOC may, on application, grant an administrative exemption for periods not exceeding five years.<sup>121</sup> According to the Sex Discrimination Commissioner, this power is exercised in a way which is as consistent as possible with the objects of the SDA. Accordingly, the exemptions are rarely granted and are strictly limited to carefully defined situations. Once a decision is made, the HREOC must publish its decision in the Commonwealth Gazette referring to the evidence on which the findings were based and the reasons for making the decision. An additional level of scrutiny is provided by making the decision reviewable by the AAT. The DDA<sup>122</sup> contains similar provisions to the SDA.

6.129 In Queensland,<sup>123</sup> South Australia<sup>124</sup> and Western Australia<sup>125</sup> such exemptions are granted by the Tribunal. In the Australian Capital Territory<sup>126</sup> and the Northern Territory<sup>127</sup> they are granted by the Discrimination Commissioner who may consider “the desirability, where relevant, of certain discriminatory actions being permitted for the purpose of redressing the effects of past discrimination”. The length of time for which exemption may be granted varies between three to five years, renewable for a further period of three or five years.

### ***Issues for consideration***

6.130 A notable feature of s 126 is that its availability is almost unlimited. With respect to its availability, one commentator has observed that:

the right of individual applicants represents yet another example of public policy operating at an *ad hoc* and quasi private level depending on the resources of the particular applicant, the calibre of the arguments presented by counsel.<sup>128</sup>

6.131 The ADB suggested that where an application is made to exempt activity which is unlawful and not intended to achieve equality, such applications should be made to the EO Division. Such exemptions should be granted in very limited circumstances, should be time limited and should be



reviewable and, as far as possible, should be conditional on taking steps to comply with the ADA. The ADB suggested further that the applicant should prove that a non-discriminatory option is not available and that the proposal is the least discriminatory option.<sup>129</sup>

### **Exemption for special needs programs and activities**

6.132 Section 126A of the ADA was introduced in 1994. It is in form a cross between a general exception and an exemption provision. It provides an exception from prescribed grounds for “anything done by a person in good faith for the purposes of, or in the course of, any program or activity for which certification is in force under this section as a special needs program or activity”.<sup>130</sup>

6.133 The exception relates to all grounds of unlawful discrimination except race and age (including compulsory retirement). It applies to transgender discrimination, although that part was introduced after s 126A. Whilst it may have been inappropriate in relation to age and compulsory retirement, it is not entirely clear why race was an excluded ground, especially given the views taken by the ADB and perhaps others in government that s 21 does not extend to employment programs. In fact, the section currently has practical application only for the grounds of sex and marital status. The grounds of homosexuality and disability provide protection for minority groups rather than a general protection for people of any sexual preference or for people without disabilities.

6.134 Although exemptions under s 126 are granted by the Minister on the recommendation of the ADB, certification of programs under s 126A is undertaken solely by the Minister administering the section or, in cases where there is a government department or public or local authority responsible for the program, the Minister responsible for that Department or authority. In those cases where there is such specific responsibility, the Minister responsible for the department or authority is required to certify the program or activity. In neither case is there any involvement of the ADB. Further, certification is not required to be for any specific period, nor indeed need any period be specified.

6.135 Introducing the amending Bill, the then Attorney General said:

This procedure [of certifying the exemption] recognises that positive actions aimed at meeting the special needs of persons protected by the ADA should not be regarded as unlawful discrimination, and provides the safeguard of ministerial approval to ensure that only appropriate programs and activities are exempted.<sup>131</sup>

6.136 Section 126A (2) states that the Minister may certify a program or activity only if:

its purpose or primary purpose is the promotion of access, for members of a group of persons affected by any form of unlawful discrimination to which this Act applies in an area of discrimination to which this Act applies, to facilities, services or opportunities to meet their special needs or the promotion of equal or improved access for them to facilities, services and opportunities.

6.137 As stated above, the ADB has interpreted “opportunities” to exclude employment opportunities,<sup>132</sup> and in practice organisations administering programs involving employment opportunities have been forced to apply for a s 126 exemption. Although the interpretation of the phrase “facilities, services or opportunities” may well bear a broader meaning than that attributed by the ADB, one beneficial effect of the interpretation followed by the ADB is to allow it a power of recommendation, and thus involvement in the process.

6.138 The types of programs and activities which have been certified under s 126A have been restricted, but include the following:

each New South Wales women’s domestic violence court assistance scheme;

all New South Wales women’s refuges;

any information, training or career development program for one sex; and

all “women’s only” gyms.

## **Conclusion**

6.139 It must be noted that while s 126A provides an exemption for special needs programs by certification, s 21 and 49ZYR provide specific exceptions for similar programs, which require no certification, in relation to race and age respectively. This inconsistency can create confusion in the community. The Commission can see no justification for requiring special needs programs and activities for women, men or people of a particular marital status to be certified by the Minister. The ADB believes that the certification program is cumbersome to administer.

6.140 The 1994 amendment, inserting s 126A, is designed to provide for special measures to improve the circumstances of persons affected by unlawful discrimination. However, for reasons set out in the discussion relating to “special measures”, the Commission is of the view that a more general exclusion is required in relation to such special needs programs and activities. In those circumstances, the specific provisions of s 126A will become unnecessary. Further, that section does not provide any additional power to that contained in s 126, which the Commission recommends, subject to appropriate changes, should be retained. The overlap caused by the existence of the two sections, together with the limited scope of s 126A, suggests that the latter section should be repealed, even where there was no specific provision for special measures.

6.141 In relation to s 126, the Commission is of the view that the power of exemption should be retained, but that it should be subject to appropriate procedures to ensure that there is transparency in the process for granting exemptions, that the public is properly notified of the existence of an exemption and that both the granting of an exemption and any conditions which may apply to it may be the subject of review by the Administrative Decisions Tribunal (“ADT”).

6.142 In these circumstances, the Commission is also of the view that the power to grant exemptions should not properly be a function of the Minister. The justification for giving the power to the Minister is to ensure a high level of responsibility and ultimately accountability in Parliament for any decisions taken. However, if, as seems desirable, the procedures for considering exemptions should be open to public participation and the decisions subject to review, it seems both inappropriate and unnecessary to place the power to grant the exemption with a Minister of the Crown. Accordingly, but in keeping with the importance of restricting exemptions to appropriate circumstances, the power should be vested either in the ADB, or in the President of the ADB.<sup>133</sup> The Commission is of the view that the ADB itself is not the appropriate body to exercise discretionary power of this kind. Rather, the power should be exercised by the head of the agency who is a full time senior Government officer and who has the day-to-day administration of the ADA.

6.143 The power to grant exemptions should be dependent upon the satisfaction of the President as to specified criteria. In short, the ADA should itself set out the circumstances in which its operation can be limited by executive fiat. Secondly, the public should be given notice in a specified manner of the intention of the President to grant an exemption. Some applications which are lodged with the President may be rejected in full. In that case, the applicant should have an opportunity for review before the ADT, but there is no need for public notification of the application. However, where the President is minded to grant an application, public notice of the general nature of the application and any conditions proposed should be given, together with a reasonable opportunity to make written submissions to the President. The President should be required to consider any submissions made within the time allowed and, if still satisfied that the exemption and conditions as proposed, or as varied following the receipt of submissions and further consultation with the applicant, should be made, public notice of the exemption should be given. Any person having a sufficient interest in the exemption should have the right to have it reviewed by the ADT.

6.144 Consistently with these principles, the relevant criteria for consideration by the President, which are of considerable importance, are set out in the Draft Bill which accompanies this Report.<sup>134</sup>

## **Recommendation 50**

**Retain power to grant exemptions but amend to provide that:**

**the power to grant an exemption be vested in President of the ADB;**

**the President be required to consider specified criteria listed in exercising such power;**

**the public be notified in a specified manner of the existence of an exemption;**

**the granting of the exemption and any conditions which may apply should be subject to review by the ADT at the request of any person having sufficient interest in the existence or absence of the exemption.**

Draft Anti-Discrimination Bill 1999: cl 69, 70

## **Recommendation 51**

**Repeal s 126A (exemption for special needs programs and activities).**

### **Specific Exceptions**

6.145 Having considered various general exceptions to the prohibitions contained in the ADA and having considered the general power to grant exemptions, it is now necessary to consider specific exceptions provided in relation to specific grounds. Although some exceptions may apply to a number of grounds, such as the case of genuine occupational qualification in relation to the area of employment, the circumstances of its application may differ from ground to ground. As a result, it is necessary to consider each separately below, but, wherever possible, the discussion of underlying principles will be dealt with on the first occasion on which the matter arises.

#### **Race**

6.146 The concept of race is the ground least susceptible to genuine exceptions from disadvantageous treatment. Further, as this ground is covered by the RDA, care must be taken to ensure that, so far as reasonably possible, exceptions will not be nugatory as a result of the absence of any equivalent exceptions in the Commonwealth law.

#### ***Genuine occupational qualification***

6.147 Where a prohibited ground may be considered a genuine qualification for work or employment, an exception may be appropriate. However, it is necessary to be aware of stereotyped assumptions, even in this area. For example, Shakespeare would not have expected the leading role in *Othello* to be played by a Moor. Nevertheless, authenticity for the purpose of a dramatic performance is sometimes assumed to be a classic example of a genuine occupational qualification.<sup>135</sup>

6.148 Section 14 of the ADA provides an exception in four circumstances, the first three of which are based on reasons of authenticity, namely participation in a dramatic performance or other entertainment, participation as a model for an artist or photographer or employment in a place where food or drink is provided. The fourth category involves the provision of services to persons of a particular race, being a category closely related to the recognition of special needs of the people for whom the service is provided.

6.149 In developing options for reform of this provision, three approaches may be considered as potentially appropriate. First, a general exception may be provided on the grounds of "genuine occupational qualification" without any attempt to define its application. Alternatively, an approach may

be adopted which expressly identifies the areas in which the exception applies: this is the current New South Wales approach. Or thirdly, the ADA may simply be silent in relation to genuine occupation qualification.

6.150 The Commission does not favour a general exception for two reasons. First, no clear guidelines as to when the exception may apply are provided, thus making it difficult for employers to know whether or not they are complying with the law. Secondly, as already noted, the ground of race is one in relation to which exceptions should be narrowly defined. Accordingly, a course which provides no exception or a specific and limited exception is preferred. There will, of course, always be a power vested in the relevant statutory authority to grant special purpose exemptions if other areas of need are identified.

6.151 While the need for “ethnic” authenticity in particular areas may accord with modern day practices and expectations, maintenance of the present exception may be ineffective while there is no similar exception under the RDA. The Commonwealth law must be one which gives effect to the CERD, which does not expressly refer to such an exception. However, the exception is more likely to favour than disadvantage minority races. It is found in other jurisdictions<sup>136</sup> and may appropriately be retained in the ADA.

### ***Membership of clubs***

6.152 Registered clubs are prohibited from discriminating on racial grounds in relation to admission of members, and in relation to benefits available to members, unless the club’s principal object is the provision of benefits for persons of a specified race, provided the race is defined otherwise than by reference, direct or indirect, to colour.<sup>137</sup> The ADA sets out the factors which must be considered when determining whether the principal object of the club is indeed to provide benefits for persons of a particular racial group.<sup>138</sup>

6.153 The exception appears to have a legitimate basis as many ethnic groups maintain their cultural identity by forming clubs and associations. However, it presents some problems in terms of its scope. The intention of Parliament was to allow genuine ethnic clubs to continue to operate for the benefit of persons of the particular race for which they were established, to the exclusion of others.<sup>139</sup> However, it has been argued that the exception may be construed broadly so that it would allow ethnic clubs to discriminate against some people who fall within the racial group for whose benefit the club was established. For example, s 20A(3) could be used by a club, set up for the benefit of persons of Spanish origin or descent and their families, to exclude a Chilean national of Spanish descent. Similarly, a club set up for the benefit of Jewish people may deny membership to a Jewish person from Ukraine. Provided that the distinguishing criterion is not colour, s 20A(3) permits racial discrimination by ethnic clubs.

6.154 Although the exception is not reflected in the RDA, raising some doubts as to the validity of the New South Wales provision, a similar exception applies in all other State and Territory jurisdictions. However, other provisions make clear that their object is similar to a special needs exception. For instance, Victoria, Queensland and the Northern Territory permit the exclusion from membership on racial grounds where the club was established to prevent or reduce disadvantage suffered by people of a particular group or to preserve a minority culture.<sup>140</sup> Western Australia<sup>141</sup> and the Australian Capital Territory<sup>142</sup> provide an exception in similar terms to the ADA, while South Australia provides an exception where the club is “established principally for the purpose of promoting social intercourse between members of a particular racial or ethnic group”.<sup>143</sup>

6.155 Several issues arise: first, is the exception operative in light of its absence in Federal race discrimination laws; secondly, is a specific exception necessary if the ADA provides a general special measures exception; and thirdly, is there a need to reconsider or clarify the operation of the current exception?

6.156 Given the lack of a general exception in the RDA, and the appropriateness of the exception to the extent that it constitutes a special measure, it is justified in this limited role.<sup>144</sup>

6.157 In relation to the second issue, it is arguable that not all ethnic clubs and associations will be able to prove special needs, and that it is not appropriate to require them to do so. For example, clubs and associations which are set up for the benefit of persons of Irish descent may not qualify as special measures, whereas an association for Laotian people may. In the Commission's view, clubs and associations which are set up to preserve and maintain the cultural identity of people of a particular racial group should be permitted to operate only for persons of that group regardless of whether the club or association can prove special needs. Accordingly, the Commission believes that a specific exception is justifiable in practical terms.

6.158 However, the exception should be framed more narrowly than at present, so that genuine ethnic clubs may discriminate on racial grounds only in the area of admission to membership. Their ability to exclude from membership persons who fall outside the racial or ethnic group for which the club was established is consistent with the object of the exception to make special provision for clubs set up to maintain and promote a specific cultural identity. The exception should not be able to be used to exclude from membership persons who do come within the particular racial group for whose benefit the club was set up. There is certainly no justification for ethnic clubs to discriminate on racial grounds against particular members of the club in the provision of and access to benefits or facilities of the club. Thus, s 20A(3) should be limited to the admission to membership of an ethnic club and should apply only in respect of persons without the attribute of those for whom the club was established.

6.159 In Chapter Four, the Commission recommends that the ADA should also cover incorporated associations whose membership is open to the public or to a section of the public.<sup>145</sup> The Commission's conclusions as to the current exceptions apply equally to the new area, as redefined in Chapter Four.

#### **Recommendation 52**

**Repeal s 20A(3) and (4), but permit a club which operates principally to prevent or reduce disadvantage suffered by people of a particular cultural identity or to preserve a minority culture, to exclude applicants for membership who are not members of that cultural identity.**

Draft Anti-Discrimination Bill 1999: cl 55

#### ***Sport***

6.160 Section 22 of the ADA presently provides an exception where anything done on the grounds of "nationality, place of birth or length of time for which a person has been resident in a particular place or area" where that is a qualification for selection or eligibility to compete in any sport or game. Neither the RDA nor any of the States or Territories have a similar exception for sport in relation to race.

6.161 The exception is somewhat anomalous in that it picks up only two criteria, namely nationality and place of birth, which fall within the definition of race. Period of residence is not in its terms within the definition of race, although it is conceivable that it might form a ground of indirect discrimination.<sup>146</sup> For example, an Italian soccer club might wish to restrict its membership to persons of Italian nationality or place of birth, but include, in addition, people who have lived in Italy for a particular period of time. Alternatively, it may be thought that there is indirect discrimination where a club selects on the basis of residence in a particular suburb of Sydney which has a disproportionate representation of people of a particular ethnic background.

6.162 The primary purpose of this exception, according to the Department of Sport and Recreation, is to allow sporting groups based on national identity to exclude persons of different national origins: it is not to regulate the number of foreign players allowed to compete in sporting activities.<sup>147</sup> Nor is it particularly concerned with eligibility to participate in national or state competitions.

6.163 The justification for this exception is therefore similar to that in relation to registered clubs. In fact, the area of sporting activity is only covered by the ADA to the extent that it constitutes the provision of a service, or involves membership of an incorporated body. The appropriate result should be achieved consistently in each area. If people of a particular race or national identity seek to play sport together, it is often because that sport is a part of their cultural identity. However, because sporting competitions are a public activity and are not, in general, limited to particular ethnic groups, there is a danger that the formation of clubs on racial grounds could have broader effects of a detrimental nature. Accordingly, the Commission considers that the exception should be limited to those areas where the purpose is to maintain or reflect an element of cultural identity: this may be achieved by the proposed exception in relation to clubs.

### **Recommendation 53**

**Repeal s 22 (exception for sport in relation to the ground of race).**

### ***Other exceptions***

6.164 The ADA presently provides exceptions in relation to training for employment wholly outside New South Wales and in respect of employment on ships or aircraft where the person was engaged for the employment outside New South Wales. Each of these exceptions is anomalous in that there is no equivalent exception in relation to any other ground in the ADA.

6.165 The latter exception (in relation to ships and aircraft) reflects a similar exception in the RDA.<sup>148</sup> Generally speaking, it appears each exception was designed to limit the possible effect of New South Wales law on extra-territorial activities. In each case, however, the specific exemption is either unnecessary or inappropriate. No other State or Territory has any similar express provision. Further, the Commission is unaware that either has had any particular impact in practice.

6.166 In the circumstances, the Commission recommends the abolition of both exceptions, being mindful that should a real need be identified the matter can be dealt with by an application for a specific exemption if the circumstances appear to justify that course.

### **Recommendation 54**

**Repeal s 15 (exception for employment intended to provide training in skills to be exercised outside New South Wales) and s 16 (exception for employment on ship or aircraft).**

### **Sex**

6.167 The ground of sex is the subject of more complaints to the ADB than any other ground and, indeed, than most other grounds put together. This fact may indicate that such discrimination is widespread and continuing. However, it may also indicate a higher level of consciousness, at least on the part of the victims, of the unacceptability of sex discrimination. It is probable that over the last two decades since the commencement of the ADA, there has been a significant increase in the understanding of the nature of sexual stereotyping and of its unacceptability.

6.168 Whilst biology may have a more limited relevance in areas covered by the ADA than was appreciated in the past, nevertheless men and women are biologically different and therefore it is necessary to identify areas in which such differences are relevant. Once identified, appropriate exceptions should be provided so as to limit the prohibitions in the ADA to areas where gender-based differences are truly irrelevant.

### ***Genuine occupational qualification***

6.169 In relation to the area of work, there is extensive provision for exceptions on the basis of sex as a genuine occupational qualification for a job.<sup>149</sup> Section 31, which was substantially reformulated in 1994, provides in subsection (1) for a general exception on this basis. Subsection (2) identifies certain requirements which will qualify as genuine occupational qualifications. Subsection (3) then permits the prescription of a job or class of jobs as involving a genuine occupational qualification, which power is expressly stated not to be limited by the requirements identified in subsection (2).<sup>150</sup>

6.170 On the face of the section, it is not entirely clear whether the drafter intended the listed requirements to be an exclusive list and hence to provide a definition of the phrase "genuine occupational qualification for a job" in subsection (1) or whether the list in subsection (2) is intended not to be exclusive, but to identify conclusively specified requirements as, in all such cases, sufficient to satisfy the exception.

6.171 The list is extensive and provides:

31(2) Being a person of a particular sex is a genuine occupational qualification for a job where any one or more of the following requirements is satisfied:

- (a) the essential nature of the job calls for a person of that sex for reasons of physiognomy or physique, excluding physical strength or stamina, or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a person of the opposite sex; or
- (b) the job needs to be held by a person of that sex to preserve decency or privacy because it involves the fitting of a person's clothing; or
- (c) the job requires the holder of the job to enter a lavatory ordinarily used by persons of that sex while it is used by persons of that sex; or
- (d) the job requires the holder of the job to research persons of that sex; or
- (e) the job requires the holder of the job to enter areas ordinarily used by persons of that sex while in a state of undress or while bathing or showering; or
- (f) the job requires the holder of the job to live on premises provided by the employer and:
  - (i) those premises are not equipped with separate sleeping accommodation for persons of the opposite sex and sanitary facilities which could be used by persons of the opposite sex in privacy from persons of that sex; and
  - (ii) it is not reasonable to expect the employer either to equip those premises with accommodation and facilities of that kind or to provide other premises for persons of the opposite sex; or
- (g) the job requires the holder of the job to keep persons of that sex in custody in a prison or other institution or in part of a prison or other institution; or
- (h) the holder of the job provides persons of that sex with personal services relating to their welfare or education, or similar personal services, and they or a substantial number of them might reasonably object to its being carried out by a person of the opposite sex; or
- (i) the job is one of two to be held by a married couple.

6.172 Almost all of these circumstances relate to positions where, for practical or decency reasons, it would not be feasible to allow members of one sex or the other to perform the inherent tasks of the position. This provision has generally been interpreted narrowly: in *Brennan v NSW Fire Brigades*,<sup>151</sup> the complainant, a male, alleged discrimination on the ground of sex in being prevented from standing for the position of spokeswoman. The respondent relied upon s 31(2)(h), stating that being a woman was a genuine occupational qualification for the position. This was not accepted by the EOT, which held that the complainant should have the right to nominate for the position and that the respondents had not established the conditions of s 31(2)(h).<sup>152</sup>

6.173 The current exception follows in general terms, though not the precise wording of, a similar exception in the SDA. However, the ADA includes three additional requirements, being those identified in paragraphs (g), (h) and (i) above.

6.174 Because the definition in the SDA is expressly stated to be inclusive, there may be no inconsistency by the addition of these three requirements, but the issue remains uncertain.

6.175 The existence of a similar exception in the SDA argues in favour of retaining in the State Act a provision to the same effect. Although the list of circumstances which will justify inclusion as a genuine occupational qualification in subsection (2) appears to be lengthy, the employment covered is relatively confined in scope. One of the broader classes is that contained in paragraph (a). However, there are not likely to be many positions which can only be performed by someone having characteristics unique to one sex. There will, however, be circumstances where a position is advertised without limitation as to sex, but an applicant of one particular sex is chosen because of a characteristic appertaining generally to that sex (but not unique to it) being an attribute not enjoyed by any of the applicants of the other sex. This example would not fall within paragraph (a) and hence justifies the broader principle outlined in subsection (1).

6.176 In relation to such classes of job as those requiring cleaners to enter lavatories, the Commission is aware that in many circumstances, one cleaner is required to clean lavatories for each sex. Although this may give support for limiting the specific classes covered by subsection (2), the Commission accepts that there may be circumstances in which an employer may wish to use cleaners of the same sex as the user of the particular lavatory and can see no reason to disregard that preference. The rationale for avoiding discrimination on the grounds of sex in the area of employment is that where gender is irrelevant, it should not be allowed to limit the opportunities of one class of persons, as against another. However, as toilets are generally provided for persons of each sex, the use of different cleaners for each set of toilets is not likely to have any adverse impact on employment opportunities. A similar justification can be accepted in relation to prison staff, although again, both men and women are employed in gaols holding persons of the other sex.

6.177 The ADB recommended that the exception in s 31(2)(i) for jobs which are one of two to be held "by a married couple" should be repealed.<sup>153</sup> As already noted, that exception is not contained in the SDA. It also appears to permit discrimination on the ground of marital status, which is otherwise unlawful under the ADA. It is anachronistic and should be removed from s 31(2).

6.178 The other provision which has no specific counterpart in the SDA is para (h), which relates to personal services. Victoria and the Australian Capital Territory<sup>154</sup> have a provision which relates to welfare services and is expressed in terms of such services being "most effectively" provided by persons of that sex. This appears to be a more appropriate form and should be adopted in relation to all characteristics as a reflection of the special measures exception.

6.179 What is of greater concern to the Commission is that, in some circumstances, employers may seek to rely upon the availability of an exception under s 31, where such reliance is not bona fide but masks an ulterior and impermissible purpose. Accordingly, the Commission recommends that the exception should be limited by a requirement that the discrimination be based on a bona fide belief on the part of the employer that sex is a genuine occupational qualification for the job. If this restriction is included, the Commission is fortified in its view that it is appropriate to retain s 31 in its current relatively broad terms.



6.180 The retention of the general provision in subsection (1), together with the power to grant an exemption under s 126, makes it unnecessary to vest a specific and further power in the Governor to make regulations prescribing particular jobs or classes of jobs. Accordingly, subsections (3) and (4) may be removed.

#### **Recommendation 55**

**Include in the genuine occupational qualification exception in respect of employment a requirement that the employer act in good faith.**

*Draft Anti-Discrimination Bill 1999: cl 28(6)*

#### **Recommendation 56**

**In relation to the genuine occupational qualification exception, repeal s 31(2)(h) and (i).**

#### **Recommendation 57**

**In relation to the genuine occupational qualification exception, repeal s 31(3) and 31(4).**

### ***Single-sex schools***

6.181 Section 31A of the ADA makes it unlawful for an educational authority to discriminate against a person (which includes a child) by refusing or failing to accept his or her application for admission as a student. The section also makes it unlawful to deny someone accepted as a student access to any benefit provided by the educational authority or to subject the student to any detriment. An exception is provided by s 31A(3)(b), but is limited to a refusal or failure to accept an application for admission by “a school, college, university or other institution which is conducted solely for students of the opposite sex to the sex of the applicant”.

6.182 The principle underlying the prohibition in this area of discrimination is that boys and girls should receive equal opportunity in relation to educational services. The exception does not excuse inequality, at least in the case of a single educational authority (such as the Department of Education) which provides separate educational facilities for boys and girls in similar circumstances.<sup>155</sup> Given the danger that inequality may arise where services are provided on a segregated basis, care must be taken to identify the justification for such segregation.

6.183 At least in relation to children above the age of adolescence, although views are divided on this issue, there is a reputable body of literature that some boys and girls perform better in a single sex school.<sup>156</sup> Accordingly, the Commission is satisfied that the exception should continue in relation to secondary schooling.

6.184 The justification in relation to single sex institutions for primary (including preschool) and tertiary education is less clear. However, in relation to primary education, the justification may be a practical one. Primary schools are often part of a single institution which provides for education throughout primary and secondary levels. It would be inconvenient and potentially disruptive to require different rules to apply to each level. Further, the precise stage at which the justification for single sex

schools commences is not readily defined. Accordingly, these various pragmatic considerations suggest that the exemption should be retained in relation to primary and secondary schooling.

6.185 The justification for permitting sex segregation at a tertiary level is less readily justified. Further, in a country which led the way in opening up university education for women, it seems a retrograde step to allow universities to be established for one sex only. In the past, there may have been a justification for single sex tertiary institutions for women only, to rectify circumstances of social disadvantage. It is unlikely that such a justification could properly be advanced in relation to any area of tertiary education today and, if it could, it would fall within the special needs exception. Accordingly, the Commission recommends the limitation of the exception so that it applies only to primary and secondary schooling.

6.186 In relation to the provision of residential accommodation, however, the Commission is of the view that there are greater justifications for allowing an exception to the general provisions of the ADA. As a result, the Commission recommends that educational institutions at any level which provide residential accommodation which is segregated on the basis of sex should, to that extent, be exempt from the ADA.

6.187 As already noted, the provision of education appears to be a subcategory of goods and services. Accordingly, the exception for single sex schools should apply both to the provision of services and to discrimination in the area of education.

#### **Recommendation 58**

**Limit the exception in relation to education on the ground of sex in s 31A(3)(b) to primary schools (including pre-schools, but not child care centres) and secondary schools in relation to admission.**

Draft Anti-Discrimination Bill 1999: cl 43

**Continue to provide a general exception at all levels for residential accommodation which is segregated on the basis of sex.**

Draft Anti-Discrimination Bill 1999: cl 51(1)

#### ***Membership of clubs***

6.188 The ADA prohibits sex discrimination by a registered club in relation to admission to membership and access to benefits or facilities provided by the club. This prohibition is subject to exceptions for single-sex clubs and clubs where the equal or simultaneous use or enjoyment of benefits by both sexes is impractical.

6.189 **Single-sex clubs.** First, an exception applies in respect of both admission to membership and access to benefits "if membership of the registered club is available to persons of the opposite sex only".<sup>157</sup> That this exception should apply to that subsection which prohibits sex discrimination against members, as opposed to applicants for membership, is, in the Commission's view, anomalous. The reference to subsection (2) should therefore be deleted.

6.190 In New South Wales, the term "registered club" is defined to have the same meaning as in the *Registered Clubs Act 1976* (NSW).<sup>158</sup> As already noted, the general exceptions relating to acts done with statutory authority and by voluntary bodies do not cover registered clubs. The intention of the present legislation is therefore to subject registered clubs to the prohibitions in the ADA, except in so far as exceptions which may be justified in particular circumstances and in relation to particular grounds.

6.191 The exception for single sex clubs appears to allow unlimited operation to the right of people to register a club for members of one sex only. The exception has been criticised by some commentators who argue that it perpetuates women's continued exclusion from important areas of social, economic and political life.<sup>159</sup>

6.192 The number of remaining single-sex clubs is quite small, according to the Registered Clubs Association, and no new ones have been established since the ADA was passed.<sup>160</sup> However, the number of single-sex clubs potentially covered by the ADA may increase if, as has been recommended, the Act is extended to cover all incorporated associations. The exception for single-sex clubs will thus take on greater relevance as some of these associations may have reasons for wishing to continue to exclude from membership people who are not members of the sex for whose benefit the association was set up.

6.193 The SDA contains a similar exception for single-sex clubs,<sup>161</sup> as in fact, do most other State laws with the exception of Queensland and Victoria.<sup>162</sup> In these two jurisdictions, the exception is more limited. A single-sex club must prove that it operates principally to prevent or reduce disadvantage suffered by people of the sex for which it was set up, in order to justify the exclusion of members of the opposite sex.<sup>163</sup> This area of operation would, under the Commission's present recommendations, be justifiable as falling within the exception for special measures.

6.194 The current exception in s 34A(3) is, in the Commission's view, inappropriate as it gives people an unrestricted power to thwart the appropriate operation of the non-discrimination principle. That is not to say that an exception should not apply in some form for those clubs which operate principally for the benefit of members of one sex for legitimate reasons. In the Commission's opinion, this can be best achieved by repealing the exception in s 34A(3) and allowing those organisations which cannot satisfy the special measures exception, but which believe they should be excused from the operation of the ADA, to apply for an exemption under s 126.

6.195 ***Use or enjoyment of benefits by both sexes impractical.*** The second limb of the exception is limited to the use or enjoyment of benefits provided by registered clubs. Under s 34A(4), it is not unlawful for registered clubs to discriminate against members of the club on the ground of sex if it is not practicable to offer the benefit or services of the club to persons of both sexes simultaneously or to the same extent. However, this exception only applies if the same or an equivalent benefit is available to both separately or if each is entitled to a reasonable proportion of the use and enjoyment of the benefit. Subsection 34A(5) provides a list of relevant circumstances which may be considered in determining the application of subsection (4). A similar exception applies in the SDA<sup>164</sup> and in other State jurisdictions.<sup>165</sup>

6.196 This exception is subjective and wide-ranging. It has been argued that the exception effectively gives clubs a licence to argue that the cost and disruption involved in accommodating the other sex (almost invariably women) renders it "impractical" for them to offer the benefits to both sexes simultaneously or to the same extent.<sup>166</sup> However, the exception appears to have been relied upon in only one case, under the SDA.<sup>167</sup> In that case, the HREOC found that it was not impracticable for men's and women's golf competitions to be played on the Club's course at the same time. The Commission has not identified any case in which the exception has been invoked in New South Wales. The absence of reliance on the exception may flow from the relatively stringent requirement of the "separate but equal" constraint on its application.

6.197 The generality of the circumstances potentially covered suggests that the exception is likely to cover circumstances which are not restricted to registered clubs. For example, its terms would cover the provision of toilet and bathing facilities. No such general exception is thought necessary in relation to employment. It is probably unnecessary to have such a provision in relation to clubs in similar circumstances. However, there may be some legitimate situations, other than situations where decency considerations are involved, when men and women cannot use a benefit or facility at the same time. Given that the exception requires an equivalent benefit to be available, equal treatment is largely retained. Further, as the Commission recommends extending the area to cover incorporated associations and limiting the single-sex clubs exception, it believes that this exception in s 34A (4)

should presently be retained. The exception may be useful in some circumstances, such as those involving sporting competitions and gymnasiums.

## **Recommendation 59**

### **Repeal s 34A(3) in relation to single sex clubs.**

#### ***Sport***

6.198 One of four specific exceptions from the operation of the sex discrimination provisions relates to “participation in any sporting activity”.<sup>168</sup> The exception does not cover coaching, nor the administration of a sporting activity. There is also power to prescribe particular sporting activities which are not covered by the exception. However, none has been prescribed.

6.199 The purpose of the exception is not to exclude persons from competing in sporting activities because of their sex, but to ensure fair competition between persons who have different levels of strength, stamina or physique on account of their sex, although the provision is not currently so limited.<sup>169</sup>

6.200 **Definition of “sporting activity”.** The ADA contains no definition of “sport” or “sporting activities”. The exception assumes that participation in a sporting activity comes within the scope of the ADA. Because it does not itself constitute a defined area, sporting activity must be implicitly covered by one of the specified areas in order for the exception to be relevant. The potentially relevant areas include employment, education, the provision of services and membership of clubs. It is possible that exclusion from sporting activities could also occur indirectly through exclusion from accommodation or places where liquor is sold.

6.201 **Other jurisdictions.** By contrast, sport is a specific area of operation under the recent Victorian legislation. “Sport” and “sporting activity” are defined to include a game or pastime. “Competitive sporting activity” is defined to include any exhibition or demonstration of a sport, but not coaching, umpiring, refereeing, administration of a sporting activity or non-competitive sport. “Participation in a sporting activity” is defined to include coaching, umpiring or refereeing or participating in the administration of a sporting activity.<sup>170</sup> The exception is limited to exclusion from participation in a competitive sporting activity in which “the strength, stamina or physique of the competitors is relevant”.<sup>171</sup>

6.202 The SDA provides an equivalent exception to the Victorian provision, but one which is significantly narrower than the New South Wales provision.<sup>172</sup> First, it merely permits the exclusion of persons of one sex from participation in any *competitive sporting activity in which the strength, stamina or physique of competitors is relevant*.<sup>173</sup> Secondly, the exception does not apply to coaching and administration, nor to umpiring or refereeing nor to participation by children under 12 years of age.<sup>174</sup> In effect, the Commonwealth law therefore excepts playing competitive sport where strength, stamina or physique is relevant.

6.203 The wording of the SDA is curious: it is difficult to imagine, for example, that physical strength would ever exclude one from administration activities. On the other hand, physical strength might exclude one from umpiring. More significantly, the test of “strength, stamina or physique” seems relevant in some cases only in inconsequential ways. For example, in non-contact sports, strength may give rise to differential levels of achievement: male javelin throwers may, as a class, exceed female throwers. Thus, there is a justification for having women-only competitions in athletic endeavours. It is not clear that the argument applies the other way: the differential in strength does not give rise to any obvious reason for excluding the weaker group from competing with the stronger, at least in non-contact sports.

6.204 The SDA exception specifically does not apply to participation in sport by children under 12 years. Some organisations, such as the Little Athletics Association, are concerned that this may be

unfair to girls. It claims that strength, stamina and physique among boys and girls under the age of 12 years can be quite distinct, particularly in running events, and that therefore single-sex events should be permitted even in under-12 competitions. Similarly, in a submission to the Lavarch inquiry, the Women's Sport Promotion Unit noted that 12 is an arbitrary age as some children reach puberty sooner than others. Since 1987, the policy of the New South Wales Education Department has been to give girls the choice of competing in open competitions or girls-only events.

6.205 **The Lavarch Committee.** The issue of gender inequality in sport was considered in great detail by the Lavarch Committee in its report, *Halfway to Equal*.<sup>175</sup> Recognising the under-representation of women in all facets of sport, including participation, administration and media coverage, the Committee recommended the development and adoption of numerous pro-active strategies to improve gender equity in sporting activities.

6.206 The Committee acknowledged that the provisions of the SDA designed to counter discrimination in sport were under-utilised, primarily because many sporting clubs are exempt from the SDA under s 25 (clubs exception) or under s 39 (voluntary bodies exception). However, it made no recommendation in respect of either exception. Nor did it recommend any changes to the specific exception for sport because it found that there were measurable benefits to be gained by women from single-sex events.

### **Conclusion**

6.207 The Commission's recommendations to extend the ADA's coverage to incorporated associations whose membership is open to the public and to repeal the exception for voluntary bodies will bring many sporting bodies, previously exempt from anti-discrimination laws, within the scope of the ADA. This will go some way to address the sex-based discrimination in sport noted above.

6.208 An exception in relation to sport, however, can be justified on two bases. First, where one group is physically less able than the other, there is justification for allowing it to maintain its own competition, just as there is justification for permitting age groups to compete amongst themselves. Secondly, in contact sports, there are decency considerations which tend to limit public acceptance of competitions, although such attitudes are by no means universal and are probably declining. Both of these factors are relevant and should be the basis upon which an appropriate exception is formulated. Other factors should be excluded. There is no need in these circumstances to identify any specific age as a limitation on the reach of the exception in relation to children's sport.

6.209 This is consistent with the view of the Commission in relation to other areas. For example, the right of particular groups to maintain their own competition to the exclusion of others is consistent with the principle of "special needs". Similarly, the principle of protecting decency is recognised in the "genuine occupational qualification" exceptions. The Commission therefore recommends that an exception for sport be retained. However, the exception should reflect the more limited exception contained in the SDA.

### **Recommendation 60**

**Limit the exception for sport in relation to sex discrimination consistently with the SDA criteria of strength, stamina and physique of competitors.**

Draft Anti-Discrimination Bill 1999: cl 56(3)

### **Superannuation**

6.210 The ADA originally contained a blanket exception for superannuation schemes from the sex (and marital status) discrimination provisions. The exception was narrowed in 1994. Funds can now only discriminate in their terms and conditions if such discrimination is based on reasonable actuarial data or, where there is no such data, the terms and conditions are reasonable having regard to other relevant

factors and any data or other relevant factors relied upon are disclosed to the EO Division if required.<sup>176</sup>

6.211 **Other jurisdictions.** Since 1994, the SDA has not permitted superannuation schemes to discriminate on the ground of sex unless one of the exemptions set out in s 41A, relating to new fund conditions, or s 41B, relating to existing fund conditions, applies. Essentially, the SDA allows superannuation funds to continue to discriminate in their terms and conditions if the fund conditions existed before 25 June 1993, the fund is closed to new members and existing members have been given an option to transfer to a non-discriminatory scheme.<sup>177</sup> Section 41A permits discriminatory terms and conditions in new funds where such discrimination:<sup>178</sup>

is based on data about the average life expectancy of women and men as groups; or

relates to the rules governing vesting, preservation and transferability of benefits; or

confers benefits on a person who was an existing member of the fund under s 41B.

6.212 The EOA (Vic) largely reflects the SDA and DDA exceptions for superannuation. It also reflects the concerns of the superannuation industry that it is difficult for trustees of funds to comply with both Federal regulatory and tax legislation and diverse Federal and State equal opportunity legislation. Under Victorian law, a superannuation fund or scheme:<sup>179</sup>

- may retain an existing discriminatory fund condition in relation to a person who was a member of the fund at the commencement of the section; and
- may discriminate on the grounds of sex (or other grounds) if the discrimination is permitted under the SDA or DDA.

6.213 Similar exceptions for superannuation are contained in other State and Territory legislation.<sup>180</sup>

6.214 **Application of the SDA to New South Wales public sector schemes.** Although the SDA is stated to bind the Crown in the right of a State,<sup>181</sup> the prohibition on discrimination in relation to employment and superannuation specifically does not apply in relation to employment by an instrumentality of a State.<sup>182</sup> Accordingly, the ADA will have full operation in relation to such employment and the benefits available to employees.

6.215 The SDA may apply, however, to discretions exercised by trustees of State superannuation funds under s 14(4) as the s 13 exception is limited to *employment*. It does not expressly extend to the provision of services, such as superannuation.<sup>183</sup> Responsibility for ensuring that funds are not discriminatory and that liability, which may arise if they are, will depend on how the fund is set up. The trustees may be liable for discriminatory decisions in areas where they have discretion.

6.216 **Actuarial statistics.** Actuarial statistics used in superannuation are different from those used in insurance, primarily because superannuation funds generally cover groups of people where it is possible to apply some averaging of risks. In contrast, individual insurance policies, including personal superannuation and annuities, generally have to be priced according to the risk being insured. Most sex differentiation in superannuation therefore occurs in the calculation of pension benefits or annuities. Although not a significant feature of superannuation today, this may well change in the light of government policies designed to encourage superannuants to take superannuation benefits in the form of annuities rather than lump sums.<sup>184</sup>

6.217 Women who pay the same for annuities as men receive a lower benefit on average on the basis of statistics which show that as a group, women live longer than men. This differentiation is not unlawful under anti-discrimination legislation to the extent that there are gender-based actuarial tables which justify it.<sup>185</sup> However, gender-based actuarial tables are being challenged on several fronts. In a

submission to the Senate Select Committee on Superannuation, the Sex Discrimination Commissioner asked:<sup>186</sup>

... why do we use sex-based actuarial data at all? It has never been considered reasonable to use data based on the links between race and longevity, or data based on the links between economic class and longevity. If this were so, upper class whites would have to pay more into annuity-based pensions and poor blacks would pay less. Yet it seems to be accepted as part of the natural order of things that the links between sex and longevity should provide a basis for actuarial data.

6.218 Actuaries justify the use of gender-based tables on the ground that sex differences in mortality and disability rates are statistically highly significant and that gender (like age) is an immutable characteristic and is easily distinguishable.<sup>187</sup> Although there are many other relevant risk factors such as smoking,<sup>188</sup> height/weight ratios, socioeconomic status and marital status which could be used to distinguish between groups, superannuation funds choose not to use these, arguing that testing for many of them may be complex, expensive or, in some cases, intrusive.<sup>189</sup> The risk factors most used in superannuation funds are gender, age and occupation.

6.219 It is further argued that gender-based actuarial tables are in direct conflict with the purpose of sex discrimination laws.<sup>190</sup> Indeed, on the basis that the purpose of sex discrimination laws is to make sex an irrelevant consideration in employment, United States cases have held that sex-based actuarial tables cannot be validly used to discriminate on the ground of sex in occupational pensions.<sup>191</sup>

6.220 Gender-based actuarial tables have also been criticised on the basis of doubts about their accuracy and objectiveness. One commentator, for example, states:<sup>192</sup>

... actuarial statistics are like other statistics: the results you get depend on which statistics you use and how you use them. In deducing contributions to and the benefits from superannuation schemes, it seems that actuarial data are used selectively and inconsistently.

6.221 The test of what is "reasonable" with regard to actuarial data has not yet been determined.

6.222 In its report on superannuation, the ADB opposed the treatment of men and women as groups for the purpose of actuarial tables.<sup>193</sup> The Women's Advisory Council, the ADB and the Sex Discrimination Commissioner all support the removal of the reasonable actuarial data exception from sex discrimination provisions.<sup>194</sup> The Gay and Lesbian Rights Lobby also submitted that the ADA should be amended so that it is unlawful for superannuation funds or insurers to discriminate in the terms and conditions of a fund or policy except where they can show that the discriminatory behaviour is reasonably based on objectively assessed, genuine and accurate actuarial data.<sup>195</sup>

6.223 **Submissions.** Submissions received by the Commission argued that the broad exception for superannuation funds under the ADA is not justifiable.<sup>196</sup> The National Pay Equity Coalition, for example, submitted that the exception from the ADA's sex discrimination provisions is "one of the reasons that women make up an increasing proportion of the aged poor" and "should most certainly be removed".<sup>197</sup> The ADB submitted that it is not convinced that "there is an acceptable rationale for discriminating on the ground of sex in the provision of superannuation".<sup>198</sup>

6.224 The Commission notes that the blanket exception for superannuation in the early State laws and in the SDA was a temporary exemption pending inquiries to address the concerns of the superannuation and insurance industry.<sup>199</sup> Several inquiries have since been conducted, including an inquiry by the ADB shortly after the ADA came into operation.<sup>200</sup> A report was released in 1978 which recommended that, with some qualifications, superannuation should be treated like any other term or benefit of employment. The ADB took the view that any scheme which treated men and women differently in their application for membership was discriminatory. It also opposed the practice of treating men and women as separate classes, basing scheme requirements on stereotyped assumptions about

women's working patterns and calculating contribution and benefit rates according to statistical predictions of women's longevity. The ADB argued that the isolation of risks associated with men and women was taking place in the absence of other equally relevant factors such as smoking and drinking.<sup>201</sup> A report of the Victorian Equal Opportunity Anti-Discrimination Board came to the same conclusions.<sup>202</sup>

6.225 The Lavarch Committee also found that women were significantly disadvantaged by the design of superannuation schemes which were predominantly geared towards unbroken full-time work-force patterns:

[a]s a result of restrictive standards covering vesting of employer contributions and inadequate portability and preservation arrangements, women have received fewer benefits than men from employer sponsored superannuation. Women ... have been shown to be less likely than men to collect a benefit by remaining in a scheme until retirement ... Consequently, women who join superannuation schemes but do not ultimately claim a retirement benefit effectively subsidise those (mostly male) members who do. Even when women do claim a retirement benefit they receive, on average, a smaller benefit than men.<sup>203</sup>

6.226 The Committee made a number of recommendations including that the Treasurer establish vesting, preservation and portability provisions which take into account women's work-force patterns, ensure that employer contributions vest immediately and are fully preserved, and encourage the Insurance and Superannuation Commission to introduce improved portability measures.<sup>204</sup> Some, but not all, of these issues have been incorporated in Commonwealth operational standards.

6.227 The Association of Superannuation Funds of Australia ("ASFA") has advised the Sex Discrimination Commissioner that it sees no major problems for the superannuation industry to comply with the requirements of the SDA even if many of the existing exemptions are removed.<sup>205</sup> In a similar submission to the Attorney General's Department in relation to the recent amendments to the ADA to cover transgender persons, the ASFA claimed that most schemes are now non-discriminatory, and do not use gender as a distinguishing factor.<sup>206</sup>

6.228 **Conclusion.** Although the 1992 amendments to the SDA, coupled with the introduction of the Superannuation Guarantee Charge,<sup>207</sup> have increased women's access to superannuation, there continue to be significant areas where superannuation schemes can and do discriminate against women with impunity. The changes to the SDA, for example, have not assisted in removing persistent forms of indirect discrimination and for this reason, both the Sex Discrimination Commissioner<sup>208</sup> and the Senate Standing Committee on Superannuation have called for further reform.<sup>209</sup> The ADB has also submitted that portability, vesting and preservation requirements should be non-discriminatory.<sup>210</sup>

6.229 There is much to be said for the Victorian approach of adopting the Federal exception in that it recognises a legitimate industry concern that the terms on which the schemes are permitted should not vary from jurisdiction to jurisdiction and avoids any danger of inconsistency between State and Federal laws. The submission of the ASFA argued that the desirability of a uniform national approach to the regulation of superannuation "cannot be over emphasised".<sup>211</sup> However, it seems that gender is gradually being abandoned as a relevant discrimen in the area of superannuation. Further, while consistency is an important principle, the SDA is not intended "to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently".<sup>212</sup> In the Commission's view, inconsistency is unlikely to arise where State anti-discrimination law prohibits a greater range of conduct than does the SDA.

6.230 Accordingly, the Commission proposes that the ADA be amended to remove the s 36 exception based on reasonable actuarial or other data. Section 36 should be replaced with an exception for existing fund conditions in similar terms to those found in the SDA. There should be no exception from the sex discrimination provisions for new fund conditions. If a superannuation fund wishes to discriminate in its terms and conditions, after the commencement of the relevant section, the fund



should have to apply for an exemption from the ADA under s 126. There should also be no exception for discriminatory terms and conditions relating to the vesting, portability or preservation of benefits, except to the extent that the exception for existing terms or conditions applies.

#### **Recommendation 61**

**Replace s 36 in relation to the exception for superannuation on the ground of sex with an exception in relation to existing funds in the same terms as the SDA.**

Draft Anti-Discrimination Bill 1999: cl 39

#### ***Insurance***

6.231 The ADA provides that it is unlawful for an insurer to make risk assessment classifications, calculate premiums and set terms of policies based on one of the prohibited grounds of discrimination under the ADA except in relation to sex, disability and age.<sup>213</sup> But those exceptions are only available to the extent that there is actuarial or other statistical data to support the discriminatory classifications or calculations. In particular, s 37 provides that sex discrimination in the terms on which an insurance policy is issued or offered is not unlawful if it is based on actuarial data from a source on which it is reasonable to rely and which is reasonable having regard to the data and any other relevant factors and if the source on which the actuarial data is based is disclosed to the EO Division if required. Curiously, the ADA does not expressly require disclosure of the data.

6.232 The exception operates only in relation to the terms on which an insurance policy is offered or issued. It does not extend to refusal to provide insurance at all, which remains subject to the prohibitions in the ADA.

6.233 ***Other jurisdictions.*** Section 41 of the SDA differs from the ADA in that it requires the insurer, at the client's request, to provide the client with a document outlining the data on which it relies or at least allow the client to see and copy the document containing the data, unless an exemption has been granted under s 44.

6.234 Other State and Territory laws virtually replicate the SDA in relation to sex discrimination.<sup>214</sup>

6.235 ***Is the actuarial exception justifiable?*** Actuarial statistics are commonly used by life insurers and insurers offering disability insurance. According to actuaries and insurers, these statistics show that the most significant factors are age and gender for death, and age, gender and occupation for disablement. However, because of Australia's relatively small population, local data tend to be insufficient to produce reliable industry statistics so insurers use a mix of local and overseas data and their own experience when setting premium rates.

6.236 Actuarial tables do not cover every conceivable risk insured against. Most decisions in relation to general insurance products are, in fact, based on a combination of previous claims experience, medical evidence and general community assumptions, none of which are flawless or immutable. Indeed, one of the major criticisms of statistical data is that such data may not be accurate or reliable, and will not be if the source of the data is biased. Although the actuarial exceptions for sex, disability and age confine the defence to "reasonable" actuarial data, this limitation has never been tested.

6.237 According to the Sex Discrimination Commissioner, sex-based data should not be the basis of actuarial tables:<sup>215</sup>

distinctions made on the grounds of sex, if any are to exist, must be very narrowly and precisely constrained to reflect demonstrable risk, but nothing else. The onus should be

squarely on the insurer to justify any differential treatment according to sex. Arbitrary differentials and those that might be struck to serve marketing or other purposes should not be permitted.

6.238 A number of submissions received by the Commission in response to DP 30 also questioned the continuing need for the exception.<sup>216</sup> Insurers and actuaries argue, on the other hand, that the actuarial exceptions should be retained in order to maintain a financially viable industry.

6.239 While the Commission accepts that insurance companies should be able to assess risks and make decisions based on actuarial data for economic reasons, they should not be able to discriminate on the basis of unreviewable assumptions about classes of people.<sup>217</sup> There is a strong argument that insurers should no longer continue to benefit from an automatic exception from the sex discrimination provisions. Like race, gender is a suspect category, and should not be relied upon when classifying risks and setting premiums unless there are compelling reasons for doing so. Under the current regime, the onus is on an individual to challenge an insurer's decision to discriminate, inevitably precluding any reasonable basis for complaint. Not surprisingly, few complaints relating to insurance ever proceed to the EO Division.

6.240 The options available in relation to this exception may be summarised as follows:

- (a) retain the exception from unlawful discrimination in its present terms;
- (b) replace the exception with one which mirrors s 41 of the SDA and which requires the insurer to provide the client with the data relied on;
- (c) replace the exception with a defence, which would require the insurer to justify a discriminatory practice; or
- (d) remove the exception entirely and require the insurer to justify its conduct for the purposes of obtaining an exemption under s 126 if it wishes to pursue a discriminatory practice.

6.241 The Commission is satisfied that, at the very least, the ADA should adopt the position found in the SDA. The effect of s 41 of the SDA is to exclude otherwise discriminatory conduct from the prohibition only where the terms on which the policy is available are discriminatory, the discrimination is based on actuarial or statistical data from a source on which it is reasonable to rely, the discrimination is objectively reasonable having regard to the data and, if requested, the insurer makes the data available to the person aggrieved.

6.242 The Commission thinks that it is appropriate to take the matter one stage further by requiring the insurer to bear the burden of establishing that its conduct is reasonable. In practice it is likely that the insurer would bear the burden in any respect, but complaints should not be discouraged by the appearance that the complainant would have to negate the reasonableness of the insurer's conduct.

6.243 The Commission has given careful consideration to the exclusion of the exception and the effective imposition on insurers of the burden of obtaining an exemption under s 126. Whilst the Commission sees merit in this position as a matter of principle, it is concerned that, in order to ensure that exemptions are only granted on appropriate grounds, it would be necessary to retain provisions similar to s 41 of the SDA as criteria upon which an exemption may be granted. In the present circumstances, it is satisfied that the preferred course is to provide a defence in terms consistent with s 41 of the SDA.

## **Recommendation 62**

**Replace s 37 in relation to the exception for insurance on the ground of sex with an exception in similar terms to s 41 of the SDA and which requires the insurer to justify discriminatory terms.**

Draft Anti-Discrimination Bill 1999: cl 37

## **Marital status**

### ***Employment of married couple***

6.244 Section 46 of the ADA provides an exception in relation to a job which is one of two to be held by a married couple. A similar exception is also provided in s 31(2)(i) of the Act, in relation to sex discrimination where the requirement that a job is one of two to be held by a married couple is considered a genuine occupational qualification. Both provisions were included in the Act as originally enacted and have never been significantly amended.

6.245 There is no similar exception under the SDA. The ADA (Qld) provides an exception to the ground of marital status where the work is one of two positions to be held concurrently by a married couple and they are required to live in accommodation that is supplied.<sup>218</sup> While the ADA merely provides an exception, the ADA (Qld) goes further in specifying the particular areas in which the exception applies, namely, the arrangements made for deciding and actually deciding who should be offered work, the terms of work, the failure to offer work or the dismissal of the worker. The EOA (WA)<sup>219</sup> provides a similar exception to the ADA as does the *Discrimination Act 1991* (ACT) (“DA (ACT)”),<sup>220</sup> except that instead of using the term “married couple” it refers to “a couple in a bona fide domestic relationship”.

6.246 The operation of this exception arose for consideration in *Graham v Norlyn Investments Pty Ltd*<sup>221</sup> and the decision in that case has raised some issues of concern. The complaint concerned a woman employed as a manager of a motel who was dismissed from employment because the company decided they would prefer a married couple to manage the motel. Accordingly, the company advertised and recruited a married couple for the position. The issue before the EOT was whether the exception in s 46 applied. In the decision, the EOT also referred to s 31(2)(i) and observed that both sections are similar in that they are both expressed in general terms and require a general assessment of the circumstances relating to the job. Having considered the evidence, the Tribunal was satisfied that “the position required the appointment of a married couple to properly fulfil its functions” and consequently dismissed the complaint. The operation of this exception resulted in the dismissal of a single person who was concededly doing her job competently.

6.247 The ADB is of the opinion that there is no continuing justification for the exceptions in s 46 and 31(2)(i), on the basis that it is inconsistent with the rights of people in de facto and same-sex relationships to include exceptions which discriminate between married and non-married couples on the basis of marital status and homosexuality. The ADB view is that if there is sufficient work for two persons then those people should be recruited on the basis of merit and not on the basis of an assumption that a couple will automatically be able to do the job better than two single people. If a couple was required, the nature of their relationship should not be a determining factor.

6.248 The Commission’s view is that this exception should not allow a single person to be dismissed to give way to a married couple, but there may be rare circumstances where it may be acceptable to require that the work be undertaken by a couple, rather than two single people. An example may be where the employer provides accommodation and the only accommodation available is that appropriate for a couple. Nevertheless, the argument in favour of such an exception is reminiscent of complaints by employers many years ago that if they had to hire women they would have to provide more toilets. Further, the exception should only be available where there is a reasonably grounded need, and not merely a preference on the part of the employer. The requirement that the couple be a “married couple” should be removed in favour of the Australian Capital Territory terminology, namely that the persons be in a “bona fide domestic relationship”.

### Recommendation 63

**Amend s 46 regarding the employment of a married couple to provide that the exception only applies where there is a reasonably grounded need and to substitute the requirement that the couple be a married couple to that the couple be in “a bona fide domestic relationship”.**

Draft Anti-Discrimination Bill 1999: cl 29

### ***Superannuation***

6.249 The ADA makes it unlawful for employers to deny or limit a person’s access to superannuation on the ground of their marital status. It also makes it unlawful for a superannuation fund or trustee to refuse to provide superannuation cover to a person or to offer it with discriminatory terms and conditions because of that person’s marital status.

6.250 These prohibitions are subject to a specific exception for funds and trustees if:<sup>222</sup>

the terms and conditions are based on reasonable actuarial or statistical data; or

where there is no such data, the terms and conditions are reasonable having regard to other relevant factors; and

the source on which any data relied upon is based, is produced to the EO Division if required.

General issues concerning the scope of these provisions are discussed in relation to the similar section relating to the ground of sex.<sup>223</sup>

6.251 ***Other jurisdictions.*** The SDA specifically permits new funds to discriminate against persons who have no spouse (including a de facto spouse) or any children by providing no benefits or less generous superannuation benefits in the event of a member’s death or to someone other than the member in the event of the member’s physical or mental incapacitation.<sup>224</sup> Unlike the ADA, it does *not* require that the discrimination be based on reasonable actuarial data. The SDA also allows an exception for existing fund conditions provided certain conditions are met.<sup>225</sup>

6.252 Broad exceptions for superannuation funds are available in most other Australian equal opportunity jurisdictions.<sup>226</sup> Some State Acts, such as the Victorian and Queensland Acts, specifically permit discrimination in superannuation on the ground of marital status to the extent that it is permitted by the SDA.<sup>227</sup>

6.253 ***Application of the SDA to public sector superannuation schemes.*** Section 13 of the SDA provides that the Act does not apply in relation to employment by an instrumentality of a State. This essentially means that the ADA will have exclusive coverage over public employment. However, the exemption in the SDA does not necessarily extend to the trustees of New South Wales public sector superannuation schemes, and New South Wales public sector funds may be partly covered under both Federal and State anti-discrimination laws.

6.254 ***Effect of the current exception.*** The s 49 exception permits both existing and new superannuation funds to discriminate against members on the basis of their marital status. Such discrimination generally takes the form of no benefits or less generous benefits to single members or members in same sex relationships. For example, the *Superannuation Industry Supervision Act 1993* (Cth) (“SIS Act”) provides that when a member dies, the trustee should pay a reversionary benefit to the dependents of the member. It defines dependent in s 10 inclusively as the spouse or any child of the

member. Spouse is, in turn, defined as the legally married spouse or the de facto spouse of the member. Similar provisions apply in public sector schemes.<sup>228</sup>

6.255 *Definition of dependent:* Most funds interpret the provisions of the SIS Act to exclude the payment of benefits to a same sex partner. They commonly argue that the same sex partner does not satisfy the definition of dependent in s 10 and therefore the payment of benefits to a same sex partner would compromise the fund's complying status under s 62.

6.256 Although defined inclusively in the SIS Act, "dependent" has consistently been interpreted narrowly in relation to superannuation benefits to mean completely financially dependent.<sup>229</sup> The EOT, however, has held that this is an outdated notion given that partners in a relationship, whether heterosexual or homosexual, frequently both work and are thus financially "independent". The EOT has construed "dependent" as:

an ordinary word having normal connotations of reliance and need, trust, confidence, favour and aid in sickness and in health including social and financial support and its normal meaning is not limited to financial dependence ... The mere fact that one member of a household couple is in receipt of earnings does not mean that he or she is not a dependent of the other or that they may not be mutually dependent.<sup>230</sup>

6.257 The case is distinguished by some superannuation trustees who argue it applies only for the purposes of health insurance.

6.258 *Definition of spouse:* Heterosexual partners are automatically considered to be dependent, whether married or in a de facto relationship with the contributor. In a recent challenge against a trustee's decision to refuse to pay a superannuation benefit to a same sex partner, the court was asked to consider whether the definition of "spouse" is capable of a same sex construction.<sup>231</sup> The AAT held that it was not but added:

It gives us no joy to do so. There is no doubt that the applicant and Mr [ ] had a close marriage-like relationship and that they conformed to the requirements of section 8A in all respects except for their gender.

6.259 In a submission to the Senate on its inquiry into superannuation, the Gay and Lesbian Rights Lobby stated:<sup>232</sup>

The outcome of this case clearly indicates that the SIS Act and the *Superannuation Act 1976* (Cth) and all other Acts governing superannuation schemes of the Commonwealth, need amendment to ensure that a person living in a bona fide domestic same sex relationship with a contributor is entitled to payment of a death benefit on the death of a contributor, regardless of the gender of either the contributor or the partner or their sexual preference.

6.260 *Other instances of discrimination against same sex couples:* Other instances of discrimination on the ground of marital status, affecting same sex couples, were outlined in a recent report by the Gay and Lesbian Rights Lobby Inc.<sup>233</sup> These included failure to acknowledge the claim to dependency of a child of the same sex relationship where the deceased contributor was a partner of the relationship even though he or she may not have been the biological parent of the child and the inequitable tax treatment of payments of death benefits to the contributor's estate (rather than to the surviving same sex partner) resulting in a higher tax liability for the partner.

6.261 *Limitation of benefits to single persons and adult children:* The limitation on the payment of benefits to a "dependent" also discriminates against some single persons and some children of the member, who, once aged 18 years, do not qualify as a dependent of the member, even where they may actually continue to be financially dependent.<sup>234</sup>

6.262 **Submissions.** The Commission received many submissions advocating the non-discriminatory treatment of same sex couples across all areas of law, including superannuation.<sup>235</sup> A major argument in support of this reform was the inconsistency of the treatment of same sex couples by superannuation laws on the one hand, and social security and industrial relations laws, on the other.

6.263 The argument has received support in the decision of the EOT in *Hope v NIB Health Funds Ltd*,<sup>236</sup> referred to above. In addition, the Senate Select Committee on Superannuation recommended that superannuation regulations be amended so that persons “in bona fide domestic relationships (including same sex partners) and single people are treated in the same manner as married and de facto superannuants”.<sup>237</sup>

6.264 The ASFA advocates strongly for a national uniform approach. It points out that the SDA’s “carefully limited exemptions” and the ADA’s exceptions for superannuation funds are not directly comparable. In cases where there are Federal discrimination laws affecting superannuation, the ASFA submits that the States should vacate the area.<sup>238</sup>

6.265 **Implications of Commission’s recommendations in relation to s 54 and the definition of marital status for NSW public sector schemes.** Issues of marital status discrimination mostly arise in the older State superannuation schemes. The Commission’s recommendations to remove the s 54 exception and extend coverage to same sex couples under the new ground of “domestic status” will be a cause of concern for public sector employers and funds, who currently obtain relief from compliance with the ADA under s 54.

6.266 Although it may be argued that New South Wales anti-discrimination law which prohibits conduct that is excepted under the SDA is inconsistent and therefore inoperative, that argument has little force in relation to a Commonwealth law which seeks to pursue a protective purpose, but without covering the field, and where protection would be greater under the State Act. It is more likely that the new ground of domestic status will be inconsistent with the SIS Act and therefore invalid in so far as it purports to extend to regulated funds.<sup>239</sup> It is not likely to be rendered inoperative with respect to New South Wales public sector schemes, which are not regulated funds under Commonwealth law.

6.267 **Conclusions.** The removal of s 54 and the extension of coverage to same sex partners will have the effect of requiring public employers and public sector superannuation schemes to provide superannuation cover on equal terms to persons regardless of their domestic status. Under current law, funds may be able to claim an exception if they can produce reliable statistical data to justify any discrimination.

6.268 The Commission believes that superannuation benefits should be provided on a non-discriminatory basis to all members, regardless of their marital status. Ideally, consensus is required at the Federal and State level to amend all relevant legislation, including tax laws, to enable non-discriminatory terms and conditions in superannuation. In the interim, the Commission has considered other options to ensure that, at the very least, New South Wales public sector schemes provide non-discriminatory superannuation cover and benefits to all contributors. Given the growing view in favour of such a result, it is clearly open to New South Wales, as the most populous state, to provide a lead in this area.

6.269 One way of ensuring non-discriminatory conditions is for the trustees to be required to pay all superannuation benefits to the estate of the member, as is provided under the First State Superannuation scheme established in 1992. This option has certain advantages in that it ensures equal treatment of members regardless of their marital status and is not inconsistent with s 62 of the SIS Act and will therefore not affect the scheme’s complying status. The disadvantage is that it does not, nor can it, address the issue of inequitable treatment in the division of estates, the narrow definition of dependent and the higher tax charges which apply to estate benefits. These are matters for the Commonwealth and State governments to resolve under superannuation, tax and de facto relationships laws.

6.270 In relation to the old schemes, the Commission accepts that the threat of losing tax concession status and the potential financial burden in removing the discriminatory provisions warrant a savings provision, as has been discussed in relation to sex discrimination in superannuation funds above. Accordingly, the Commission recommends that it should not be unlawful for existing funds to retain existing discriminatory provisions provided the fund is closed to new members and existing members are offered an option to transfer to new non-discriminatory schemes.<sup>240</sup> New schemes should not benefit from any specific exception under the ADA. Rather, the onus should be on each new scheme, if they believe they can justify domestic status discrimination, to obtain a s 126 exemption from the President of the ADB. Accordingly, the Commission proposes the repeal of s 49.

#### **Recommendation 64**

**Repeal s 49 in relation to the exception for superannuation on the ground of marital status.**

#### **Recommendation 65**

**Insert a saving provision allowing existing funds to retain provisions which discriminate on the ground of domestic status provided the scheme is closed and existing members have been offered an option to transfer to a non-discriminatory scheme.**

**Draft Anti-Discrimination Bill 1999: cl 39, 40**

### **Disability**

6.271 Various exceptions limit the application of the ground of disability in relation to specific areas of operation as well as generally across all grounds. In all areas of operation there is an implicit obligation to accommodate a disability so long as it does not impose an unjustifiable hardship on the employer, educational authority, service provider etc as the case may be. In relation to employment there is a requirement that the person be able to carry out the inherent duties of the job, and if reasonable accommodation is required to do so, that such accommodation should not cause unjustifiable hardship. The definitional and practical difficulties arising from these concepts are dealt with in both Chapter Three and Chapter Five of this report. Particular exceptions that apply in relation to disability are dealt with below. In their submission to the Commission in response to DP 30, the Disability Council of New South Wales argued for the repeal of all general and specific exemptions to the ADA allowing for the grant of exemptions by the President of the ADB only on application from the person seeking the particular exemption.<sup>241</sup>

### **Public health**

6.272 Section 49P of the ADA provides that it is not unlawful to discriminate against a person with an "infectious disease" if it is reasonably necessary to protect "public health". Thus, the rule applied by most schools that any child with chicken pox must stay away from school until the infectious period has passed, does limit access to benefits, but does not contravene the ADA. This exception is necessary to ensure that the spread of infectious diseases is controlled.

6.273 The DDA provides an exception for infectious diseases in identical terms to the ADA. Victoria provides for a health or safety exception,<sup>242</sup> while Queensland provides a general public health exception as well as a workplace health and safety exception.<sup>243</sup> In Western Australia, infectious diseases are dealt with by way of regulation which provides that particular provisions shall not have effect in relation to a person suffering from an infectious disease.<sup>244</sup> The Australian Capital Territory<sup>245</sup> and the Northern Territory<sup>246</sup> Acts contain provisions similar to the ADA.

6.274 The ADA presently contains no definition of the term “infectious disease”. Further, it is not a term upon which the protective provisions of the *Public Health Act 1991* (NSW) are based. Nor is the term “public health” a defined term in the Act. Finally, although protection against inappropriate measures may be found in the requirement that the exception only applies where the act is “reasonably necessary” to protect public health, generally speaking, members of the public at large are not in a good position to make judgments about such matters.

6.275 Although it may be necessary to take steps in relation to persons who have an infection or other condition which is readily transmissible, it is now well understood that effective public health measures often demand preventive treatment, such as immunisation or vaccination. These measures are usually directed towards sections of the population who are not identified on the basis of any ground prohibited under the ADA, except, generally speaking, age.

6.276 On one view, an employer, service provider or other person covered by the Act might be unwise to rely on this exception in the absence of appropriate medical opinion to support the action. However, if that is the appropriate course for people to follow, arguably that should be made express by the terms of the exception. The control of infectious and other diseases often involves complex matters of public policy. For example, the provision of services to people with particular conditions may require that the services be available at particular places or by particular means. Finally, there is a danger in allowing members of the public to make decisions, albeit subject to a requirement that they be “reasonably necessary”, without adequate knowledge of what conditions are transmissible and how. For example, there has, in the recent past, been a level of unacceptable discrimination against people infected with HIV in circumstances where such people provided no real risk to members of the public. The submission of the AIDS Council of New South Wales specifically noted the practice in some hospitals of requiring HIV patients to wear distinguishing armbands. It was argued that such a requirement exposes HIV patients to discrimination and is out of all proportion with the risks actually presented.<sup>247</sup> Further, there is an issue as to what is involved in “protection of the public”. Is a measure designed to protect a small work-force, or children in a small school, covered by such a purpose?

6.277 The ADB has argued that:

There should be a public health exemption in relation to infectious diseases where discriminatory measures are necessary to protect public health. This exception should be construed as narrowly as possible to ensure that any discrimination is absolutely necessary in the interests of public health.<sup>248</sup>

6.278 On balance, the Commission is of the view that the exception should be re-worded, so as to give effect to its apparent purpose, and that the ADB should be given express authority to establish guidelines as prima facie evidence of what is reasonably necessary in particular circumstances.

### **Recommendation 66**

**Provide a public health exception for an act where:**

**the disability of a person concerned involves a condition which is transmissible in the circumstances which may arise if the act is not done;**

**the act is done on the basis of medical or other expert opinion on which it is reasonable to rely in the circumstances; and**

**the measures taken are not disproportionate to the risks involved.**



**Provide an exception for acts done for the purpose of giving effect to a requirement of, or made under, the *Public Health Act 1991 (NSW)* or the *Mental Health Act 1990 (NSW)*.**

**Draft Anti-Discrimination Bill 1999: cl 67**

6.279 **Goods and Services.** There are no exceptions (other than the unjustifiable hardship exception) applicable to the provision of goods and services generally. However, there are specific exceptions in relation to various types of services, including education, accommodation, superannuation, insurance and sport. These will be dealt with in turn below.

***Educational institutions conducted solely for students with a disability***

6.280 Section 49(L)(3) of the ADA provides an exception in relation to admission by an educational authority where the institution is “conducted solely for students who have a disability which is not the same as that of the applicant”. The effect of this exception is that an educational authority administering a school, college, university or other institution which is conducted *solely* for students who have a particular disability, is not required to admit an applicant without that disability.<sup>249</sup> The submission of the ADB expressed its general support for such an exemption.<sup>250</sup>

6.281 This provision gives rise to a number of difficulties. First, there is no reason to require that the institution be conducted “solely” for students with a particular disability. This involves the removal of such students from the potential benefit of associating with other students without the disability. This is unnecessary and counter-productive.

6.282 Secondly, the provision allows discrimination against a person with a disability which is “not the same as” that for which the institution caters. The absolute nature of this terminology also gives rise to inflexibility which seems unnecessary in the circumstances and actually leads to some confusion. For example, it is not clear whether an institution can properly distinguish between children with mild, moderate and severe hearing impairments.

6.283 Similar exceptions apply in other jurisdictions. The DDA provides an exception for educational institutions established “wholly or primarily for students who have a particular disability”.<sup>251</sup> In Victoria, the terminology refers to “an educational institution or program” which is operated “wholly or mainly” for students with a “general or particular impairment”.<sup>252</sup> The distinction between institution or program seems preferable to the New South Wales terminology. The distinction between a general or particular impairment is not entirely clear. Other States and the Territories adopt similar terminology.

6.284 Despite the general availability of such an exception, its rationale is obscure. Institutions which accept students with a particular disability only, discriminate against those without that disability. However, it is not unlawful under the ADA to discriminate against able bodied people, nor to discriminate against disabled people on the ground of lack of a particular disability; and even if it were, it would be justifiable as a special measure.

6.285 Secondly, the fact that an institution caters for students with a particular disability does not give rise to any obvious reason for allowing it to discriminate unlawfully against those with other disabilities. For example, it is not readily apparent why, as a matter of general principle, an institution which provides education or services to the blind should automatically be entitled to exclude blind students in wheelchairs. The appropriateness of such conduct should depend upon the unjustifiable hardship test, as with other institutions. Accordingly, the exception should be repealed.

**Recommendation 67**

**Repeal s 49L(3)(b) in relation to the exception applicable to educational institutions conducted solely for students with a particular disability.**

### **Superannuation and insurance**

6.286 Prior to 1994, it was not unlawful under the ADA for a superannuation provider to discriminate on the ground of disability even where the risk was exactly the same for a person without a disability. Now, however, a superannuation or insurance provider can discriminate on the ground of disability in the terms and conditions of a superannuation fund or an insurance policy if the discrimination is reasonable having regard to actuarial or statistical data on which it is reasonable to rely, and any other relevant factors, and the source of such data is disclosed to the Tribunal if required.<sup>253</sup>

6.287 **Other jurisdictions.** The DDA, by comparison, permits a superannuation fund to refuse membership to a person with a disability and allows an insurer to refuse to offer an insurance policy to a person with a disability. It also allows a superannuation fund and an insurer to discriminate on the ground of disability in the terms and conditions of the fund or insurance policy.<sup>254</sup> The preconditions mirror the ADA, except that there is no express requirement to disclose the source.

6.288 Similar exceptions for superannuation and insurance are also provided in other State jurisdictions.<sup>255</sup>

6.289 **Scope of the exception.** The ADA appears to offer better protection to persons with a disability than the DDA which allows persons to be refused membership of a fund or insurance cover because of their disability. The ADA exception, on the other hand, applies only to the terms and conditions of a superannuation fund or insurance policy. This may however be an academic distinction if the insurance policy has such a broad exclusion clause that it is tantamount to a refusal to cover.

6.290 In relation to insurance, it is not clear whether the ADA applies to all forms of insurance. In *AMP v Goulden*,<sup>256</sup> the High Court held in 1986 that the ADA was inconsistent with the *Life Insurance Act 1945* (Cth) insofar as it purported to affect the ability of registered life insurance companies to classify risks and fix premiums according to actuarial and prudential standards. However, the reasoning depended upon the operation of s 78 of the *Life Insurance Act 1945* (Cth), which provided that life insurance policies be issued according to a risk classification and the rate of premium be fixed by the company upon actuarial advice. That requirement was held to be incompatible with any State law which purported to make it unlawful to take account of a particular physical impairment in decisions concerning the issue of policies and the fixing of premiums. Such a State law would alter, impair or detract from the Commonwealth law and hence would be inoperative pursuant to s 109 of the *Commonwealth Constitution*.

6.291 Since that decision in 1986, the scheme of prudential regulation of life insurance companies has changed significantly with the introduction of the *Life Insurance Act 1995* (Cth). Whilst any direct inconsistency between State and Commonwealth law would still result in the State law being inoperative, the 1995 Act declares that "it is the intention of the Parliament that this Act does not apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Act".<sup>257</sup> The interaction of the 1995 Act with the Commonwealth's own DDA, which contains a similar provision protective of State laws, requires a reconsideration of the issue determined by *Goulden*. As a result, the extent to which the ADA is able to regulate life insurance policies in New South Wales remains an open question. To the extent that it offers the same protection as does the DDA, the effectiveness of the protection will depend upon the extent to which the DDA and *Life Insurance Act 1995* (Cth) can stand together. To the extent that it offers additional protection to that available under the DDA, the protection is likely to be effective so long as it is not directly inconsistent with the requirements of the Commonwealth law.<sup>258</sup>

6.292 The ADA also operates, however, in relation to health insurance and other insurance (such as CTP and workers compensation) which are not covered by Commonwealth regulatory laws. It should also apply to an insurer's decision whether or not to issue a policy of general insurance and, to the extent that they are not covered by the *Insurance Contracts Act 1984* (Cth), to the terms and conditions on which a general insurance policy is issued or offered.

6.293 Uniformity with Federal laws is appropriate where Federal law offers better protection or where the State law is likely to be otherwise inoperative. In this instance, the Commission does not consider uniformity with the DDA desirable or necessary for two reasons. First, it is unlikely that s 49Q of the ADA will be inoperative, as it affords better protection to persons with a disability than the DDA. Secondly, uniformity would mean winding back the protection afforded under the ADA.

### ***Sport***

6.294 Section 49R provides that it is not unlawful to exclude a person with a disability from a sporting activity:

- (a) if the person is not reasonably capable of performing the actions reasonably required in relation to the sporting activity; or
- (b) if the persons who participate or are to participate in the sporting activity are selected by a method which is reasonable on the basis of their skills and abilities relevant to the sporting activity and relative to each other; or
- (c) if the sporting activity is conducted only for persons who have a particular disability and the person does not have that disability.

6.295 This exception was inserted in 1994 to reflect the provisions of the DDA which contain a specific prohibition against discrimination on the ground of disability by exclusion from a "sporting activity".<sup>259</sup> As already noted, there is no such prohibition in relation to sporting activity in the ADA. Nor is it intended that any such prohibition be included, except to the extent that it will be included as a service provided by an incorporated club or association. It is appropriate, therefore, to consider the exception in that context. In any event, the exception would require some clarification as paragraph (b) is unnecessarily convoluted and imprecise. It is presumably intended that sprinters may be selected on the basis of running ability, so as to exclude persons in wheelchairs. The proposed definition of disability discrimination is too wide if it gives rise to such a difficulty.

6.296 The Commission recommends the repeal of s 49R.

### **Recommendation 68**

#### **Repeal s 49R (exception for sport on the ground of disability).**

### ***Membership of clubs***

6.297 Section 49O prohibits discrimination by registered clubs in relation to admission to membership and access to benefits. The section provides that:

- (1) It is unlawful for a registered club to discriminate against a person who is not a member of the registered club on the ground of disability:
  - (a) by refusing or failing to accept the person's application for membership; or
  - (b) in the terms on which it is prepared to admit the person to membership.
- (2) It is unlawful for a registered club to discriminate against a person who is a member of the registered club on the ground of disability:
  - (a) by denying the person access, or limiting the person's access, to any benefit provided by the registered club; or

- (b) by depriving the person of membership or varying the terms of the person's membership; or
- (c) by subjecting the person to any other detriment.

6.298 The ADA provides two exceptions: first, in s 49O(3), it allows clubs to discriminate on the ground of disability in relation to both admission to membership and the terms and conditions of membership if the principal object of the club is to provide benefits only for persons with a particular disability.<sup>260</sup> The ADA outlines what factors should be taken into account when determining the principal object of the club.<sup>261</sup> The second exception, in s 49O(5), relates only to access to benefits provided by the club and states as follows:

- (5) Nothing in sub-section 2(a) renders it unlawful to discriminate against a person on the ground of disability where, because of the person's disability, the person requires the benefit to be provided in a special manner and the benefit cannot without unjustifiable hardship be so provided by the registered club.

6.299 Equivalent exceptions are provided by the DDA.<sup>262</sup>

6.300 The provisions in other Australian jurisdictions can be divided into two camps: Victoria, Queensland and the Northern Territory all except clubs which are established for the benefit of disadvantaged persons but the exception applies only in relation to the admission of persons to membership of the club.<sup>263</sup> No unjustifiable hardship exception is provided in relation to members' access to a club benefit. The Western Australian and Australian Capital Territory anti-discrimination laws, on the other hand, are modelled on the DDA provisions.<sup>264</sup>

6.301 At present the unjustifiable hardship exception in s 49O(5) only applies in relation to the provision of benefits.<sup>265</sup> The exception should logically apply to the terms and conditions of membership and the treatment of members generally. Thus, if one of the purposes for which a club is established is to conduct sporting activities, the club should be entitled to restrict those activities to persons who are, by reason of a disability, unable to participate in the normal way. Thus, an athletics club may have a separate class of membership for those who are unable to participate, with appropriately reduced subscriptions. The terms and the restrictions should, in accordance with general principles, be proportionate to the relevant disability and not based on stereotyping assumptions.

6.302 In Chapter Four, the Commission recommended that the current area of "registered clubs" be substituted by a new area of "clubs and associations".<sup>266</sup> The above analysis would apply equally to this area.

## **Recommendation 69**

**Extend the unjustifiable hardship exception in s 49O(5) in relation to the provision of benefits by a club to apply to all aspects of the prohibition in s 49O(2).**

Draft Anti-Discrimination Bill 1999: cl 14, 52

## **Homosexuality**

6.303 There are no specific exceptions to the ground of homosexuality. The only exceptions that currently apply to this ground are the general exceptions discussed above and the limitations on the public sphere of operation discussed in Chapter Four. If the Commission's proposal as to a new ground is accepted, homosexuality will be included within the wider ground of sexuality and will no longer be a separate ground.<sup>267</sup> However, this change will not require the inclusion of any new specific exceptions.

## Age

6.304 The practical difficulties associated with defining age as a ground of discrimination, discussed in Chapter Five of this Report,<sup>268</sup> have resulted in an increased focus on the role of the exceptions. Currently, this ground is subject to more exceptions than any of the other grounds of discrimination. In addition to the general exceptions to which all grounds are subject, there are specific exceptions that limit the coverage of particular areas of operation in which age discrimination is prohibited. Additionally, there are other exceptions that apply to age discrimination across all areas of operation.

6.305 To repeat briefly the problems identified in Chapter Five, the concept of age is not an entirely irrelevant consideration in many areas of public activity. The difficulty is to identify those areas where it is entirely irrelevant and to distinguish them from those areas where it is not. For example, taking the important area of employment, we treat it as a matter of pride that we protect our children from the labour force and require them to have educational opportunities. Similarly, in other areas, there are laws relating to the legal capacity and welfare of people under 18 years which provide legitimate protection to children.

6.306 The ADA presently provides numerous general exceptions to Part 4G including exceptions in relation to laws:

relating to the legal capacity and welfare entitlements of children;<sup>269</sup>

programs providing for the special needs of people of particular ages;<sup>270</sup> and

regulation of fitness to control a vehicle.<sup>271</sup>

6.307 The Commission has no doubt that these exceptions should be retained. However, there are numerous other specific exceptions within the ADA which are in part designed to reflect the operation of laws which discriminate on the basis of age. Despite the Commission's view that a general statutory exemption for things which it is necessary to do in order to comply with any other Act or statutory instrument is inappropriate, nevertheless, in relation to age, that approach should be adopted.

6.308 Whilst age can be an arbitrary measure, in many areas it is largely accurate and provides a practical approach to what otherwise might require a mass of individual assessments. Pragmatic judgments based on a criterion such as age, as to abilities and weaknesses are not necessarily correct in relation to each individual, but individual assessment is not immune from arbitrary variation. Questions of degree are involved.

6.309 The principles which the Commission has sought to apply in the following consideration of the exceptions are as follows:

- (1) if age is truly an arbitrary distinction, no exception should apply;
- (2) if age can be identified on a pragmatic basis as a rough guide to abilities or disabilities, an exception to the general prohibition should be considered;
- (3) the justification for an exception will depend upon:
  - (a) the extent to which relevant disabilities or abilities can be identified as age-related; and
  - (b) the difficulties which might be associated by requiring individual assessment of the relevant ability or disability.

### ***General exceptions: age***

6.310 As noted in the discussion relating to the general exception provided by s 54 of the current ADA, the Commission considers it appropriate to retain a general exception relating to compliance with

statutory provisions in relation to the ground of age. The reason for this approach is reflected in the general exceptions now contained in relation to this ground, particularly those relating to the legal capacity and welfare of children<sup>272</sup> and safety procedures.<sup>273</sup> Generally, the statutory provisions, the operation of which is retained by these exceptions, reflect a policy decision that age is an appropriate basis for regulating particular kinds of conduct. Without having conducted a comprehensive review of the provisions, it appears to the Commission that, generally, that approach is legitimate in the areas where it has been adopted. Nevertheless, the Commission recommends that a review be undertaken of such legislation and that any future legislation which may introduce age-based criteria, should be the subject of scrutiny by a Parliamentary Committee. The purpose of such scrutiny should be to ensure that age is not being used as a short-cut to an appropriate consideration of individuals on their merits. Such an approach is readily justifiable where individual assessment would involve a largely impressionistic or subjective decision made in a vast number of cases, where the intrusion on individual rights is not likely to be disproportionate to the benefits sought to be achieved by the form of regulation imposed, and where the link with age is reasonably clear.

#### **Recommendation 70**

**Provide a general exception to the ground of age where an act is necessary to comply with another Act, regulation or other statutory instrument.**

**Draft Anti-Discrimination Bill 1999: cl 65**

#### **Work**

6.311 **Qualifying bodies.** Qualifying bodies which are responsible for conferring, renewing or extending trade, professional or occupational qualifications are allowed to impose a “reasonable and appropriate minimum age under which an authorisation or qualification will not be conferred”.<sup>274</sup> Thus, for example, the New South Wales Boxing Association, which does not confer a trainer’s boxing licence until the age of 18, will not be discriminating on the ground of age against those under 18. Clearly, the focus is, in principle, on whether the minimum age set is “reasonable and appropriate”. The rationale for this exception is that people must be suitably qualified to obtain a qualification and the ability to obtain such qualifications is often linked to age via levels of education and experience. In relation to a sporting activity, it may also be concerned with physical development, which also tends to be linked to age.

6.312 The Commission has been troubled by this exception for two reasons. First, if it is appropriate to impose a minimum age before which a particular employment qualification cannot be granted, why is it not appropriate to allow the imposition of a maximum age up to which the qualification can be held? Secondly, the area of authorisations and qualifications is usually treated as one to which assessment of specific competence is readily applicable. For example, a minimum age for qualification as a medical practitioner is likely to be dictated by the time taken to satisfy the training requirements. On the other hand, the holding of a trainer’s boxing licence, referred to above, may be thought to be dependent upon a level of maturity and judgment, which, like other aspects of legal capacity, can appropriately be expected only of persons above a specified age.

6.313 The Commission is not inclined to recommend the abolition of this exception. Rather, it believes that, consistently with the rationale for the exception, qualifying bodies should be entitled to require groups identified by age to undergo differential requirements for renewal or extension of the relevant authority or qualification. This would allow the assessment of competence and skills by imposing relevant testing, for example, to an older age bracket, without unnecessarily retesting everyone. In principle, there can be no objection to a hospital requiring surgeons to undergo skills based testing after they reach, say, 60 years of age. To impose such a requirement is to ensure that people do not retain jobs for which they are no longer competent, without requiring younger people who are not likely to lose their particular skills in the absence of accident or disease routinely to undergo re-testing for no good purpose.

## Recommendation 71

**Extend the exception in s 49ZYG(2) to allow qualifying bodies to require groups identified by age to undergo differential requirements for renewal or extension of the relevant authority or qualification.**

Draft Anti-Discrimination Bill 1999: cl 34

6.314 **Junior employees.** Section 49ZYI of the ADA provides an exception from the age discrimination provisions for employers in relation to offering employment and terms of employment for people under 21 years. The section as originally inserted in 1993 excepted junior employees from discrimination in the terms and conditions of employment “if those terms and conditions were in accordance with an award”. However, the section was amended in 1994 to remove any reference to awards. The exception is to apply for at least two years from proclamation of the age discrimination amendments (ie from 1 July 1994) and will continue until it is lifted by proclamation.

6.315 The issue of whether employers should be able to pay a lower wage to workers under 21 years is a contentious one. On the one hand, there is concern that the abolition of youth wages would lead to an increase in youth unemployment and reduce the opportunities for young workers to gain experience. On the other hand, it has been suggested that workers should be paid according to merit and productivity and that a “training wage” would be a more appropriate option for an inexperienced worker. Wage discrimination against young people is considered by some to be just as offensive as wage discrimination against women or Aboriginal people.<sup>275</sup> Many of the justifications used to deny women equal pay have been used to deny fair treatment in the workplace for juniors: they are not good workers, they need more training, they do not need the money, they have no dependents to support etc.<sup>276</sup> Although none of these arguments is convincing, attempts to change the practice have been unsuccessful due to fears of significant economic ramifications.<sup>277</sup> Reviews of age discrimination in the Australian Capital Territory, Western Australia, South Australia and Victoria have recommended that, in the absence of conclusive evidence of the effects of youth wages on youth employment, it is inappropriate to prohibit youth wages.<sup>278</sup> It has also been argued that the system of youth wages should not be altered by anti-discrimination law, but rather in the industrial arena in line with the policy of equal pay for work of equal value.

6.316 When considering this issue in New South Wales, the Attorney General’s Department suggested three possible options:<sup>279</sup>

providing an open-ended exception for junior wage rates which would meet the concerns of employers for containing costs and providing jobs for young people, but ignoring the merit principle;

making junior wage rates unlawful on the basis that it is inappropriate for young people to be paid less than adult workers; and

phasing out an exception for junior wage rates over a period of two years to provide employers time to plan for and assess the impact of the removal of junior wage rates.

6.317 The majority of the submissions in response to the Green Paper expressed strong preference for the phasing-out option,<sup>280</sup> which was incorporated into the ADA. There is, however, a committee of representatives from the Department of Industrial Relations, the ADB, the Public Employment Office, employer groups, unions and representatives from youth affairs currently considering the future of this exception.

6.318 The purpose of incorporating the phasing-out option was to give employers time to plan for the removal of this exception, given that one of the major concerns of employers was that the removal of

this exception would result in a significant impact on teenage employment. An issue discussed at length in the White Paper was the implementation of competency-based training wages to replace age-based wages. It was suggested that such an approach would not increase youth unemployment if wage rates are linked to agreed levels of experience, training or skill. While this approach would be advantageous to teenagers in sectors where junior rates do not exist, such as in the main building and construction awards, its overall value as a replacement for age-based rates would depend largely on the development of appropriate competency standards. However, even that approach could be indirectly discriminatory, unless justifiable. In policy terms, it would be necessary to consider whether the reasonableness of the rates was to be assessed by the EO Division (in the absence of an express exception in the ADA) or by some other body.

6.319 Federally, s 120B of the *Workplace Relations Act 1996* (Cth) requires that the Full Bench must prepare a report on the feasibility of replacing junior rates with non-discriminatory alternatives by June 1999.<sup>281</sup>

6.320 Consistent with the recommendations of reviews into age discrimination, all existing age discrimination legislation in Australia, except the Northern Territory, makes some provision for youth wages. Victoria<sup>282</sup> and Queensland<sup>283</sup> have a blanket exception, while South Australia,<sup>284</sup> Western Australia<sup>285</sup> and the Australian Capital Territory<sup>286</sup> except junior wages fixed in accordance with an industrial award or agreement.

6.321 Although the current exception is difficult to justify in terms of justice or equity, the Commission is reluctant to recommend repealing the exception while the matter is being considered in the industrial arena and federally. However, given that the exception is now operating beyond the target date, the Commission recommends that a further target date be set to ensure that alternatives are considered and change is not permanently resisted. The target date should be December 2000.<sup>287</sup>

## **Recommendation 72**

**Amend s 49ZYI(3) in relation to junior employees by stating that the section ceases to operate in December 2000.**

**Draft Anti-Discrimination Bill 1999: cl 32**

6.322 ***Genuine occupational qualification.*** Section 49ZYJ provides an exception where being of a particular age or age group is a genuine occupational qualification for the job. The section reads as follows:

- (1) Nothing in this Division renders unlawful discrimination against a person on the ground of the person's age if being a person of a particular age or age group is a genuine occupational qualification for the job.
- (2) Being a person of a particular age or age group is a genuine occupational qualification for a job if either of the following requirements is satisfied:
  - (a) in dramatic performances or other entertainment, the essential nature of the job calls for a person of that age or age group for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a person of another age or age group;
  - (b) the holder of the job provides persons of that age or age group with services for the purpose of promoting their welfare or furthering their education and



those services can most effectively be provided by a person of a particular age or age group.

6.323 As stated in the Second Reading Speech,<sup>288</sup> the genuine occupational qualification exception in relation to age is based on equivalent exceptions applicable to race and sex. Although the ADA specifies the areas in which the exception applies, it also makes provision for further prescription by regulations.<sup>289</sup> There have been no such regulations to date. In any event, the Commission sees no need to provide for widening the exception beyond the circumstances specified in the ADA: subsection (2) does not limit the generality of (1).

6.324 The genuine occupational qualification exception to age applies in all States and Territories which have legislated against age discrimination. In Victoria, it applies in relation to “a dramatic or an artistic performance, entertainment, photographic or modelling work or any other employment, if it is necessary to do so for reasons of authenticity or credibility”.<sup>290</sup> In Queensland,<sup>291</sup> South Australia<sup>292</sup> and the Northern Territory,<sup>293</sup> the exception is even more open ended with no specific circumstances prescribed in the legislation. The exception applicable in Western Australia<sup>294</sup> and the Australian Capital Territory<sup>295</sup> is a combination of the New South Wales and Victorian provisions.

### **Recommendation 73**

#### **Repeal the regulation making power regarding the genuine occupational qualification exception on the ground of age in s 49ZYJ(3) and 49ZYJ(4).**

6.325 ***Voluntary retirement and severance schemes.*** Retirement or severance schemes which are based solely on age and are not voluntary, are presently unlawful under the compulsory retirement provisions of the ADA. However, s 49ZYK provides that where the retirement or severance scheme is voluntary, it is not unlawful to use length of service as a basis for offering an employee, commission agent, contract worker or partner participation in such a scheme.

6.326 The rationale behind this exception was outlined in the Second Reading Speech which noted that:

[a]lthough the Government is of the view that voluntary retirement and other similar schemes based solely upon an employee’s age are discriminatory on the ground of age, it is acknowledged that some voluntary redundancy schemes validly enable employees to take advantage of redundancy packages which recognise length of service.<sup>296</sup>

6.327 Linking years of service to employment benefits is justified on the basis that:

it is a common feature of the industrial landscape;

long service should be rewarded; and

employees have relied on expectations that certain benefits will flow after a period of time.

6.328 However, in recent times, there has been a conscious integration of equal employment and anti-discrimination principles into industrial law<sup>297</sup> which has resulted in changes to discriminatory work practices.<sup>298</sup> Previously accepted and entrenched industrial practices must now be justified. Statistics also reveal changing patterns of work for people depending on age<sup>299</sup> with the greatest job mobility for young persons aged between 20-24 years and the least for those aged between 55 and 69.<sup>300</sup> This indicates that a higher proportion of young people may be disadvantaged by linking benefits of employment to length of service. It is therefore evident that while rewarding years of service may be a

legitimate consideration, it has an adverse impact on women because of their broken patterns of work-force participation and on young people because of their high job mobility. Other groups such as persons with a disability may also have broken patterns of work-force participation due to illness and may consequently be disadvantaged. So also may migrants from non-English speaking backgrounds because of recent re-entry into the work-force and substantial periods of casual or part-time work.

6.329 The only other jurisdiction in Australia that excepts voluntary retirement schemes from age discrimination is Western Australia.<sup>301</sup>

6.330 On balance, the Commission is not satisfied that the link between age and length of service requires that length of service be rejected absolutely. The exception should therefore be retained. Further, if it is to be reconsidered it raises policy issues which may properly be dealt with in the context of relevant industrial laws.

### **Education**

6.331 In May 1992 the Attorney General's Department stated in its Green Paper that the main areas of age discrimination in education were as follows:<sup>302</sup>

providing an upper age limit for completion of school education;

restricted admissions to courses for certain ages;

upper age limits specified for scholarships; and

age limits for qualifications, for example upper age limits for tertiary degrees and specified ages for re-qualification in the various professional areas.

6.332 A subsequent White Paper<sup>303</sup> stated that the retention of the s 54 general exception and the operation of the special needs provision would cover the problem areas, such as the operation of schemes which target particular age groups for their educational benefit and the concerns of the Department of School Education regarding ages of compulsory school attendance prescribed by the *Education Reform Act 1990* (NSW). By implication no other exceptions were considered necessary. This proposal was somewhat narrower than the exceptions recommended by the ADB in its outline of proposals published in 1985.<sup>304</sup>

6.333 The current exceptions<sup>305</sup> to the area of education are set out in s 49ZYL. They provide that:

- (3) Nothing in this section applies to or in respect of:
  - (a) the admission of, or the refusal of admission to, a person to a school, college, university or other institution if the level of education or training sought by the person is provided only for students above a particular age; or
  - (b) a private educational authority; or
  - (c) an education authority prescribed by the regulations in relation to such circumstances (if any) as may be so prescribed.
- (4) Nothing in this section applies to or in respect of a refusal by an educational authority to enrol at a government school or registered non-government school a child who is not of or above the age of 6 years. In this subsection, "registered non-government school" has the same meaning as in the *Education Reform Act 1990*.
- (5) Nothing in this section applies to or in respect of benefits, including concessions, provided in good faith to a student by reason of his or her age.

6.334 In Victoria, there are exceptions for educational institutions set up for particular age groups and for age-based admission schemes or age-based quotas.<sup>306</sup> In Queensland,<sup>307</sup> South Australia<sup>308</sup> and Western Australia<sup>309</sup> the only exception to age in the area of education relates to minimum age admission schemes. In the Australian Capital Territory,<sup>310</sup> where a minimum age is fixed under a mature age scheme, discrimination against a student whose minimum age is below the minimum age fixed is not unlawful. Until 1 January 1996, the Australian Capital Territory also excepted discrimination in admission or re-admission to a senior secondary college where a maximum age was fixed for completion of studies. It is also the only jurisdiction (apart from New South Wales) that excepts the provision of bona fide benefits and concessions to a person on the ground of age.<sup>311</sup> There are no comparable exceptions in the Northern Territory.

6.335 The Commission does not have concerns in relation to minimum age requirements. Of greater difficulty are the circumstances in which admission is not available to people in older age groups. There are two situations in which they may arise. First, and by way of example, a university may wish to reserve a specific number of available places for mature age students and a further number for high school graduates. There may then be a pool available for persons who are not recent high school graduates, and do not satisfy the special mature age entry requirements. Such an arrangement may well be discriminatory, at least indirectly, on the ground of age because high school graduates tend to be approximately 18 years of age. However, to give preference in any way to high school graduates is to discriminate in favour of students *below* a particular age. Secondly, some university programs restrict their availability to persons under a higher age, perhaps 55 years. Again, the restriction can be justified on social policy grounds. There is a high public investment in providing university education. For a person to commence medical training, which he or she will not complete until over 60 years of age, may be an inappropriate allocation of limited resources. In theory, the example could be justified where the older person paid the full cost of the course. However, to require that of older people would itself be discriminatory and in any event might not leave space available for additional younger entrants.

6.336 The Commission considers that the Victorian Act, which excepts selection of students subject to a minimum qualifying age or by imposition of quotas in relation to students of different ages or age groups has much to recommend it.<sup>312</sup> That however, does not cater for a maximum age requirement. The latter problem falls into a different category. While the Commission has been able to identify some examples which satisfy it that such a requirement should not necessarily be unlawful, it cannot be sure that there may not be areas where a maximum age is applied inappropriately. The proper course in these circumstances is to require that institutions and programs seeking to impose a maximum age justify their policy to the ADB and obtain an exemption in appropriate circumstances.

6.337 In addition to these considerations, the Commission is concerned that there is, in this area as in other areas, a curious exception in relation to the provision of "benefits or concessions" on the basis of age. This involves a direct contradiction of the prohibition against "denying or limiting access to any benefit" on the ground of age. It may also involve a contradiction of the prohibition on discriminating in the terms on which a person is admitted as a student. It may be that the intention, also reflected in the exception in relation to goods and services, is to permit concessions on fares and fees for people under or over a particular age. However, the exception is not so limited. The requirement that the benefit be provided "in good faith" is presumably intended to prevent the imposition of fees or other burdens which effectively exclude students from particular programs or services. The difficulty is that the exception leaves the matter to the educational authority or service provider to make a decision as to the circumstances in which age-based discrimination will be appropriate. The effect of the exception is to swallow up a large part of the prohibition.

6.338 The dilemma revealed by this exception is simply a further reflection of the fact that age is often considered relevant in our society and the broad prohibition, in standard form, causes many difficulties. The Commission is of the view that this dilemma can only be resolved by accepting that other policies may validly override the prohibition but requiring that, unless those policies find expression in legislative form, they must be the subject of a precisely worded exception or the conduct will need to be the subject of an exemption from the ADB. The particular exception in question should be limited to the obvious areas of intended application, namely the provision of benefits or services at concessional rates based on age.

6.339 Finally, there appears to be a difficulty in relation to the prohibition with respect to educational services which is not covered by the present exceptions, except in so far as the exceptions with respect to “benefits” is sufficient to cover almost anything. The prohibition on admission concerns admission “as a student” and “the terms on which” a person is admitted as a student. Most educational institutions operate at different levels which, particularly in relation to school children, are often age-based. There may be legitimate reasons why a school would wish to make certain benefits available to children at a particular age or at a particular level, which itself will reflect a particular age group. Where a school provides a particular benefit, such as a form excursion or right to undertake particular extra-curricular activities, to a particular grade or level, the discrimination may be indirect and the institution may be able to justify its requirements on a reasonableness basis. However, given the general acceptability of schools working on the basis of age groups, the Commission considers that it would be preferable to accept that age discrimination simply should not apply to the provision of education at least up to and including secondary schooling and associated services.

#### **Recommendation 74**

**Provide an exception in relation to age discrimination in relation to:**

**the provision of educational services up to and including secondary schooling;** [Draft Anti-Discrimination Bill 1999: cl 45(a)]

**the provision of goods or services at concessional rates based on age;** [Draft Anti-Discrimination Bill 1999: cl 38]

**the imposition of a minimum age requirement on a particular educational program and quotas in relation to students of different ages.** [Draft Anti-Discrimination Bill 1999: cl 45(c)]

**In relation to the imposition of a maximum age requirement, an educational authority should be required to seek an exemption from the President of the ADB.**

Draft Anti-Discrimination Bill 1999: cl 69

#### ***Access to places and vehicles***

6.340 Until earlier this year, the ADA provided an exception which allowed discrimination in the area of access to places and vehicles.<sup>313</sup> The matter is now covered within the definition of “services” by adding the following paragraph:

- (f) services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not.<sup>314</sup>

6.341 The exception in relation to benefits and concessions applicable to the provision of goods and services covers situations such as student concessions on private transport and is dealt with below.

#### ***Provision of goods and services***

6.342 There are three specific exceptions that limit the operation on the ground of age.<sup>315</sup> They are:

any benefits or concessions provided in good faith based on a person’s age;

holiday tours offered or provided to persons of a particular age or age group; and

disposal of goods by way of a gift or through a will.<sup>316</sup>

6.343 It appears that holiday tours were provided for because it was specifically raised during community consultation on the Age Discrimination Bill.<sup>317</sup>

6.344 According to the ADB, benefits and concessions provided in good faith include Senior Citizen prizes awarded at competitions conducted for people within certain age groups and age-based discounts on travel, cinema, hairdressing or other retail products.

6.345 **Benefits or concessions provided in good faith.** For reasons already identified, the provision of benefits and concessions either falls within the definition of provision of services or it does not. If it does not, no exception is required. If it does, there is no obvious reason why a service which constitutes a benefit should be the subject of a specific exception.

6.346 The reasoning behind the exception may be that the rationale of the exception is similar to that in relation to gifts, namely that people should be entitled to discriminate on the ground of age, in the provision of free benefits or gifts. Nevertheless, the justification remains obscure. If the purpose of the free service is to provide for a peculiarly disadvantaged group, then there will be no unlawful discrimination, at least within the definition proposed by the Commission. In other cases, the restriction to a particular group may be designed, for commercial purposes, to target a specific sector of the community, arguably not because it is disadvantaged but because it has ready access to funds which may lead to increased sales. However, again, the exception seems to destroy the rule. If it is to be unlawful to sell the same goods at differential prices, depending on the age of the buyer, in principle it should also be unlawful to offer discounts based on the age of the buyer. If such conduct is thought to be acceptable, the proper course is to remove the prohibition on age discrimination in the area of provision of goods and services. Whilst the prohibition remains, there is no basis for maintaining the exception.

6.347 **Holiday tours and gifts.** Again, the reason for the exception is probably because it is difficult to see anything inherently undesirable in providing recreational services to a particular age group. Indeed, since retired people may constitute a distinct group for legitimate reasons, it is difficult to understand why the prohibition should be imposed in the first place. For example, elderly people are more likely to be retired, and therefore have greater time at their disposal for recreational purposes and, at the same time, may be less physically adept and hence may wish to take longer to undertake a particular activity.

6.348 **Disposal of goods by way of gift or will.** The Commission is of the view that a gift or bequest is not, in usual terminology, the provision of a service. In so far as a gift may be associated with the provision of a service, the comments in relation to benefits and concessions are apposite.

6.349 **Conclusions.** The Commission is firmly of the view that none of these three categories of exceptions should be retained. If they are thought to have merit, and the Commission is of the view that they may well have merit, that conclusion flows from the fact that age is a relevant consideration and would justify withdrawal of the area of provision of goods and services from the prohibition in relation to age discrimination.

#### **Other exceptions**

6.350 In the Northern Territory, the carrying out of an artificial fertilisation procedure is specifically excluded from the coverage of provision of services. There have been decisions in different jurisdictions around Australia exposing the stark contradictions between laws governing reproductive technologies and laws which prohibit discrimination. The primary consideration underlying IVF legislation generally is the best interests of the child. On the other hand, anti-discrimination legislation focuses on the person who claims to be unfairly discriminated against. An example cited by the head of reproductive biology at the Royal Women's Hospital in Melbourne sums up the conflicting values: "If a 70 year old woman wants a child – medically there is not a problem with that, but it would cause an outrage. Yet (most State) anti-discrimination legislation says we should not discriminate on the basis of age".<sup>318</sup>

6.351 **Medical services.** Age is often a relevant consideration in relation to the provision of medical services including surgical procedures and prescription of drugs. Some procedures involve risks of complications which can only be assessed in practical terms on the basis of age. Other procedures, such as those relating to fertility, are widely thought to be inappropriate for people over a particular age.

6.352 The Commission is not satisfied that this matter can properly be dealt with by way of an exception. The circumstances in which age may be relevant in relation to the provision of medical services are too complex to be readily defined. In some situations (though rarely) legislation, or regulations made under legislation, may authorise the conduct, in which case the general exception will apply. In many other circumstances, age is taken into account, not for the purpose of refusing a treatment, but as a basis for recommending that a particular treatment should or should not be availed of. As a practical matter, questions of discrimination by a medical practitioner may therefore not arise as frequently as might be expected. On the other hand, where they do arise, it is not possible legislatively to resolve a dispute as to whether or not a particular factor is medically relevant. Nor is it useful, within the structure of the present ADA, to prescribe a requirement that judicial or administrative exemption be retained before such a decision, based on age, can lawfully be made.

#### **Recommendation 75**

**Repeal s 49ZYN(2) and 49ZYN(3) in relation to the provision of goods and services on the ground of age.**

#### **Accommodation**

6.353 In addition to the general exceptions relating to the provision of accommodation,<sup>319</sup> there is an additional exception which relates to concessions provided in good faith based on age.<sup>320</sup> However, it has been erroneously added onto s 49ZYO(3) with the word “and” rather than “or”, as was the original intention.

6.354 The Commission sees no reason for this provision on the basis that the circumstances can be covered by a general special measures exception. The same argument was used to recommend the repeal of the exception applicable to establishments providing housing accommodation for aged persons in s 59 of the ADA.<sup>321</sup>

6.355 In Victoria, there is a general exception that applies to age-based benefits and concessions<sup>322</sup> and specific exceptions where the accommodation is provided in a hostel or similar institution established wholly or mainly for persons of a particular age or in an educational institution established for students of a particular age.<sup>323</sup> In Queensland, age is a lawful consideration in relation to accommodation only if the accommodation is provided by a body established for charitable purposes.<sup>324</sup> In South Australia, there are exceptions that apply to persons of a particular age group if the accommodation is provided by a non-profit organisation or where the accommodation is provided for recreational purposes to persons of a particular age group.<sup>325</sup> Western Australia provides an exception in relation to accommodation that allows benefits and concessions on the ground of age.<sup>326</sup> The Australian Capital Territory provides an exception that allows the provision of benefits and concessions on the ground of age to all areas of operation.<sup>327</sup> The age-based exceptions to accommodation in the Northern Territory are limited to those established for a charitable purpose.

#### **Recommendation 76**

**Repeal s 49ZYO(3) in relation to to the exception for age based accommodation.**

### **Registered clubs**

6.356 It is unlawful for registered clubs to discriminate against a person who is over 18 years old, on the basis of age in respect of whether and on what terms it admits that person to membership of the club or to deny or restrict that person's access to benefits provided by the club. However, the ADA provides a broad exception for those registered clubs whose principal object is to provide benefits to persons of a particular age or age group.<sup>328</sup> It also provides that clubs can retain different categories of membership for members of different ages or age groups.<sup>329</sup> Because the terminology refers to the "retention" of different age categories of membership, this exception implicitly provides a defence only for those clubs which had different age categories prior to the commencement of the age discrimination provisions on 1 July 1994. Clubs which did not differentiate between members on the basis of age prior to that date cannot rely on this exception.

6.357 The prohibition of age discrimination by registered clubs specifically does not apply to persons who are under 18 years of age. Thus, a club may exclude persons who are under 18 or admit them as members on different terms from persons who are aged 18 years or over. If, for example, a term or condition of junior (under 18) membership is that a person cannot use or participate in some activities of the club, the junior member will have no recourse under the ADA against the club because such a restriction was a condition of membership.

6.358 A major problem for clubs is in the area of concessions provided to members on the basis of age, years of membership or income status. For example, some clubs provide discounts to members who are aged over 60 years, who are on an aged pension or who have 15 years' membership with the club. Unless these concessions fall within the exception relating to existing age categories of membership, they may in some cases constitute discrimination, either directly or indirectly. For instance, a discount on membership fees for people who are on an aged pension could be directly discriminatory against people under the age of 65 years. A discount for members who have had 15 years' membership, on the other hand, may be considered indirect discrimination against younger members (who would be unable to comply with the condition) unless the club could prove that the condition was reasonable.

6.359 These issues give rise to interesting analogies with a leading case on sex discrimination in the United Kingdom, *James v Eastleigh Borough Council*.<sup>330</sup> In that case, a retired couple, both 61 years of age, sought admission to a leisure centre operated by the Local Council. Being of pensionable age, the wife was admitted free but the husband was required to pay a fee. The House of Lords held that the conduct constituted discrimination on the ground of sex. Because the *Social Security Act* determined pensionable age on a discriminatory basis on the ground of sex, the Council discriminated on the ground of sex by adopting the statutory scheme provided by the *Social Security Act*. Had there been a prohibition on age discrimination, that would also no doubt have been contravened by the approach adopted by the Council.

6.360 A similar problem arises in relation to the operation of State and Territory legislation in Australia, where the *Social Security Act 1991* (Cth) applies differentially on the ground of age and, being Commonwealth legislation, cannot be affected by State or Territory laws.<sup>331</sup> The general exception for compliance with a statutory provision will not apply where the adoption of the pensionable age criterion is not itself required by an Act.

6.361 An extension of the coverage of the ADA to include other incorporated associations will exacerbate the problems raised by this ground. For example, bodies such as the Bar Association may set practising certificate fees (and hence membership fees) by reference to seniority. Because most people increase their incomes with age and experience, such scales have a rational basis. Such conduct will involve indirect discrimination, but will not be unlawful, if reasonable.

6.362 The Commission's recommendation to provide a general "statutory authority" exception in relation to the age discrimination provisions will resolve the problem of conflict between the ADA and other legislation.<sup>332</sup> Otherwise, the Commission does not recommend any change in this area.

#### ***Legal capacity and welfare of children***

6.363 Under s 49ZYQ of the ADA, a general exception to the age discrimination provisions is provided in relation to laws which affect the legal capacity and welfare of children. There are many laws that relate to the legal capacity and welfare of a person under 18, including criminal laws, all of which would override the provisions of the ADA pursuant to this exception as well as the proposed general statutory authority exception in relation to age. Examples of statutory requirements based on age are as follows:

Section 6B of the *Traffic Act 1909* (NSW) prohibits persons under the age of 16 from driving on a public street;

Section 28 of the *Children (Care and Protection) Act 1987* (NSW) prevents tattooing of persons under 18 years;

Section 19 of the *Children (Protection and Parental Responsibility) Act 1997* (NSW) allows a police officer to remove a person under the age of 16 from a public place under certain circumstances; and

Section 17 of the *Minors (Property and Contracts) Act 1970* (NSW) provides that where a minor participates in a civil action, the action is not binding on him or her except in accordance with the provisions of the Act.

6.364 Given the general exception for compliance with a statutory provision, this specific exception is largely otiose, but should be retained as it has a necessary and wider operation.

#### ***Special needs programs***

6.365 Section 49ZYR deals with an exception relating to age specific special needs programs and activities. The Commission has recommended that special needs programs be a general exception under the ADA applicable to all prohibited grounds of discrimination.<sup>333</sup> Accordingly, this exception is rendered unnecessary by the Commission's recommendation.

#### **Recommendation 77**

**Repeal s 49ZYR in relation to the exception for age specific special needs programs and activities.**

#### ***Superannuation***

6.366 In relation to superannuation, age discrimination will occur when a trustee treats a member or any other beneficiary less favourably than another person of a different age in the same circumstances unless an exception applies.

6.367 Section 49ZYS of the ADA provides that it is not unlawful to treat a person less favourably because of their age in the terms and conditions of a superannuation fund if:



the discrimination occurs because of the application of a standard under the *Occupational Superannuation Standards Act 1987* (Cth) or under the *Superannuation Industry (Supervision) Act 1993* (Cth);

the discrimination is required in order to comply with, obtain a benefit from, or avoid a penalty under any other Commonwealth laws;

the discrimination is based on reasonable actuarial or statistical data, or where there is no such data, it is based on other data on which it is reasonable to rely;

if none of the above apply, the discrimination is reasonable having regard to any other relevant factors; and/or

the discrimination is based on an existing condition and relates to a person who became a member of the fund before the commencement of this section or not more than 12 months after its commencement.

6.368 A similar exception, based on a model provision developed by the Standing Committee of Attorneys General (“SCAG”), applies in all States and Territories bar South Australia.<sup>334</sup> Although the Commonwealth does not specifically make age discrimination unlawful, it has indicated its intention to prevent and eliminate age discrimination in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)<sup>335</sup> and in the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).<sup>336</sup>

6.369 **Age related factors in superannuation funds.** Age related factors influence the design of superannuation funds. These factors are not, as one might expect, related to actuarial principles but rather tend to reflect government policy and community attitudes, for example:

different pension age entitlements for men and women, set by government;<sup>337</sup>

early retirement schemes encouraged by government based on the rationale that older workers should make way for younger employees; and

compulsory preservation requirements for superannuation contributions which aim to defer the payment of superannuation benefits until genuine retirement.<sup>338</sup>

6.370 Age discrimination in superannuation funds takes many forms. Some funds, for example:

set upper and lower age limits which restrict a person’s eligibility to join a fund;

pay different benefits to members depending on their age: for example, most funds pay the maximum benefit to a member when he or she reaches a specified retiring age, generally 65;

fix contribution levels according to a member’s age, often requiring higher contributions as the member gets older because it is thought that an older person has more disposable income and providing for retirement has become a higher priority; and

use age as a factor to calculate the value of a lump sum when converting it to a pension and vice versa: these calculations are generally based on actuarial or statistical data.

6.371 Benefits which are secured by insurance, such as death and disability benefits, also tend to reflect actuarial information.

6.372 **Accepting contributions from members aged over 65.** Previously, Commonwealth superannuation laws did not permit funds to accept contributions from members aged over 65.<sup>339</sup> This was a source of great concern for many older workers, women in particular, who, because of broken work-force patterns, may not have accumulated enough superannuation savings by the age of 65 to provide for a reasonable retirement income.

6.373 This rule was also inconsistent with New South Wales government policy to remove compulsory retirement provisions. Thus, New South Wales public employers and fund trustees were placed in an unenviable position of being unable to comply with the ADA by making contributions on behalf of, or allowing members aged over 65 to make their own contributions to a superannuation fund, without jeopardising the fund's tax concession status under Commonwealth law.<sup>340</sup>

6.374 This issue was addressed by the Federal Government in 1996 with the announcement that it would amend the SIS Act to allow funds to accept contributions made by or on behalf of members who are aged up to 70 years provided the contributor works for more than 10 hours per week. The change came into effect on 1 July 1997.

6.375 **Submissions.** It is argued that not allowing exceptions from the age discrimination provisions may lead to changes to the design of funds, some of which may have unintended and undesirable consequences. For example, if funds are not permitted to set or vary premiums for death and disability benefits according to age, they may cease to provide these benefits altogether.<sup>341</sup>

6.376 **Conclusion.** There is an argument that discrimination in superannuation and insurance should be acceptable where such discrimination is based on reasonable actuarial or statistical data or, in the absence of such data, it is based on other available data on which it is reasonable to rely and which is reasonable having regard to other relevant factors. Threatening the viability of a superannuation fund, thus adversely affecting all members, is not a desirable outcome.

6.377 The Commission accepts that, pending further research into actuarial data and, particularly, what is meant by "reasonable actuarial data", the actuarial exception should remain for age discrimination in superannuation. Also, in view of the desirability of uniform discrimination laws, the Commission recommends no further amendments to the superannuation exception for age discrimination.

### **Insurance**

6.378 Section 49ZYT provides that it is not unlawful to discriminate on the ground of age in the terms on which an insurance policy is offered or may be obtained if the discrimination is based on actuarial data or, where there is no such data, on other reasonable data. In each case, the data must be from a reasonably reliable source, which must be disclosed to the EO Division if required. Essentially this permits insurers to use age as a criterion when making risk assessment classifications and calculating premiums, but only to the extent that there is actuarial or other data on which it is reasonable to rely. Similar exceptions apply in other jurisdictions.<sup>342</sup>

6.379 While there is actuarial data to suggest that age is a significant factor when assessing risks in life and disability insurance, such data does not generally cover the types of risk insured against in general insurance products. Instead, most decisions in relation to general insurance are based on a combination of previous claims experience, medical evidence and general community assumptions. It is in this area that most complaints of age discrimination against insurers are brought. For example, people over 65 years of age have complained that they have been denied travel insurance or have been required to produce medical certificates in order to obtain car insurance.

6.380 The current exception represents an attempt by Parliament to balance the objectives of anti-discrimination laws with the commercial interests of the insurance industry to be able to classify risks and set premiums. While it appears wide, the Commission notes that the exception has not yet been tested. Most insurance complaints are settled or withdrawn. The ADA has, however, had an educative effect on the industry. The ADB reports that in a number of complaints that have been settled, insurers have agreed to alter their policies in relation to their treatment of older persons seeking general insurance.<sup>343</sup>

6.381 In view of this and the complexity of the issues involved, the Commission does not propose amendment of s 49ZYT except to make it consistent with other similar provisions which impact on other grounds.

6.382 **Credit applications.** The ADA contains an exception to the age discrimination provisions in relation to credit applications in similar terms to that provided for the provision of insurance. Section 49ZYU states that it is not unlawful to discriminate on the ground of age with respect to the criteria on which an application for credit is assessed, or the terms on which credit is offered, if the discrimination is based on actuarial data from a reasonably reliable source or, where there is no such data, on other data. In each case, the source of any such data must be disclosed to the EO Division if required. The only other State legislation which provides a similar exception is that of Victoria.<sup>344</sup>

6.383 This exception was introduced at the same time as the exceptions relating to superannuation and insurance.<sup>345</sup> The Second Reading Speech on the introduction of these provisions merely stated that:

[t]he approach adopted by the bill in this regard has been reached in consultation with peak bodies in the areas of superannuation, insurance and credit provision, and it is based on equivalent provisions elsewhere in the Anti-Discrimination Act and relevant Commonwealth legislation.<sup>346</sup>

6.384 The justification is presumably based on the fact that payment of interest and the repayment of a loan may be dependent on continuing employment or at least a continuing life. Accordingly, a credit provider should be entitled to limit the availability of credit, so that the period of the loan will not extend beyond retirement or death. Were that not permitted the cost of the credit (through increased insurance premiums) would need to be higher.

6.385 As the Commission is not recommending repeal of the equivalent exceptions in relation to superannuation and insurance, and the exception is limited by the requirement of reliance on appropriate data, this provision should be retained.

### **Safety procedures**

6.386 Section 49ZYV of the ADA permits discrimination on the ground of age in assessing a person's fitness to control a vehicle and the terms and conditions upon which a licence is issued, provided the manner of assessment or terms and conditions are imposed to meet safety considerations that are reasonable.

6.387 There are many other aspects of public safety that are closely linked with age considerations. For instance, the issue of whether a medical doctor should be permitted to conduct particular forms of surgery, such as eye or open heart surgery at the age of 70 or whether a pilot should be permitted to fly at a similar age may raise serious public safety issues even if the risk of accident is only very slim. To prevent pilots flying or medical doctors from operating when they reach a particular age would clearly be age discrimination. However, such discrimination must be balanced against the real risk to the public. One way of dealing with this issue may be to re-introduce compulsory retirement in relation to certain types of employment that pose a particular risk to public safety based on available data. In this context, it is worth considering two cases brought under the unfair dismissal provisions in the Federal Industrial Commission.

6.388 In *Christie v Qantas Airways Ltd*,<sup>347</sup> the right to retire pilots compulsorily at the age of 60 years was challenged. The case was brought under s 170DF(1)(f) of the *Industrial Relations Act 1988* (Cth) which prohibits termination for prescribed reasons including age. A defence to the claim is whether it is based on the "inherent requirements of the particular position". Mr Christie's original employment contract with Qantas contained no condition about the duration of his employment. Mr Christie's employment was terminated on account of his age. However, many countries apply a rule to their own pilots and pilots using their airports, or even overflying their territories, that says a pilot must not be aged over 60 years. It was argued that the result of these restrictions would cause problems for Qantas in allocating flights to Mr Christie. Consequently, it was decided that being under the age of 60 was an inherent requirement of a position as a B747-400 captain. On appeal to the Industrial Relations Court of Australia,<sup>348</sup> it was held that the requirement to retire at 60 years was a condition imposed on his

position rather than an inherent requirement of the job. The High Court reversed the decision on appeal and upheld the judgment of the trial judge.<sup>349</sup>

6.389 In *Allman v Australian Airlines Ltd*,<sup>350</sup> it was decided that being less than 60 years is not an inherent requirement of being a pilot with a domestic carrier. It was suggested that examples of inherent requirements include the possession of an appropriate current licence and medical fitness, in accordance with the standard prescribed for pilots. This case supports the position that inherent requirements of a job need to be defined in terms of appropriate skill, accreditation and medical fitness, not by reference to age.

6.390 In relation to the ground of disability, the Commission accepts the appropriateness of an exception designed to protect public health. That exception reflects the fact that a disability may itself constitute a relevant hazard to public health. There is a question as to whether a general exception should be provided in relation to age to protect public health and safety.

6.391 While age is not a factor which itself constitutes a risk to public health and safety (as opposed to the health and safety of the individual), both youth and old age correlate in varying degrees with impaired judgment, physical capacity and intellectual skills. Where possible, those forms of capacity should be assessed and stereotyped judgments avoided. Statistically we may know that increased age is associated with an increased risk of incapacitating illness, without being able to predict in individual cases on the basis of physical assessment whether there is a reason to suppose that the increased risk attaches to the individual. Where the risk to the public is insignificant, medical assessment may be required at any age. In some circumstances, such as the risk attaching to the issue of a licence for driving a private motor vehicle, it may be thought impracticable to carry out a medical assessment on every individual every year. With bus drivers, train drivers or pilots, medical assessment may be required regularly or at various ages. The higher the risk and the greater the danger if the risk is realised, the greater the justification for permitting restrictions on employment by age, regardless of individual circumstances.

6.392 Given these considerations, the Commission considers that there should be a general exception in relation to statutory measures designed to protect public health or safety. This could be achieved by an expansion of s 49ZYV. Alternatively, it could be achieved by use of the general exception relating to compliance with statutory requirements. Since s 49ZYV was included in the ADA whilst there was, in any event, a general exception with respect to statutory compliance, it appears that Parliament then considered that a further exception was necessary. In the Second Reading Speech to the Bill which introduced the section to the ADA, it was stated that the exception for safety procedures:

has been included to ensure that certain discretionary procedures of the Roads and Traffic Authority aimed at achieving road safety are not affected by the legislation. For example, drivers' licence requirements for persons above 80 years of age are often dependent upon such persons undergoing regular testing to assess their continued ability to drive safely.<sup>351</sup>

6.393 As age is, in human rights terms, a suspect category, the Commission would prefer that the use of age as a determining characteristic for purposes of public health and safety, should be a responsibility of government. Accordingly, such restriction should be imposed by Parliament or by regulation or other subsidiary instrument subject to Parliamentary disallowance. Given that other jurisdictions do not uniformly contain a specific non-statutory exception for public health and safety in relation to age, the Commission is satisfied that no such exception is required in New South Wales.

#### **Recommendation 78**

**Repeal s 49ZYV in relation to the exception for age based safety procedures.**

## **Sport**

6.394 Section 49ZYW provides that it is not unlawful to exclude persons of particular ages from participation in any sporting activity. However, the exception does not apply to coaching, sport administration or to any prescribed sporting activity.

6.395 A similar but narrower exception applies in other jurisdictions which prohibit age discrimination.<sup>352</sup> The exception is narrower in these jurisdictions in two ways: first, it applies only to *competitive* sporting activity where the competition is permitted between persons of particular age groups and, secondly, it does not apply to coaching, *umpiring or refereeing* or sport administration.<sup>353</sup>

6.396 The age exception for sport in the ADA is broad and is intended to allow sporting events to be limited to persons of particular age groups in order to preserve fair competition. However, age distinctions can be arbitrary and need not necessarily reflect the level of skill or ability relevant to the sporting activity. In rugby competitions for example, a rule which prevents a relatively small 16 year old male from competing in an under-14 team, and yet will allow a big 14 year old male to compete does not necessarily ensure fair competition. A better criterion might well be weight to height ratio, or, as has been recommended in relation to sex discrimination in sport, strength, stamina or physique.<sup>354</sup>

6.397 Again, the arbitrariness of using age as a determinant may be justified by the difficulty of identifying an appropriate alternative. It is not the role of the ADA to specify how competitive sport is established, but rather to identify areas in which age is an illegitimate criterion. In this area, age is by no means irrelevant; rather, it is an imprecise but straightforward mechanism for governing wide areas of social activity. Further, it is a mechanism which has widespread social acceptance. Accordingly, the exception is not inappropriate in principle.

6.398 As already noted in relation to sport and other grounds, the area of sport is not expressly covered by the ADA, but only indirectly through coverage of service provision and incorporated associations. The exception should be retained but redrafted so as to reflect the formulation used in relation to other grounds.

### **Recommendation 79**

**Amend s 49ZYW in relation to the exception for age based sport to provide that it applies only to competitive sporting activities, where the strength, stamina or physique of the competitors is relevant.**

**Draft Anti-Discrimination Bill 1999: cl 54(3)**

## **Transgender status**

6.399 Discrimination on transgender grounds is prohibited in areas of public life and is currently subject to the standard private exceptions which apply across other grounds of discrimination. These exceptions have been dealt with in Chapter Four.

6.400 Part 3A of the ADA creates two specific exceptions from the prohibition of discrimination on transgender grounds in relation to the participation of transgender persons in sport and in relation to the administration of a superannuation or provident fund or scheme.<sup>355</sup> It is convenient to deal with superannuation first.

## ***Superannuation***

6.401 Legal recognition of post-operative transgender persons specifically does not extend to superannuation.<sup>356</sup> It is not unlawful, in the administration of a superannuation or provident fund, to treat a transgender person (whether or not a recognised transgender person) as a member of the transgender person's former sex. For example, reliance on the assumed or established fact that women live longer and have a higher propensity to become ill or disabled, will continue to apply to a transgender person, including those who have undergone gender reassignment surgery.

6.402 According to the ASFA, the sex of a person may be a relevant factor in the determination of a contribution rate or benefit level, commutation factors, and insurance charges.<sup>357</sup> Gender may also be a relevant factor in the payment of a death benefit. But as this relates more to whether the superannuation benefit is payable to same-sex couples, it is only marginally relevant to transgender persons. The ASFA further submits that many superannuation funds do not make any distinction on the basis of gender. Therefore, the inclusion of transgender status as a ground of discrimination under the ADA should not present problems that a superannuation fund manager cannot resolve administratively once made aware of the changed circumstances of a transgender person.<sup>358</sup>

6.403 In view of these circumstances and in the light of the Commission's recommendations in relation to sex discrimination in the superannuation and insurance areas,<sup>359</sup> the Commission recommends that the exception for superannuation funds be removed.

### **Recommendation 80**

**Repeal s 38Q in relation to the exception for superannuation on the ground of transgender status.**

## ***Sport***

6.404 Section 38P provides that it is not unlawful to exclude a transgender person from participating in sporting activities for members of the sex with which the transgender person identifies. The exception applies equally to recognised and non-recognised transgender persons. Thus, legal recognition of recognised transgender persons does not extend to participation in sport.

6.405 The exception does not apply to coaching duties, administration of any sporting activity or to prescribed sporting activities.<sup>360</sup> This approach was adopted in order to clarify the law for sporting bodies and avoid placing them in conflict with the rules of national or international affiliate bodies.<sup>361</sup>

6.406 The current provision, as enacted, is radically different from that proposed by the ADB, following extensive consultation with peak transgender and sporting groups. The ADB suggested the following provision:

- (1) It is unlawful for a person or body to discriminate against a recognised transgender person on transgender grounds by:
  - (a) refusing or failing to select the transgender person in a sporting team for members of the sex with which the transgender person identifies, or
  - (b) by excluding the transgender person from participating in any sporting event for members of the sex with which the transgender person identifies.
- (2) However, nothing in subsection (1) renders unlawful discrimination by a person or body against a recognised transgender person on transgender grounds if the transgender person:

- (a) is required by a national or international sporting body or organisation to undergo a biological sex test to determine eligibility for selection in a sporting team or participation in a national or international sporting event, and
  - (b) does not satisfy the requirements of any such test.
- (3) The admission of a transgender person to a sporting team or the participation of a transgender person in a sporting event does not affect the status of the team or event as a team or event for persons of the same sex.

6.407 The ADB submits that the current exception is too broad and is inconsistent with the legal recognition of recognised transgender persons in other areas of public life. It believes that discrimination against recognised transgender persons in sport should be unlawful unless the recognised transgender person is required by a national or international organisation to undergo a biological sex test to determine eligibility to compete and fails the test.

6.408 This suggestion was opposed by the Minister for Sport and Recreation who argued that it would, in most cases, compromise fair competition between sports persons.<sup>362</sup> The Department argued that as most recognised transgender persons are male to female, they retain the strength, stamina and physique of men, who tend to be bigger and stronger than women. Allowing such persons to compete in women's teams or women-only events would give them an unfair advantage over people who are biologically female.

6.409 In response to the argument that there would be few recognised transgender persons who would even want to compete in competitive sports, the Department said that the current prohibition has kept numbers small. It claimed that by removing the barrier, more recognised transgender persons would be encouraged to come forward. The Department argues that the current exception should stand. Individual sporting clubs and associations would then have a choice as to what policy they wished to adopt in relation to transgender persons. The current broad exception would protect the right of those clubs and associations which wished to discriminate on transgender grounds.

6.410 The issue of transgender persons competing in sporting teams and events for members of the sex with which they identify has always attracted a great deal of controversy and even notoriety in some cases. While it is true that the numbers of persons likely to be involved is very small, this does not mean that the issue does not warrant proper consideration and resolution. The issue to be resolved is whether there should be an exception for sport from discrimination against transgender persons, including non-recognised transgender persons, and, if so, its scope.

6.411 The first point to be considered in relation to this potential exception is the scope of the area concerned, namely sport. As has been stated on a number of occasions, the ADA does not contain a particular area which covers all sport. However, most sporting or recreational clubs are, or are likely to become, incorporated in order to be eligible for grants.<sup>363</sup> Competitive sport generally involves a regional or national structure and often involves an international component. The view of the Commission is that the current exception is correct in principle, in that it recognises the legitimate distinction made between male and female competitions, at least after the onset of puberty. The Commission has accepted this as the basis for an exception in relation to gender. Although transgender persons who undergo hormone treatment may change their physical characteristics, there is a legitimate concern that they will retain the physical characteristics of their former sex and accordingly may achieve an unfair advantage in competitive sport. As a practical matter, it does not seem sensible to require sporting bodies which regulate gender-based competition to assume that a transgender person has the physical characteristics of his or her new sex. However, the weakness of the proposal put forward by the ADB is that it allows the exception only in cases where there is a national or international requirement of biological sex testing to determine eligibility. This element may impose a higher level of regulation, expense and intrusions on privacy than is warranted by the scope of the problem. No such restrictive requirement is imposed in relation to legitimising separate sex sporting competitions generally.

6.412 It has also been suggested that the real area of unfairness is in relation to male-female gender change. However, while people who were formerly men may retain certain physical male characteristics, such as strength or stamina, those are not the only characteristics relevant to sporting activity. Females have certain characteristics which may give them a particular advantage in relation to some sports. The discussion tends to focus on the former category, because they are by far the more numerous. At a practical level, this is not an irrelevant consideration. In all the circumstances, the Commission does not think it appropriate to differentiate between male-female and female-male.

### **Recommendation 81**

**The exception applicable to transgender persons for participation in sporting activities in s 38P should be consistent with the exception permitted in relation to sex generally.**

Draft Anti-Discrimination Bill 1999: cl 56

### **EXCEPTIONS TO THE NEW GROUNDS**

6.413 The grounds of political opinion and “religious belief” involve both holding and expressing views which are either an essential element in a free and democratic society (in the case of political opinion) or an inherent part of the culture, dignity and self-identity of a person, whether individually or as a member of a community (in the case of religious belief). The value of protecting such beliefs has been recognised in many countries with political and legal systems similar to our own. In many cases, including both Canada and the United States of America, such values are constitutionally entrenched. The acts of government, including legislative acts, are subject to the dictates of the constitutional protection. However, the jurisprudence of these countries demonstrates the need to qualify the protections given.

6.414 The reason for the qualification is obvious: the fact that a democratic society is based on freedom of political belief does not require it to accommodate beliefs which are inconsistent with its own existence. Where constitutional protection applies, it will, inevitably, be necessary to provide a level of discretion in relation to legislation which impinges upon the protected area. Thus, general statutes providing protection in the areas of health, safety and welfare will usually be upheld, even though they may incidentally intrude upon the protected area. Depending on the importance placed on the protection, varying levels of scrutiny may be applied to legislative activity which appears to impinge on the protection.

6.415 It is also important to deal with possible conflicts, which may arise even within a protected area. Thus, protection given to political opinion or religious belief may involve both protection of a “right” on the one hand and a freedom on the other. For example, the “right” of an employer to choose employees on the basis of their religious beliefs may impinge upon the freedom of a particular employee not to be treated adversely on the ground of his or her beliefs. In a Canadian case, *R v Zundel*,<sup>364</sup> the Court stated:

A “right” is defined positively as what one can do. A “freedom”, on the other hand, is defined by determining first the area which is regulated. The freedom is then what exists in the unregulated area – a sphere of activity within which all acts are permissible. It is a residual area in which all acts are free of specific legal regulation and the individual is free to choose. The regulated area will include restrictions for purposes of decency or public order, and specifically with respect to the freedom of expression, prohibitions concerning criminal libel and sedition.

6.416 In relation to religion, for example, freedom of religious belief may not involve freedom to ignore the prohibitions imposed by a criminal law. On the other hand, freedom of religious belief or political opinion may permit the distribution of tracts, otherwise prohibited by a local government by-law.



6.417 The difficult judgment required where basic principles conflict is well illustrated by the ADA itself. Thus, it is necessary to determine whether a political or religious belief which is inconsistent with the equality of the races or of the sexes should be tolerated. The answer presently provided by the ADA is that it should not. Thus, the prohibition on race discrimination does not presently include an exception for those who seek to discriminate on the basis of religious belief or political opinion. The only way in which an exception may exist is pursuant to the limitations imposed upon the prohibitions presently contained in the Act.

6.418 The Commission starts from the premise that it is appropriate to maintain the present state of the law in that regard, subject to the reforms suggested elsewhere in this Report. Accordingly, the introduction of the new grounds of political opinion and religious belief must be subject to recognition of the priority given to the maintenance of recognised human rights and fundamental freedoms.

### **Political opinion**

6.419 Discrimination on the ground of “political opinion” or its equivalent is currently included in the anti-discrimination legislation of five Australian jurisdictions, namely Victoria,<sup>365</sup> Queensland,<sup>366</sup> Western Australia,<sup>367</sup> the Australian Capital Territory<sup>368</sup> and the Northern Territory,<sup>369</sup> as well as that of New Zealand.<sup>370</sup> Nevertheless the protection offered by such prohibitions is not absolute. Legislation in each jurisdiction contains some exceptions. These exceptions are either particular to the ground of political opinion or its equivalent, or may be more general, applying to numerous grounds. In practice, however, the exceptions have rarely been the subject of dispute or litigation.

### ***Genuine occupational qualification – political employment***

6.420 Except for the Northern Territory, all jurisdictions which contain a ground of political opinion discrimination, or its equivalent, have provided a specific exception to it for “political employment”. Whilst most Acts specify the exact nature of political employment in the form of the position that the person must hold, or at least require that employment must be similar to the positions listed,<sup>371</sup> the Western Australian legislation provides merely that the position be “politics-related” and thus could theoretically be more broadly interpreted.<sup>372</sup> The Northern Territory on the other hand provides no specific exception in relation to political employment, and only contains the more general exception of lawful discrimination based upon a genuine occupational qualification.<sup>373</sup>

6.421 The ADB in its submission to the Commission suggested that an exception based on a genuine occupational qualification was justified by *ILO Convention 111*<sup>374</sup> which allows for distinction, exclusion or preference based on the inherent requirements of a particular job.<sup>375</sup>

6.422 **Government activities.** The Victorian and Queensland Acts provide for an exception to the unlawfulness of discrimination based on political belief or activity in the area of local government. The Victorian Act provides that discrimination against another councillor, or against a member of a committee of the council in the performance of his or her public functions on the basis of political belief or activity is not unlawful.<sup>376</sup> Similarly in Queensland, discrimination based on this ground by a local government member against another member in the performance of official functions will not be unlawful.<sup>377</sup> However, in Victoria and Queensland, the area of conduct is defined as internal council activity. It is not proposed to include such an area in New South Wales. The exception is therefore not relevant. Public services available from such bodies or persons should certainly not be distributed on the basis of political opinion.

### ***Clubs established for persons of a particular political belief or affiliation***

6.423 The ADB recommended that clubs established for persons of a particular political belief or affiliation should also benefit from an exception to the prohibition of discrimination based on the ground of political conviction.<sup>378</sup> In other jurisdictions, Victoria permits the exclusion of people from private clubs on any of the prohibited grounds.<sup>379</sup> The Northern Territory provides that discrimination based on political conviction by non-profit associations providing goods, services and facilities and established for

various purposes including political, are exempt from the provisions prohibiting discrimination based on political conviction.<sup>380</sup>

### **Discussion**

6.424 The Commission accepts that a politician and local government councillor should be entitled to select staff who share his or her political beliefs. That principle should also apply to other employees providing services (such as research) on a political basis, and to clubs which provide services or support on a political basis. The promotion and propagation of political beliefs may properly involve distinctions on this ground.

### **General exceptions**

6.425 The recommendations made in relation to general exceptions earlier in this chapter will apply to this ground. Thus, religious bodies<sup>381</sup> will be generally excepted from discrimination on this ground and the new special measures exception<sup>382</sup> will also be applicable. It should be noted that the Commission is recommending the repeal of the existing general exceptions in relation to statutory authority, charitable benefits and voluntary bodies.<sup>383</sup>

6.426 Apart from the above, there should be no other specific exceptions applicable to this ground except for the private exceptions dealt with in Chapter Four applicable to all other grounds. Thus, the exception applicable to domestic employment, that is, employment in the home of the employer, should also be available to the ground of political opinion.<sup>384</sup> This exception is available in all jurisdictions which contain the ground.<sup>385</sup> So also, the exception applicable to domestic accommodation, that is accommodation in the owner's or near relative's residence, should be available for this ground.<sup>386</sup> This exception has also been included by all jurisdictions which contain the ground.<sup>387</sup>

### **Recommendation 82**

**Provide an exception to discrimination on the ground of political opinion in relation to political and local government employment.**

Draft Anti-Discrimination Bill 1999: cl 30

### **Recommendation 83**

**Provide an exception to discrimination on the ground of political opinion in relation to clubs established for persons of a particular political persuasion.**

Draft Anti-Discrimination Bill 1999: cl 57

### **Religion**

6.427 Discrimination on the ground of religion or its equivalent is currently included in the anti-discrimination legislation of Victoria,<sup>388</sup> Queensland,<sup>389</sup> Western Australia,<sup>390</sup> the Australian Capital Territory<sup>391</sup> and the Northern Territory,<sup>392</sup> as well as that of New Zealand<sup>393</sup> and Canada.<sup>394</sup> In each case, the protection offered is limited by a number of important exceptions. The ADB submitted that exceptions to this ground "should recognise the right of individuals to associate in groups, to make instruments of charitable intent and to educate on the basis of a shared belief".<sup>395</sup> The ADB argues that the need for such exceptions is in accordance with international human rights standards, in particular those detailed in Articles 5 and 6 of the 1981 UN *Declaration on the Elimination of All Forms of*

*Intolerance and of Discrimination Based on Religion or Belief.* This rationale is apparent to a varying extent in the legislative exceptions discussed below.

6.428 The exceptions suggested by the ADB were:<sup>396</sup>

religion or belief as a genuine occupational qualification;

educational or health related institutions with religious purposes or accommodation with religious purposes if discrimination is in accordance with doctrine and necessary to avoid offending religious sensitivities of people of the religion;

clubs established for persons of a particular religion;

domestic employment;

domestic accommodation; and

religious bodies in relation to training and appointment of religious personnel.

6.429 In addition to this, the ADB supported the retention of the general exceptions in relation to the ground of religion (with some modifications).

#### ***Genuine occupational qualification***

6.430 The ADB recommended that there should be an exception based on the inherent requirements of the job.<sup>397</sup> A number of other submissions also expressed the view that religious organisations should be permitted to discriminate on religious grounds in the selection of their staff.<sup>398</sup> There are, however, a range of views on the extent to which such discrimination should be allowed to occur. Some submissions have argued that religious organisations should be permitted to discriminate on religious grounds in the selection of all staff (including cleaners, gardeners etc),<sup>399</sup> while others have argued that the exception should be limited to the religious personnel of the organisation.<sup>400</sup>

6.431 The Queensland and Canadian Acts contain a general exception for discrimination in the work area based on genuine occupational requirements which could, in practice, apply to discrimination based on religion or belief.<sup>401</sup> Other Acts which contain a genuine occupational qualification provision do not allow for such a qualification based on religion.<sup>402</sup> However, some Acts contain specific exceptions to allow for discrimination in employment requiring the applicant or employee to hold some particular religious or other belief.

6.432 Religious schools in Victoria are exempt with respect to employment of people where such discrimination is in accordance with relevant religious beliefs or principles.<sup>403</sup> Queensland provides that religious discrimination is not unlawful in relation to employment with an educational or health-related institution established for religious purposes and where such discrimination is in accordance with the doctrine of the religion and is necessary so as not to offend the religious sensibilities of the adherents of that religion.<sup>404</sup> Western Australia allows discrimination in employment by private educational authorities and by religious bodies in the health field, if the duties of the employment are for the purposes of, or in connection with the participation of the employee in any religious observance or practice.<sup>405</sup> Western Australia also contains more general exceptions for educational institutions established for religious purposes with respect to employment of staff and contract workers and the provision of education or training.<sup>406</sup> The Australian Capital Territory permits discrimination in connection with the employment of a staff member of an educational institution or the appointment of a contract worker involved in work in an educational institution established for religious purposes.<sup>407</sup> There is a further exception regarding employment in an educational institution or a hospital if the duties of the employee involve working in the teaching, observance or practice of the relevant religion.<sup>408</sup> New Zealand also allows differential treatment based on religious or ethical belief with respect to employment as a teacher in a private school, or where the position would be one of teacher or

propagator of the religion or belief, or as a social worker working for an organisation whose members are solely or principally adherents to that belief.<sup>409</sup>

6.433 In Chapter Four the Commission recommended that the genuine occupational qualification defence should be available in relation to employment in a religious private educational institution, where discrimination is in good faith and necessary to avoid conflict with the tenets of the religion.<sup>410</sup> Thus, existing exceptions already recognise in some measure the need to accommodate religious beliefs which may be inconsistent with the protection of other human rights and fundamental freedoms. To that extent, religious beliefs will be given priority. Otherwise, as already noted, both political opinions and religious beliefs will not be permitted to override existing prohibitions. Genuine occupational qualification in employment provides one example of this principle, religious schools provide a second.

#### ***School admission***

6.434 An issue that arose for consideration in the context of education in private educational institutions was whether religious schools should be allowed to discriminate in admitting students. The Commission accepted that they should be where the school is established and operated wholly or mainly for students of a particular religion. A religious school may also seek to discriminate on other grounds to avoid conflict with the tenets of the religion. A number of submissions to the Commission from religious organisations supported the view that religious schools should continue to remain exempt from the ADA on specified grounds.<sup>411</sup>

6.435 In Victoria,<sup>412</sup> Queensland<sup>413</sup> and the Northern Territory<sup>414</sup> an exception is provided for educational institutions for particular groups. In the Australian Capital Territory<sup>415</sup> there is a specific exception for educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed. These exceptions reflect the principle accepted by the Commission.

#### ***Clubs established for persons of a particular religion or belief***

6.436 The Commission has recommended that genuine ethnic groups should be able to discriminate on the grounds of race or ethnicity with respect to membership of their clubs.<sup>416</sup> It would appear anomalous to prohibit religious groups from so discriminating, especially considering the overlap in many groups between ethnicity and religion. The ADB believes that clubs established for persons of a particular religion or belief, which discriminate with respect to eligibility for membership against people of different beliefs, should not be prohibited from so doing.<sup>417</sup>

6.437 Other jurisdictions which prohibit discrimination on the ground of religious belief do not exempt clubs based on religious membership. None contain specific exceptions, and the only potentially relevant exception in Victoria, Queensland and the Northern Territory is that which provide for clubs which operate to preserve a minority culture or prevent or reduce disadvantage suffered by a particular group.<sup>418</sup> These provisions serve only to protect “minority” cultures or disadvantaged groups and therefore do not afford the same rights to all religious clubs. To benefit from these provisions as a “minority culture”, a religious group would need to be able to establish some form of cultural homogeneity such that it may constitute a “culture”, which may be difficult for religious groups whose membership comprises many different ethnic, racial and language groups. A mainstream church club, such as a Catholic or Anglican club, might be unable to benefit from such an exception.

6.438 The Commission considers that there should be an exception with respect to clubs and associations, consistent with that in relation to genuine ethnic groups.

#### ***Accommodation***

6.439 In Victoria,<sup>419</sup> Queensland<sup>420</sup> and the Northern Territory<sup>421</sup> there is an exception where accommodation is provided for students in a religious educational institution. The Queensland<sup>422</sup> and Northern Territory<sup>423</sup> legislation also provide a specific exception for accommodation established for

religious purposes and the Victorian Act provides an exception in relation to accommodation established wholly or mainly for the welfare of persons of a particular religious belief.<sup>424</sup> In the Northern Territory,<sup>425</sup> accommodation for a charitable purpose is also made exempt from the operation of the various grounds of discrimination.<sup>426</sup>

6.440 The Commission considers that the Victorian and Queensland model should be adopted.

### ***Access to places***

6.441 In addition, the Queensland and Northern Territory laws provide an exception which allows the restriction of access to sites of cultural or religious significance where the restriction is in accordance with the doctrines of the religion concerned and is necessary to avoid offending cultural or religious sensitivities of the people of the culture or religion.<sup>427</sup> In Queensland this exception also extends to the disposal of interests in land or buildings with cultural or religious significance.<sup>428</sup>

6.442 These exceptions are acceptable in principle but the Commission is not satisfied that they should be adopted in New South Wales. Their main practical application is in relation to Aboriginal sites, protection of which will readily fall within the special measures exception. The need for a further exception is not apparent.

### ***General exceptions***

6.443 The ADB recommended, in its submission to the Commission, that the exception which applies to other grounds with regard to employment in the home of the employer should be available in relation to the ground of religion.<sup>429</sup> This exception is available in all jurisdictions which contain the ground.<sup>430</sup> In its submission, the ADB also recommended that exceptions should be made for domestic accommodation, in the owner's or near relative's residence.<sup>431</sup> This exception has also been included by all other jurisdictions which contain the ground.<sup>432</sup> As discussed in Chapter Four,<sup>433</sup> these exceptions should continue to apply.

The Victorian and Western Australian Acts continue to provide an exception to the anti-discrimination provisions for small businesses,<sup>434</sup> but, consistently with the Commission's general recommendation in relation to repeal of the small business exception,<sup>435</sup> this exception should not be available in relation to the ground of religion.

#### **Recommendation 84**

**Provide an exception to discrimination on the ground of religion on the basis of a genuine occupational qualification.**

*Draft Anti-Discrimination Bill 1999: cl 28(5)*

#### **Recommendation 85**

**Provide an exception to discrimination on the ground of religion in relation to admission to educational institutions established for particular religious groups.**

*Draft Anti-Discrimination Bill 1999: cl 44*

#### **Recommendation 86**

**Provide an exception to discrimination on the ground of religion in relation to clubs established for persons of a particular religion or belief.**

**Recommendation 87**

**Provide an exception to discrimination on the ground of religion in relation to accommodation established for religious purposes, similar to that contained in the Victorian and Queensland legislation.**

**Recommendation 88**

**An exception to discrimination on the ground of religion in relation to access to sites of religious significance is supported but is covered by the special measures exception.**

**Carer responsibilities**

6.444 Conduct which discriminates on the ground of family or carer responsibilities is currently prohibited by anti-discrimination legislation in all Australian jurisdictions except New South Wales and South Australia.<sup>436</sup> In Chapter Five the Commission recommended the introduction of the ground of carer responsibilities to the ADA in relation to the area of employment.<sup>437</sup> Under the Commission's recommendation, the ground applies only in the area of employment and requires that employers make reasonable accommodation for people with carer responsibilities (subject to a defence of unjustifiable hardship).

***Genuine occupational qualification***

6.445 In Queensland an employer may limit the offering of employment on the basis of "parental status" or its equivalent if it is a genuine occupational requirement of the employment.<sup>438</sup> However, the Queensland provisions are based on a general prohibition of discrimination on the ground of "parental status" in the area of employment. As the Commission is recommending that an employer be required to make reasonable accommodation on the ground of carer responsibilities, subject to a defence of unjustifiable hardship, a defence of genuine occupational qualification would be superfluous. The genuine occupational qualification provisions of the other jurisdictions do not provide exceptions on the ground of family responsibilities or its equivalent.

***General exceptions***

6.446 The recommendations made in relation to general exceptions earlier in this chapter will apply to this ground. As the Commission is not recommending that the ground of carer responsibilities be introduced in relation to any area other than employment, exceptions which exist in other jurisdictions in relation to other areas, such as education and accommodation,<sup>439</sup> are not considered.

**Footnotes**

1. See Chapter 1 at para 1.5-1.9.
2. Call to Australia, *Submission 1* at 2 and M Hains, *Submission*.

3. ADA s 54.
4. ADA s 55.
5. ADA s 56.
6. ADA s 57.
7. ADA s 59. ADA s 58 was repealed in 1981.
8. Section 54(3) provides that:
 

Except as provided in this section; this Act has effect notwithstanding anything contained in –

  - (a) the *Co-operation Act 1923*;
  - (b) the *Financial Institutions (NSW) Act 1992*;
  - (c) the *Friendly Societies Act 1989*;
  - (c1) the *Co-operatives Act 1992*;
  - (d) the *Gaming and Betting Act 1912*;
  - (e) the *Registered Clubs Act 1976*

or any instrument of whatever nature made or approved thereunder.

Section 54(2) was repealed in 1994.
9. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 November 1976 at 3341.
10. New South Wales, Anti-Discrimination Board, *Part 1: Discrimination in Legislation; Part II: Discrimination in Government Policies and Practices; Part III: Discrimination in Superannuation* (Sydney, May, 1978).
11. M Thornton, *The Liberal Promise – Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne, 1990) at 133.
12. [1982] 2 IR 93 (NSW CA).
13. *Anti-Discrimination (Amendment) Act 1982* (NSW).
14. See *Nadjovska v Australian Iron and Steel* [1985] EOC 92-140, where the EOT refused to allow the respondent to rely on s 36 of the *Factories Shops and Industries Act 1962* (NSW) which limited the weights lifted by women.
15. *Clinch v Commissioner of Police* [1984] EOC 92-115.
16. *Anderson v Director-General of Education* [1978] 2 NSWLR 423; *Gavaghan v Chairman, Public Service Board of NSW* [1985] EOC 92-143.
17. ADA s 49ZW(3).
18. RDA; EOA (SA); *Sex Discrimination Act 1975* (UK) – however, acts done in order to comply with the requirements of an award or industrial agreement in relation to employment on the grounds of age are exempted; EOA (SA) s 85(f)(4).

19. SDA s 40(2) and 40(3): these sections are subject to review under SDA s 40A; DDA s 47(1); EOA (WA) s 69.
20. ADA (Qld) s 106.
21. Victorian Law Reform Commission, *Review of the Equal Opportunity Act* (Report 36, 1990) at 29 and the Victoria, Scrutiny of Acts and Regulations Committee, *Review of the Equal Opportunity Act 1984: Final Report* (1993) recommended that acts done on the basis of statutory authority should be exempt only if specifically provided for by regulation, or specifically authorised. However, the recommendations were not adopted in the EOA (Vic).
22. EOA (Vic) s 207.
23. Disability Discrimination Legal Centre, *Submission* at 6; Gay and Lesbian Rights Lobby, *Submission* at 2; P Jenkin, *Submission* at 2; Law Society of NSW, *Submission* at 4; National Pay Equity Coalition, *Submission* at 3; NSW Department of Industrial Relations, Employment, Training and Further Education, *Submission* at 11; NSW Independent Teachers' Association, *Submission* at 1; NSW Women's Advisory Council, *Submission* at 4. It should be noted, however, that the submission of the Catholic Education Commission specifically rejected the repeal of the statutory authority exception: Catholic Education Commission NSW, *Submission* at 19.
24. M Thornton, *The Liberal Promise – Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne, 1990) at 132-133.
25. National Pay Equity Coalition, *Submission* at 3.
26. Sex Discrimination Commissioner, *Sex Discrimination Act 1984: A Review of Exemptions* (AGPS, Canberra, 1992) at para 6.29.
27. SDA s 40 has been amended by the following Acts: *Statute Law (Miscellaneous Provisions) Act 1988* (Cth); *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (Cth); *Social Security (Rewrite) Transition Act 1991* (Cth); *Sex Discrimination Amendment Act 1991* (Cth); *Income Tax (International Agreements) Amendment Act 1995* (Cth); *Sex Discrimination Amendment Act 1995* (Cth); *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).
28. In addition, subsection (3) provides exemptions for compliance with any regulations, rules, by-laws, determinations or directions made under several of the Acts listed in subsection (2). Subsection (4) also provides that for three years from the commencement of the subsection, the sex discrimination prohibitions contained in the Act will not apply to a scheme established under the *Student and Youth Assistance Act 1973* (Cth) or a current special educational assistance scheme within the meaning of that Act.
29. Section 40A introduced by the *Sex Discrimination Amendment Act 1991* (Cth). Subsection (1) provides that the Minister's review and recommendations should take place before 1 June 1996. This review was co-ordinated by the Attorney-General's Department in 1996 and the report was tabled in Parliament on 26 June 1996. The report recommended that s 40 be amended but the recommendations have not been implemented as at 1 August 1999.
30. Anti-Discrimination Board, *Submission 1* at 112.
31. Anti-Discrimination Board, *Submission 1* Attachment 5 at 298.
32. Anti-Discrimination Board, *Submission 1* at 111-112; Law Society of NSW, *Submission* at 4.
33. (1991) 173 CLR 349. See EOA (Vic) s 39(e).



34. *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 368; see also Brennan J at 381, Dawson and Toohey JJ at 388-390, and McHugh J at 413-414. The minority in *Waters* disagreed that the exception was confined to specific obligations to discriminate imposed directly by the Act. They took the view that the exception would cover any discrimination that was necessary in order to carry out a third person's directions under the legislation. Despite the difference in opinion, the reasoning does reinforce that the exception refers to necessity and that an employer who has a discretion is not covered by the exception.
35. [1984] EOC 92-115.
36. [1994] EOC 92-654. See also *Kinley v East Sydney Area Health Service* [1994] EOC 92-559 where the EOT found that the applicable regulation did not require the action complained of and hence there was no question of a need for compliance.
37. [1987] EOC 92-196.
38. [1994] EOC 92-586.
39. [1994] EOC 92-654.
40. [1994] EOC 92-654 at 77,448.
41. See *Kitt v Tourism Commission* [1987] EOC 92-169 and 92-209.
42. See below at para 6.276.
43. See below at para 6.363.
44. *Lead Regulations 1956* (NSW) reg 2. These regulations were created under the *Factories Shops and Industries Act 1962* (NSW) and were due to be repealed under the *Subordinate Legislation Act 1989* (NSW) on 1 September 1994. However, yearly postponement of their repeal has been granted since this time.
45. Such a provision, to be found in the *Factories Shops and Industries Act 1962* (NSW) s 36, was the subject of judicial consideration by the EOT in *Nadjovska v Australian Iron and Steel* (1985) EOC 92-140. A brief history of that legislation may be found in a report by Dr Chloe Refshauge (Mason): New South Wales, Anti-Discrimination Board, *Protective Legislation at Work: A Case Study of the "Weight Limit" on Manual Handling* (Sydney, 1984).
46. See *In the Matter of an Application for Exemption by Broken Hill Associated Smelters Pty Ltd* [1987] EOC 92-210.
47. *In the Matter of an Application for Exemptions by Pasmaenco Metals – BHAS Ltd* [1991] EOC 92-384 at 78, 640.
48. *In the Matter of an Application for Exemptions by Pasmaenco Metals* at 78, 640.
49. EOA (Vic) s 70.
50. *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 413-414.
51. Anti-Discrimination Board, *Submission 1* at 111-112. The time suggested by the ADB for agencies to make submissions was three years.
52. *Hawes v NSW Ambulance Service* [1994] EOC 92-586; *Kitt v Tourism Commission of NSW* [1987] EOC 92-209; *Public Service Board of NSW v Napier* [1984] EOC 92-116; *Director-General of Education v Breen* (1982) 2 IR 93.

53. *Anti-Discrimination (Amendment) Act 1994* (NSW) Sch 4 (23) removed s 54(1)(e).
54. One of the stated objects of the IRA is “to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value”: s 3(f). Furthermore, s 169 of the IRA requires the IRC to take into account the principles embodied in the ADA when making determinations and provides that an award may be varied at any time to remove unlawful discrimination. In addition to this s 9 of the IRA required that the IRC undertake a three yearly review of all awards and in so doing must take into account a range of factors including any issue of discrimination under the award.
55. New South Wales, Anti-Discrimination Board, *Discrimination the Other Epidemic: Report of the Inquiry Into HIV and AIDS Related Discrimination* (Sydney, 1992) at 91.
56. See below at para 6.272.
57. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 November 1976 at 3341.
58. RDA s 8(2).
59. SDA s 36.
60. DDA s 49.
61. EOA (Vic) s 74; ADA (Qld) s 110; EOA (SA) s 45, 64, 80 and 85n; EOA (WA) s 70.
62. ADA (NT) s 52.
63. Anti-Discrimination Board, *Submission 1* at 117.
64. J Clementson, *Submission* at 1; Gay and Lesbian Rights Lobby, *Submission* at 9; NSW Ministry for the Status and Advancement of Women, *Submission* at 24; National Pay Equity Coalition, *Submission* at 2; NSW Independent Teachers’ Association, *Submission* at 1.
65. EOA (Vic) s 75; ADA (Qld) s 109; EOA (WA) s 72; DA (ACT) s 32 and ADA (NT) s 51.
66. EOA (SA) s 50.
67. Anglican Church of Australia (Diocese Sydney), *Submission* at 2; The Brethren (Universal Christian Fellowship), *Submission* at 2; Catholic Education Commission NSW, *Submission* at 3; NSW Council of Churches, *Submission* at 1; Presbyterian Church of Australia, *Submission* at 1; Seventh-Day Adventist Church, *Submission* at 3; Wesley Mission, *Submission* at 3. See also P Fitzgerald, *Submission* at 10; M Hains, *Submission* at 1; J Hollier, *Submission* at 2; M Kirby, *Submission* at 20; K & M McKenzie & Co, *Submission* at 2; B O’Farrell, *Submission* at 1.
68. Article 6.
69. Anti-Discrimination Board, *Submission 1* at 119.
70. M Kirby, *Submission* at 20.
71. Wesley Mission, *Submission* at 2.
72. *The Church of the New Faith v The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120 at 135-136.
73. ADA s 57(1).

74. New South Wales, Anti-Discrimination Board, *Annual Report 1980/1981* at 129.
75. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 March 1981 at 5107.
76. Sex Discrimination Commissioner, *Sex Discrimination Act 1984: A Review of Exemptions* (AGPS, Canberra, 1992) at 89.
77. See also Chapter 4 at para 4.236.
78. SDA s 39.
79. This may mean that the ADA and the RDA are inconsistent with each other and that the Federal law will prevail under s 109 of the *Federal Constitution*. Section 6A of the RDA also provides that other State and Territory laws can operate concurrently with RDA which is not meant to exclude or limit their operation. Presently, the Board refers any race discrimination complaints about voluntary bodies which are outside the jurisdiction of the ADA to the HREOC.
80. See Chapter 4 at para 4.244.
81. DDA s 27(1).
82. DDA s 4.
83. EOA (WA) s 71(1) (however, the exception does not apply in relation to discrimination on the ground of impairment or age if the voluntary body is incorporated: s 71(2)) and DA (ACT) s 31.
84. EOA (SA) s 40(4).
85. *Anonymous Submission 1*; Anti-Discrimination Board, *Submission 2* especially at 16-21; Anti-Discrimination Board, *Submission 1* at 117-118; J Anderson, *Submission* at 6; J Clementson, *Submission* at 1; Combined Community Legal Centre Group NSW, *Submission* at 9; Disability Discrimination Legal Centre, *Submission* at 6; Gay and Lesbian Rights Lobby, *Submission* at 9; NSW Ministry for the Advancement and Status of Women, *Submission* at 24; National Pay Equity Coalition, *Submission* at 2; NSW Independent Teachers' Association, *Submission* at 1; D Robertson, *Submission* at 13. It should be noted, however, that the submission of the Seventh Day Adventist Church specifically opposed the repeal of the exception for voluntary bodies from the operation of the Act: Seventh Day Adventist Church, *Submission* at 5. See also A Norton, *Submission* at 1.
86. NSW Ministry for the Advancement and Status of Women, *Submission* at 24.
87. National Pay Equity Coalition, *Submission* at 2.
88. Anti-Discrimination Board, *Submission 1* at 117.
89. Anti-Discrimination Board, *Submission 1* at 118.
90. See Chapter 4 at para 4.249.
91. See Chapter 4 Recommendation 27.
92. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 March 1977 at 5244.
93. New South Wales, Anti-Discrimination Board, *Discrimination and Age* (Sydney, 1980) at 214-215; New South Wales, Anti-Discrimination Board *Discrimination and Religious Conviction* (Sydney, 1984) at 480-46 (Recommendation 36).

94. Anti-Discrimination Board, *Discrimination and Age* at 215.
95. EOA (WA) s 74.
96. This would appear to accommodate, for example, the concerns of the Seventh-Day Adventist Church, who argued that the exception should be retained in its current form: Seventh-Day Adventist Church, *Submission* at 2.
97. See below at para 6.97.
98. RDA s 8; SDA s 7D; DDA s 45; HREOC Act s 11(2); ADA s 21, 49ZJR and 126A; EOA (Vic) s 39(f); ADA (Qld) s 104 and 105; EOA (SA) s 46, 47, 65, 82 and 85p; EOA (WA) s 28, 31, 35K, 51 and 66ZP; DA (ACT) s 27 and 37; ADA (NT) s 57; *Human Rights Act 1993* (NZ) s 73.
99. Australia, Human Rights and Equal Opportunity Commission, *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984* (Sydney, 1996) at 13.
100. S Pritchard, "Special Measures" in Australia – Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* (AGPS, Canberra, 1995) at 230-231.
101. (1985) 159 CLR 70.
102. [1993] EOC 92-417.
103. W Sadurski, "Gerhardy v Brown: Reflections on the Landmark Case that Wasn't" (1986) 11 *Sydney Law Review* 5 and S Pritchard, "Special Measures".
104. J Morgan, "Equality Rights: A Feminist Assessment" in P Alston (ed), *Towards and Australian Bill of Rights* (Centre for International and Public Law, Sydney and Canberra, 1994) at 137-139.
105. S Walpole, "Foreword" in Australia, Human Rights and Equal Opportunity Commission, *1996 Guidelines for Special Measures under the SDA* (Sydney, 1996) at 6.
106. See discussion in Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) Vol 1 at para 149-151.
107. See SDA s 7D(4).
108. SDA s 7D(3).
109. (1985) 159 CLR 70 at 135.
110. *Gerhardy v Brown* at 136.
111. See discussion of s 126A below at para 6.132.
112. Blackmun J in *University of California Regents v Bakke* (1978) 438 US 265 at 407 quoted by Brennan J in *Gerhardy v Brown* at 131.
113. ADA s 126(2) and 126(3).
114. Amended by the *Anti-Discrimination Amendment Act 1997* (NSW).
115. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 November 1976 at 3346.
116. New South Wales, Anti-Discrimination Board, *Annual Report 1995/1996* at 52.

117. The special measures provisions under ADA s 21, 49ZJR and 126A cover programs or activities that provide access or promote equal or improved access to facilities, services or opportunities. However, "opportunities" has been interpreted by the Board as not including employment opportunities (targeted positions).
118. For examples see New South Wales, Anti-Discrimination Board, *Annual Report 1995/96* at 52; *Annual Report 1994/95* at 95-96 and *Annual Report 1993/94* at 57.
119. Anti-Discrimination Board, *Submission 1* at 123.
120. Disability Council of NSW, *Submission* at 4; Gay and Lesbian Rights Lobby, *Submission* at 9; National Children's and Youth Law Centre, *Submission* at 3; NSW Independent Teachers' Association, *Submission* at 1; NSW Women's Advisory Council, *Submission* at 8.
121. SDA s 44.
122. DDA s 55.
123. ADA (Qld) s 248.
124. EOA (SA) s 92.
125. EOA (WA) s 135.
126. DA (ACT) s 109.
127. ADA (NT) s 59.
128. M Thornton, *The Liberal Promise – Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne, 1990) at 142.
129. Anti-Discrimination Board, *Submission 1* at 123-124.
130. ADA s 126A(1).
131. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 4 May 1994 at 1832.
132. The ADB's view is consistent with the Crown Solicitor's advice on this issue.
133. Two submissions also specifically argued that the power to grant exemptions should be vested in either the ADB or the President: Gay and Lesbian Rights Lobby, *Submission* at 9; D Robertson, *Submission* at 16.
134. See Appendix A at p 789.
135. See ADA (Qld) s 25; and EOA (Vic) s 21(4)(b).
136. See EOA (Vic) s 17(3) and ADA (Qld) s 25.
137. ADA s 20A.
138. ADA s 20A(4).
139. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 25 March 1981 at 5106.
140. EOA (Vic) s 61; ADA (Qld) s 97; and ADA (NT) s 47(1).

141. EOA (WA) s 48(3).
142. DA (ACT) s 43.
143. EOA (SA) s 57(2).
144. Special measures are themselves exempt from the prohibitions in the RDA: RDA s 8.
145. See Chapter 4 Recommendation 27.
146. See *Tocigl v Aitco Pty Ltd* [1996] EOC 92-775.
147. Governing sporting bodies and associations commonly set down eligibility rules to govern the number of "foreign" or restricted players to compete in a team. For instance, the rules of the National Basketball League require a person to have resided in Australia for a continuous period of three years following naturalisation in order to qualify as a non-restricted player. These rules were found not to constitute race discrimination: *Henderson v National Basketball League Management Limited* [1992] EOC 92-435.
148. RDA s 9(3) and 15(4).
149. ADA s 31.
150. ADA s 31(3) and (4).
151. [1996] EOC 92-846.
152. The Tribunal stated, somewhat curiously, that the situation may have been different if the position were filled by appointment, rather than election: see *Brennan v NSW Fire Brigades* [1996] EOC 92-846 at 79,256.
153. Anti-Discrimination Board, *Submission 1* at 66.
154. See EOA (Vic) s 19; and DA (ACT) s 34 (2)(i).
155. *Leves v Haines* [1986] EOC 92-167 at 76, 631.
156. E Jimenez and M Lockheed, "Enhancing Girls Learning through Single-Sex Education: Evidence and a Policy Conundrum" (1989) 11(2) *Educational Evaluation and Policy Analysis* 117; S Sampson, "Are Boys a Barrier for Girls in Science?" in G Leder and S Sampson (eds), *Educating Girls* (Allen and Unwin, Sydney, 1989) at 139-143; K Rowe, "Single-Sex and Mixed Classes: The Effects of Class Type on Student Achievement, Confidence and Participation in Mathematics" (1988) 32(2) *Australian Journal of Education* 180. However, for a discussion of the limitations of single-sex schooling, see: J Kenway and S Willis, "On Overcoming Sexism in Schooling: To Marginalise or Mainstream" (1986) 30(2) *Australian Journal of Education* 132.
157. ADA s 34A(3).
158. ADA s 4(2).
159. M Thornton, *The Liberal Promise – Anti-Discrimination Legislation in Australia* (Oxford University Press, Melbourne, 1990) at 130; K Dempsey, "Women's Leisure, Men's Leisure: A Study in Subordination and Exploitation" (1989) 25 *Australia and New Zealand Journal of Sociology* 27.
160. Information supplied by Adam Jones, Research Officer, Registered Clubs Association (June 1995).
161. SDA s 25(3).

162. EOA (WA) s 22(3); DA (ACT) s 40(1); ADA (NT) s 47(3)(a); and EOA (SA) s 35(1).
163. EOA (Vic) s 61(a); and ADA (Qld) s 97(b).
164. SDA s 25(4) and (5).
165. EOC (Vic) s 63; ADA (Qld) s 98; EOC (SA) s 35(2); EOC (WA) s 22(4); DA (ACT) s 40(2); ADA (NT) s 47(3)(b); and SDA (Tas) s 26(2).
166. M Thornton, "The Public/Private Dichotomy" (1991) 18 *Journal of Law and Society* 448 at 455-456.
167. *Corry v Keperra Country Golf Club* [1986] EOC 92-150.
168. ADA s 38.
169. The submission of the Commissioner for Equal Opportunity (SA) argued that the NSW exclusion should be "limited to cases where physique or strength are relevant" as under the EOA (SA): Commissioner for Equal Opportunity (SA), *Submission* at 4.
170. EOA (Vic) s 64. However, the Commission has not recommended the extension of the ADA to include such an area, except to the extent that it is covered by the activities of incorporated associations.
171. EOA (Vic) s 66.
172. SDA s 42.
173. SDA s 42(1). Emphasis added.
174. SDA s 42(2).
175. Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* ("Lavarch Report") (AGPS, Canberra, 1992).
176. ADA s 36(a) and (b).
177. Or the fund could obtain a temporary exemption from the requirement to make the offer to members: SDA s 44.
178. See Australia, Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Superannuation and the Sex Discrimination Act 1984: Current Status and Future Directions* (AGPS, Canberra, 1994) at 2.
179. EOA (Vic) s 72-73.
180. SDA (Tas) s 29 (gender, marital status, pregnancy, parental status, family responsibilities); ADA (Qld) s 59 (sex, marital status), s 60-65 (age or impairment); EOA (WA) s 34 (sex, marital status, pregnancy), s 66ZL (age), s 66P (disability); DA (ACT) s 29 (all grounds); ADA (NT) s 49 (all grounds); the EOA (SA) is most unwieldy (s 42 allows discriminatory commutation factors and rates and benefits in employer schemes, s 44 allows discrimination on the ground of marital status in the payment of benefits and s 49 excepts insurance from sex discrimination provisions and other grounds).
181. SDA s 12(1).
182. SDA s 13(1).

183. Australia, Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Superannuation and the Sex Discrimination Act 1984: Current Status and Future Directions* (AGPS, Canberra, 1994) at 21.
184. Superannuation benefits taken in the form of a pension receive more favourable tax treatment. Also, annuitants can organise their assets and income in such a way as to still qualify for a part social security pension.
185. ADA s 36; SDA s 41A; see also para 6.231 on insurance.
186. Australia, Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Submission from the Sex Discrimination Commissioner to the Senate Select Committee on Superannuation* (1995) at 9.
187. Institute of Actuaries, *Submission to ADB* (21 December 1995) at 8.
188. Note, however, that in many cases, the occupation classification has an implicit allowance for smoking: Institute of Actuaries, *Submission to ADB* (21 December 1995) at 5.
189. Institute of Actuaries, *Submission to ADB* (21 December 1995) at 8.
190. See *City of Los Angeles Department of Water and Power v Manhart* 435 US 702 (1978), referred to in Australia, Human Rights and Equal Opportunity Commission, *Superannuation and the SDA: Current Status and Future Directions* at 9-10.
191. Australia, HREOC, *Superannuation and the SDA: Current Status and Future Directions* at 10.
192. M Owen, "Discrimination was not Meant for Women" (1984) 56 *Australian Quarterly* 363 at 368-370 quoted in J Scutt (ed), *Women and the Law* (Law Book Co, Sydney, 1990) at 73.
193. New South Wales, Anti-Discrimination Board, *Discrimination in Superannuation* (Sydney, 1978).
194. Anti-Discrimination Board, *Submission 1* at 67; NSW Women's Advisory Council, *Submission* at 8 and Australia, HREOC, *Superannuation and the SDA: Current Status and Future Directions* at 15.
195. Gay and Lesbian Rights Lobby, *Submission* at 6.
196. Anti-Discrimination Board, *Submission 1* at 66; NSW Ministry for the Status and Advancement of Women, *Submission* at 26; National Pay Equity Coalition, *Submission* at 2; NSW Women's Advisory Council, *Submission* at 8.
197. National Pay Equity Coalition, *Submission* at 2.
198. Anti-Discrimination Board, *Submission 1* at 67.
199. Australia, *Parliamentary Debates (Hansard)* Senate, 20 October 1983, the Hon G Evans at 1893; New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 November 1976, the Hon NK Wran, Premier, Second Reading Speech at 3340; New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 24 November 1976, the Hon D P Landa at 3392. In the Second Reading Speech of the ADA in the Legislative Assembly, it was specifically stated that:

it is the government's intention in due course to make unlawful discrimination in respect of wages, salaries and superannuation because of sex or any other ground and to bring it within the purview of the general intention of the legislation (at 3340).
200. New South Wales, Anti-Discrimination Board, *Discrimination in Superannuation* (Sydney, 1978).



201. New South Wales, Anti-Discrimination Board, *Discrimination in Superannuation* at 47.
202. Victoria, Equal Opportunity Board, *Discrimination in Superannuation and Pension Schemes* (Melbourne, 1980).
203. Lavarch Report at 97-100.
204. Lavarch Report at 104-105.
205. Australia, Human Rights and Equal Opportunity Commission, *Superannuation and the SDA: Current Status and Future Directions* at 16.
206. Association of Superannuation Funds of Australia, *Submission to Attorney General's Department* (5 March 1996) at 1.
207. Introduced on 1 July 1992, it requires employers to contribute a fixed percentage of a worker's wage in a superannuation fund in respect of any person who earns more than \$450 per month. Employer contributions under the SGC and under any award schemes vest immediately in the employee and are fully preserved until retirement. The same applies to company funds since the changes to operating standards in 1994.
208. Australia, HREOC, *Superannuation and the SDA: Current Status and Future Directions* at 2.
209. Australia, Senate Standing Committee on Superannuation, *Super and Broken Work Patterns* (Report 17, 1995).
210. Anti-Discrimination Board, *Submission 1* at 67.
211. Association of Superannuation Funds of Australia, *Submission* at 2.
212. SDA s 10(3).
213. ADA s 37 (sex); s 49Q (disability); and s 49ZYT (age).
214. See, for example, EOA (Vic) s 43.
215. Australia, Human Rights and Equal Opportunity Commission, *Insurance and the Sex Discrimination Act 1984* (AGPS, Canberra, 1990) at 2.
216. S Coates, *Submission* at 1; Disability Council of NSW, *Submission* at 5; Gay and Lesbian Rights Lobby, *Submission* at 6; National Pay Equity Coalition, *Submission* at 2; M Santin, *Submission* at 1.
217. See, for example, New South Wales, Anti-Discrimination Board, *Discrimination – the Other Epidemic: Report of the Inquiry into HIV and AIDS Related Discrimination* (Sydney, 1992) at 65.
218. ADA (Qld) s 31.
219. EOA (WA) s 30.
220. DA (ACT) s 35.
221. [1996] EOC 92-783.
222. ADA s 49.
223. See above at para 6.210.

224. SDA s 41A.
225. SDA s 41B. See also discussion concerning sex discrimination above at para 6.210.
226. See EOC (SA) s 44; EOA (WA) s 34; and DA (ACT) s 29.
227. EOA (Vic) s 73(2)(a); and ADA (Qld) s 59.
228. *Superannuation Act 1916* (NSW) s 30 and 31. The estate of members who die leaving no legally recognised spouse or child receives only the sum of contributions without interest.
229. *Benney v Jones* (1991) 23 NSWLR 559; *Re Fitzpatrick and Commissioner for Superannuation* (1995) 38 ALD 767; *Re Scott and Commissioner of Superannuation* (1989) 19 ALD 208; *Re Johnson and Commissioner for Superannuation* (1979) 2 ALD 825; *Re Bonny* [1986] 2 QdR 80. The Commonwealth is trying to argue that a beneficiary must be substantially financially dependent on the member.
230. *Hope v NIB Health Funds Ltd* [1995] EOC 92-716.
231. See decision of AAT in *Re Brown and Commissioner for Superannuation* (1995) 38 ALD 344.
232. Gay and Lesbian Rights Lobby, *Submission* at 6.
233. Gay and Lesbian Rights Lobby Inc, *Superannuation and Same-Sex Relationships* (1995).
234. See *Pope v Lawler* (1996) 41 ALD 127.
235. Anti-Discrimination Board, *Submission 1* at 69, 96-97 and 298-301; Gay and Lesbian Rights Lobby, *Submission* at 10; NSW Ministry for the Status and Advancement of Women, *Submission* at 26.
236. [1995] EOC 92-716.
237. Australia, Senate Select Committee on Superannuation, *Super and Broken Work Patterns* (Report 17, 1995) Recommendation 14.
238. Australian Superannuation Fund of Australia, *Submission* at 2.
239. See s 62 which requires regulated funds to be maintained solely to provide benefits to the member or the member's legal personal representative or dependents on the member's death or incapacitation. Dependent is defined inclusively as the married or de facto spouse of the member.
240. See discussion above concerning sex discrimination at para 6.210.
241. Disability Council of NSW, *Submission* at 5.
242. EOA (Vic) s 80.
243. ADA (Qld) s 107 and 108.
244. EOA (WA) s 66U.
245. DA (ACT) s 56.
246. ADA (NT) s 55.
247. Aids Council of NSW, *Submission* at 1.

248. Anti-Discrimination Board, *Submission 1* at 86.
249. ADA s 49L(3)(b).
250. Anti-Discrimination Board, *Submission 1* at 92.
251. DDA s 22(3).
252. EOA (Vic) s 38.
253. ADA s 49Q.
254. DDA s 46(1) and 46(2).
255. EOA (Vic) s 73(2)(b) and 43(1)(a); DA (Qld) s 60-65 and s 74-75; EOA (SA) s 43(c), 44(2) and 49; EOA (WA) s 66P and 66T; DA (ACT) s 29 and 28 (in relation to superannuation and insurance respectively). The exceptions in s 49(1) of the ADA (NT) apply to both insurance and superannuation and s 49(2) to superannuation alone.
256. (1986) 160 CLR 330.
257. Section 233(1).
258. It should be noted that the submission of the ASFA argued for uniformity of Commonwealth and State legislation in the area of the superannuation: Australian Superannuation Funds of Australia, *Submission* at 1-2.
259. DDA s 28.
260. ADA s 49O(3).
261. ADA s 49O(4).
262. DDA s 27(3).
263. EOA (Vic) s 61; ADA (Qld) s 97.
264. EOA (WA) s 66M(3) and (5); DA (ACT) s 55(1) and (3).
265. See ADA s 49O(2)(a).
266. See Chapter 4 at para 4.272.
267. See Chapter 5 at para 5.106.
268. See Chapter 5 at para 5.117.
269. ADA s 49ZYQ.
270. ADA s 49ZYR.
271. ADA s 79ZYV.
272. ADA s 49ZYQ.
273. ADA s 49ZYV.
274. ADA s 49ZYG(2)

275. Youth Action and Policy Association, "Junior Wages Update – January 1996".
276. National Children's and Youth Law Centre, "Youthism: age discrimination and young people" Discussion Paper (July 1995). The submission of the National Children's Youth Law Centre also argued for the abolition of the junior wage rates exception on the basis that: "if the same job is performed by people of different ages essentially it should be paid at the same range according to an Award or registered agreement": National Children's and Youth Law Centre, *Submission* at 3. The submission of the National Pay Equity Coalition also opposed the exception, arguing that: "Training wages can be provided in awards and agreements with provisions ensuring access to training. Age is no indicator of competence nor of need for income and should not be a permissible basis for pay discrimination": National Pay Equity Coalition, *Submission* at 3.
277. New South Wales, Attorney General's Department, *Age Discrimination Options for NSW: A Discussion Paper* ("Green Paper") (Sydney, 1992).
278. Western Australia, Equal Opportunity Commissioner, *Age Discrimination and Equal Opportunity Legislation* (Discussion Paper 1, 1989); South Australia, *Report of the Task Force Monitoring Age Discrimination* (1989); Victorian Law Reform Commission, *Review of the Equal Opportunity Act* (Report 36, 1990); Australian Capital Territory, *Issues and Options for Age Discrimination Law in the ACT* (Discussion Paper, Canberra, 1993).
279. Green Paper at 30.
280. New South Wales, Attorney General's Department, *Age Discrimination Legislation for NSW* (Sydney, 1993) ("White Paper").
281. Since writing this Report, the Full Bench of Australian Industrial Relations Commission has reported on this issue and concluded that "none of the non-discriminatory alternatives were feasible". The Full Bench further stated that:
- "Well designed junior rate classifications framed to reduce the capacity to exploit the use of them, may justifiably be used for creating or protecting employment opportunities for young employees": Australian Industrial Relations Commission, *Junior Rates Inquiry – Report of the Full Bench Inquiring under section 120B of the Workplace Relations Act 1996*, 4 June 1999.
282. EOA (Vic) s 27.
283. ADA (Qld) s 33.
284. EOA (SA) s 85f(4).
285. EOA (WA) s 66ZS.
286. DA (ACT) s 57B.
287. This recommendation may need to be reconsidered in view of the Report of the Australian Industrial Relations Commission's Junior Rates Inquiry, which was not available to the Commission at the time of writing.
288. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 November 1993 at 5709.
289. ADA s 49ZYJ(3) and (4).
290. EOA (Vic) s 17(3).
291. ADA (Qld) s 25. The section includes examples to illustrate "genuine occupational requirements".

292. EOA (SA) s 85f(2).
293. ADA (NT) s 35(1)(b).
294. EOA (WA) s 66ZQ.
295. DA (ACT) s 57A.
296. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 November 1993 at 5709.
297. See Chapter 2 at para 2.34.
298. An example of the kinds of employment practices which have been rendered unlawful by anti-discrimination laws is provided in the case of *Kemp v Minister for Education* [1991] EOC 92-340. In that case the EOC in Western Australia decided that a requirement that an appointee have a minimum total length of service and seniority was indirectly discriminatory on the ground of sex. The Commission found that a greater number of women than men were likely to be out of the work force for periods of time for purposes of child bearing and child rearing and that the requirement was not reasonable in the circumstances.
299. Australian Bureau of Statistics, *Labour Mobility in Australia* (February 1998)
300. Australian Bureau of Statistics, *Labour Mobility in Australia*, See Table 4: "Worked during the year ending February 1998: Job Mobility" at 15.
301. EOA (WA) s 66ZN(1). The basis for offering participation in such a scheme is age and not length of service. It is also noteworthy that the temporary exception with regard to compulsory retirement is included in the retirement exception to age.
302. Green Paper at 31.
303. White Paper at 17.
304. New South Wales, Anti-Discrimination Board, *Discrimination and Age: Outline of Proposals* (Sydney, 1985). Based on the ADB's research published in New South Wales, Anti-Discrimination Board, *Discrimination and Age* (Sydney, 1980) and subsequent developments. The exceptions proposed were:
  - services, programs or treatment designed to meet the special needs of a particular age group;
  - mature age admission schemes;
  - private educational authorities;
  - anything done in compliance with other legislation; and
  - refusal to admit children to school under age 6 years.
305. The exceptions applicable to private educational authorities and prescribed education authorities are dealt with in Chapter 4 at para 4.178-4.184.
306. EOA (Vic) s 38 and 41.
307. ADA (Qld) s 43.
308. EOA (SA) s 85i(3).

309. EOA (WA) s 66ZD(4).
310. DA (ACT) s 57E.
311. DA (ACT) s 57H.
312. See EOA (Vic) s 41.
313. ADA s 49ZYM(2). The provision stated that: “[n]othing in this section applies to or in respect of benefits, including concessions, provided in good faith to a person by reason of his or her age”.
314. *Anti-Discrimination Amendment Act 1997* (NSW).
315. ADA s 49ZYN(2) and 49ZYN(3).
316. See Chapter 4 at para 4.274.
317. Information supplied by the Legal and Policy Division of the ADB.
318. D Carrick, “Reproductive Technology, Legislation and Discrimination” (1997) 32(4) *Australian Lawyer* 14.
319. See above at para 6.95 and Chapter 4 at para 4.206.
320. ADA s 49ZYO(3).
321. See above at para 6.96 and Recommendation 48.
322. EOA (Vic) s 81.
323. EOA (Vic) s 55 and 56.
324. ADA (Qld) s 91.
325. EOA (SA) s 85I(4) and (5).
326. EOA (WA) s 66ZG(3).
327. DA (ACT) s 57H.
328. ADA s 49ZYP(3)(a). The Act sets out the factors that should be taken into account when determining what is the principal object of the club.
329. ADA s 49ZYP(3)(b).
330. [1990] 2 AC 751.
331. Under the provisions of the *Social Security Act 1991* (Cth), the pensionable age for women is 60 years and men is 65 years: s 23(5A) and 23(5B).
332. See above at para 6.310 and Recommendation 70.
333. See above at para 6.97.
334. In a submission to the Martin Report, in 1994, the Equal Opportunity Commissioner recommended the retention of the age discrimination provisions pending further research: see South Australia, *Legislative Review of the Equal Opportunity Act 1984* (1994) (“Martin Report”) Appendix (iv).

335. The *Human Rights and Equal Opportunity Commission Regulations* which came into operation on 1 January 1990 provide that discrimination on a number of grounds, including age, constitute discrimination for the purposes of the HREOC Act. The effect of this is that complaints alleging age discrimination can be brought to the HREOC which has the power to investigate and conciliate the complaint.
336. *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) s 3.
337. *Social Security Act 1991* (Cth) s 23(5A) and 23(5B). Transitional provisions are in place to equalise the age (65) at which men and women will be entitled to receive the age pension by 2002.
338. R Harris, "Age Discrimination and Superannuation" (1989-90) 120 *Superfunds* 13 at 13.
339. Under the *Superannuation Industry (Supervision) Regulations*, regulated super funds can accept contributions on behalf of members who are over 65 if those contributions are mandated employer contributions under the superannuation guarantee scheme or under an industrial agreement or award: regs 7.04 and 7.05.
340. ADA s 49ZYS appears to offer protection to the trustee of the super fund and the employer.
341. Association of Superannuation Funds of Australia, *Submission* at 2.
342. EOA (Vic) s 43(b); ADA (Qld) s 74 and 75; EOA (SA) s 85r(1) and (2); EOA (WA) s 66ZR; DA (ACT) s 28; and ADA (NT) s 49(1)(d)-(f).
343. Information supplied by Nancy Hennessy, Anti-Discrimination Board (27 August 1997).
344. EOA (Vic) s 44.
345. *Anti-Discrimination (Age Discrimination) Amendment Act 1993* (NSW) s 3.
346. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 November 1993, Second Reading Speech on the *Anti-Discrimination (Age Discrimination) Amendment Act 1993* (NSW) at 5711.
347. (1995) 60 IR 17.
348. (1996) 68 IR 248.
349. *Qantas Airways v Christie* (1998) 72 ALJR 634.
350. (1995) 60 IR 17.
351. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 November 1993, Second Reading Speech on the *Anti-Discrimination (Age Discrimination) Amendment Act 1993* (NSW) at 5711.
352. EOA (Vic) s 66(2) and (3); ADA (Qld) s 111(c); EOA (SA) s 85q; EOA (WA) s 66ZJ(3) and (4); DA (ACT) s 57M.
353. Emphasis added.
354. See above at para 6.209.
355. ADA s 38P and 38Q.
356. ADA s 38Q.

357. The Association of Superannuation Funds of Australia Limited, *Submission to the Attorney General's Department* (14 August 1996).
358. Association of Superannuation Funds of Australia Limited, *Submission to the Attorney General's Department* (14 August 1996).
359. See above at para 6.210.
360. Section 38P(2). No sporting activities have been prescribed.
361. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 2 May 1996 at 644.
362. Information supplied by Legal Division, NSW Department of Sport and Recreation.
363. See Chapter 4 at 4.259.
364. (1987) 35 DLR (4th) 338.
365. EOA (Vic) s 6(g) refers to discrimination on the ground of "political belief or activity".
366. ADA (Qld) s 7(j) refers to "political belief or activity".
367. EOA (WA) s 53 refers to "political conviction".
368. DA (ACT) s 7(h) refers to "political conviction".
369. ADA (NT) s 19(1)(n) refers to "political opinion, affiliation or activity". The South Australian, Tasmanian and Commonwealth anti-discrimination provisions do not prohibit discrimination on the basis of political conviction.
370. *Human Rights Act 1993* (NZ) s 21(1)(j) refers to "political opinion, which includes the lack of a particular political opinion or any political opinion" as a ground of prohibited discrimination. Other overseas jurisdictions such as Canada and the United Kingdom do not have an equivalent ground of discrimination based on political conviction.
371. EOA (Vic) s 18 provides an exception to the appointment of ministerial advisers, members of staff of a political party, the electoral staff or similar positions. Under the ADA (Qld), s 25 provides for an exception to apply to the employment of an adviser to a political party or a worker in the office of a member of Parliament. The DA (ACT) s 45 provides an exception for the employment of an adviser to, or a member of the staff of, a Minister, the Speaker of the Legislative Assembly or a member of the Legislative Assembly; an officer or employee of, or a worker for, a political party; a member of the electoral staff of a person; or a person involved in any other similar employment or work. Similarly, the *Human Rights Act 1993* (NZ) s 31 provides an exception for employment of a political adviser or secretary to a member of Parliament; a political adviser to a member of a local authority or a candidate seeking election to the House of Representatives or to a local authority; or a member of staff of a political party.
372. EOA (WA) s 66(2).
373. ADA (NT) s 35(1)(b).
374. *Discrimination (Employment and Occupation) Convention 1958* Art 1.2.
375. Anti-Discrimination Board, *Submission 1* at 146.
376. EOA (Vic) s 68.
377. ADA (Qld) s 102(2).



378. Anti-Discrimination Board, *Submission 1* at 147.
379. EOA (Vic) s 3 defines “club” to include only organisations which occupy crown land or receive public funding.
380. ADA (NT) s 41(2).
381. See above at para 6.70.
382. See above at para 6.97-6.119.
383. See Recommendations 43, 45 and 47.
384. See also Anti-Discrimination Board, *Submission 1* at 147.
385. EOA (Vic) s 16; ADA (QLD) s 26; EOA (WA) s 54(4)(a); DA (ACT) s 24; ADA (NT) s 35(2) and *Human Rights Act 1993* (NZ) s 27(2) all provide exceptions for employees who work to perform domestic duties in the residence of the employer. DA (ACT) s 25 and ADA (Qld) s 27 provide a further specific exception for care of children in the employer’s home.
386. Anti-Discrimination Board, *Submission 1* at 147.
387. The exceptions contained in EOA (Vic) s 54; ADA (Qld) s 87; EOA (WA) s 63(3); DA (ACT) s 26; ADA (NT) s 40(1), and *Human Rights Act 1993* (NZ) s 54 allow for discrimination in deciding who shall reside in accommodation in which the person or near relative lives.
388. EOA (Vic) s 6(j) refers to discrimination on the ground of “religious belief or activity”.
389. ADA (Qld) s 7(i) refers to “religion”.
390. EOA (WA) s 53 refers to “religious conviction”.
391. DA (ACT) s 7(h) refers to “religious conviction”.
392. ADA (NT) s 19(1)(m) refers to “religious belief or activity”. The South Australian and Tasmanian anti-discrimination provisions do not prohibit discrimination on the basis of religion or its equivalent.
393. *Human Rights Act 1993* (NZ) s 21(1)(c) refers to “religious belief” and s 21(1)(d) to “ethical belief, which means the lack of religious belief, whether in respect of a particular religion or religions or all religions”. Other overseas jurisdictions such as the United Kingdom do not have an equivalent ground of discrimination based on religion or religious conviction.
394. “Religion” is a prohibited ground of discrimination under s 3(1) of the *Canadian Human Rights Act* RSC 1985 c H6 (enacted 1976-1977).
395. Anti-Discrimination Board, *Submission 1* at 141. Furthermore, a number of submissions from church groups which argued that religion should not be included as a separate ground under the Act did so on the basis of a concern that such a ground would not fully recognise the communal nature of religious practice and that it would impinge on the autonomy of religious bodies: Anglican Church of Australia (Diocese Sydney), *Submission* at 2; Catholic Education Commission NSW, *Submission* at 1-2; NSW Council of Churches, *Submission* at 2-3; Wesley Mission, *Submission* at 1. See also Chapter 5 at para 5.150.
396. Anti-Discrimination Board, *Submission 1* at 141-142.
397. Anti-Discrimination Board, *Submission 1* at 141, relying on Art 1.2 of *ILO Convention 111*.

398. Anglican Church of Australia (Diocese Sydney), *Submission* at 2; The Brethren (Universal Christian Fellowship), *Submission* at 2; Catholic Education Commission NSW, *Submission* at 3; NSW Council of Churches, *Submission* at 1; Presbyterian Church of Australia, *Submission* at 1; Seventh-Day Adventist Church, *Submission* at 3; Wesley Mission, *Submission* at 3. See also P Fitzgerald, *Submission* at 10; M Hains, *Submission* at 1; J Hollier, *Submission* at 2; M Kirby, *Submission* at 20; K & M McKenzie & Co, *Submission* at 2; B O'Farrell, *Submission* at 1.
399. For example, the submission of the Wesley Mission specifically stated that “[p]eople providing even menial tasks come into contact with the general public ... and so at times can be as crucial to the smooth operation of an organisation as the Chairperson of the Board”: Wesley Mission, *Submission* at 2.
400. The submission of Justice Kirby stated that “it scarcely seems justifiable to confine staff in the college kitchen to members of the religion, unless they are obliged to observe religious rituals in the preparation of food”: M Kirby, *Submission* at 20.
401. ADA (Qld) s 25(1); *Canadian Human Rights Act* RSC 1985, c H6 s 15(a).
402. See EOA (Vic) s 17(2); *Human Rights Act 1993* (NZ) s 27(1).
403. EOA (Vic) s 76.
404. ADA (Qld) s 29(1)(a).
405. EOA (WA) s 66(1).
406. EOA (WA) s 73.
407. DA (ACT) s 33. Under the ACT legislation, employment agencies are also free to discriminate in their selection of candidates where, had the proposed employer so discriminated against the person, it would not have been unlawful: DA (ACT) s 26A.
408. DA (ACT) s 44.
409. *Human Rights Act 1993* (NZ) s 22. The New Zealand legislation also provides that a qualifying body can discriminate in selection of candidates where the authorisation or qualification facilitates engagement in a profession or calling for the purposes of an organised religion and is limited to persons of that religious belief: *Human Rights Act 1993* (NZ) s 39(1).
410. See Chapter 4 at para 4.128.
411. Anglican Church of Australia (Diocese Sydney), *Submission* at 1-2; Catholic Education Commission NSW, *Submission* at 4-5; NSW Council of Churches, *Submission* at 2; Presbyterian Church of Australia, *Submission* at 2; Seventh-Day Adventist Church, *Submission* at 4.
412. EOA (Vic) s 38.
413. ADA (Qld) s 41.
414. ADA (NT) s 30.
415. DA (ACT) s 33(2).
416. See paras 6.152-6.159 above.
417. Anti-Discrimination Board, *Submission 1* at 141.
418. EOA (Vic) s 61; ADA (Qld) s 97; and ADA (NT) s 47.

419. EOA (Vic) s 56 and 76.
420. ADA (Qld) s 89.
421. ADA (NT) s 40(2).
422. ADA (Qld) s 90.
423. ADA (NT) s 40(3). In addition to this, the *Human Rights Act 1993* (NZ) s 55 also provides a specific exception where accommodation is provided for people of the same religious or ethical belief.
424. EOA (Vic) s 55.
425. ADA (NT) s 40(4).
426. See also Anti-Discrimination Board, *Submission 1* at 141.
427. ADA (Qld) s 48 and ADA (NT) s 43.
428. ADA (Qld) s 80.
429. Anti-Discrimination Board, *Submission 1* at 142.
430. EOA (Vic) s 16; ADA (Qld) s 26; EOA (WA) s 54(4)(a); DA (ACT) s 24; ADA (NT) s 35(2) and *Human Rights Act 1993* (NZ) s 27(2), all provide exceptions for employees who work to perform domestic duties in the residence of the employer. Sections 25 of the DA (ACT) and 27 of the ADA (Qld) provide a further specific exception for care of children in the employer's home.
431. Anti-Discrimination Board, *Submission 1* at 147.
432. The exceptions contained in EOA (Vic) s 54; ADA (Qld) s 87; EOA (WA) s 63(3); DA (ACT) s 26; ADA (NT) s 40(1) and *Human Rights Act 1993* (NZ) s 54 allow for discrimination in deciding who shall reside in accommodation in which the person or near relative lives.
433. Chapter 4 at para 4.223.
434. EOA (Vic) s 21 provides an exception for businesses with no more than five full time employees (ie five or less), whereas EOA (WA) s 54(4)(b) requires that there be less than five employees (full-time/ part time status not specified).
435. See Chapter 4 at para 4.94.
436. SDA s 7A "family responsibilities"; ADA (Qld) s 7(1)(d) "parental status"; SDA (Tas) s 16(d) and (e) "parental status" and "family responsibilities"; EOA (Vic) s 6(1) "status as a parent or carer"; EOA (WA) s 35A "family responsibility or family status"; DA (ACT) s 7(1)(e) "status as a parent or carer" and ADA (NT) s 19(1)(g) "parenthood". Note that a Bill to introduce the ground is currently being considered in *NSW Anti-Discrimination Amendment (Pregnancy and Carers' Responsibility) Bill 1997* (NSW).
437. For further discussion see Chapter 5 at 5.185-5.220.
438. ADA (Qld) s 25. In Victoria, an employer may also limit the offering of employment on the basis of "status as a parent or carer" provided the discriminatory requirement constitutes a reasonable term of employment: EOA (Vic) s 23.
439. Exceptions which apply in other jurisdictions include the following:

*Accommodation* – where shared residence: EOA (Vic) s 54, ADA (Qld) s 87, DA (ACT) s 26, ADA (NT) s 40(1); provision of accommodation for employees: ADA (Qld) s 88, and EOA (WA) s 35L;

*Education* – education or training of Ministers of religion: SDA

s 37(b), ADA (Qld) s 109(b), EOA (Vic) s 75(b), EOA (WA) s 72(b), ADA (ACT) s 32(b), and ADA (NT) s 51(b); non-state school authorities: ADA (Qld) s 42; bona fide benefits in education: EOA (WA) s 35I(3);

*Clubs* – EOA (Vic) s 78; and

*Disposal of interests in land* – EOA (Vic) s 48, and ADA (Qld) s 79.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 7. Other Unlawful Conduct

#### INTRODUCTION

7.1 The principal purpose of the *Anti-Discrimination Act 1977* (NSW) ("ADA") is to prohibit discrimination on defined grounds in certain areas. However, the ADA also makes unlawful certain other related conduct. These prohibitions extend to:

harassment;

vilification;

victimisation; and

discriminatory advertising.

7.2 In addition, the ADA imposes liability on principals and employers for acts done by their agents or employees; and also imposes liability upon those who aid or abet discriminatory conduct.

7.3 The concept of "harassment" is closely related to that of discrimination and involves a significant level of overlap. This matter will be dealt with first.

7.4 The concept of "vilification" is similarly a related concept as it involves adverse treatment on a proscribed ground. The proscribed areas are based upon the public/private distinction, but are not so limited as those in relation to grounds of discrimination. Further, because of the close relationship of vilification and restraints on freedom of speech, different procedures are adopted in order to deal appropriately with the areas of concern.

7.5 Victimisation is a derivative prohibition, designed to provide protection and, where necessary, a remedy, to those who seek to rely upon or enforce their rights under ADA generally.

7.6 Discriminatory advertising is an ancillary area of prohibition and conceptually provides another area within which the general prohibitions operate.

7.7 This chapter deals with each of these matters in turn.

#### HARASSMENT

##### Concept of harassment

7.8 The Anti-Discrimination Board ("ADB") has described harassment in a workplace as:

any form of behaviour that is not wanted and not asked for and that provides a hostile environment. For example, it:

humiliates someone (puts them down);or

offends them; or

intimidates them; and

that happens because of their race, sex, pregnancy, homosexuality, marital status, disability, transgender (transsexuality) or age.<sup>1</sup>

7.9 Such harassment can take many forms including the public display of material that is racist, sexist etc, verbal abuse because of a person's race, sex etc, jokes based on race, gender, offensive gestures, intrusive questions and in the case of sexual harassment, sexual or physical contact, repeated sexual invitations, unwelcome wolf whistling, staring, leering in a sexual manner etc.<sup>2</sup>

7.10 Under the current provisions of the ADA, only sexual harassment is specifically prohibited. All other forms of harassment, such as racial and disability harassment, are dealt with only to the extent that they constitute a form of discrimination.<sup>3</sup> In 1997, the ADA was amended to include the following definition of "sexual harassment":<sup>4</sup>

For the purposes of this part, a person sexually harasses another person if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
- (b) the person engages in other unwelcome conduct of a sexual nature in relation to the other person,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

7.11 This provision reflects the definition in the *Sex Discrimination Act 1984* (Cth) ("SDA") and other related legislation. It provides a clear and straightforward definition of the concept in relation to sexual behaviour.

### **Harassment and discrimination**

7.12 Although express reference to sexual harassment was only included in the ADA in 1997, there is a long line of authority to the effect that harassment can constitute discrimination in particular areas. For example, in 1983, the Equal Opportunity Tribunal ("EOT") upheld a complaint by a doctoral student concerning treatment by staff at a university. The treatment alleged to constitute discrimination was a form of racial harassment by an educational authority.<sup>5</sup> In the United States, it has been held in the area of employment that "simply by creating or condoning an environment at the workplace which significantly and adversely affects an employee because of his race or ethnicity, regardless of any other tangible job detriment to the protected employee" constitutes unlawful discrimination.<sup>6</sup> The principle upon which the approach is based is that the creation of a hostile working environment constitutes differential treatment in relation to the terms or conditions of employment. In New South Wales, this principle was applied in *O'Callaghan v Loder*,<sup>7</sup> where Judge Mathews reviewed and applied the American cases. Her conclusion that unwelcome sexual conduct could create a hostile or demeaning atmosphere is reflected in the current statutory definition.

7.13 In 1988 her Honour's approach obtained definitive support from the Full Federal Court in *Hall v A&A Sheiban Pty Ltd*.<sup>8</sup>

7.14 There are, however, a few limitations on the scope of harassment as a form of discrimination. First, the current definition of discrimination, requiring reliance upon a comparison between the treatment of the victim and the actual or hypothetical treatment of someone of the other sex, at least in theory leaves open "the bisexual" defence. In other words, if the respondent can satisfy a court or tribunal that he or she would have harassed someone of the other sex to the complainant in exactly the same way, there is, arguably, no differential treatment and therefore no unlawful discrimination. This difficulty would, however, be overcome by the definition of discrimination focusing on detriment proposed in this Report.

7.15 Secondly, this approach does not cover all forms of harassment which may arise in the workplace. For example, harassment by a co-employee, in circumstances where there is no involvement or approval by management or senior supervisory staff, will not give rise to unlawful discrimination.

Similarly, harassment of a parent by a teacher at a school will not fall within the current areas of discrimination.

7.16 Apart from the above, while harassment and discrimination both result in some form of detriment to the aggrieved person, the humiliation and intimidation that is intrinsic in the concept of harassment may not always be prevalent in discrimination.

7.17 One response to these limitations has been to seek to broaden the scope of the prohibited conduct. In relation to employment, the new statutory provisions prohibit sexual harassment of an employee by “a person”, thus not restricting the prohibition to the conduct of the employer. However, the Commission is of the view that despite any similarities between the two, harassment and discrimination must be defined separately, as is currently the case with sexual harassment. This decision raises concerns in relation to other forms of harassment that are currently considered as discrimination.

## **Harassment on other grounds**

### ***Other Australian jurisdictions***

7.18 The current approach in relation to sexual harassment in the ADA reflects that adopted in other jurisdictions, including the Commonwealth SDA.<sup>9</sup> However, there is a concern that the expanded prohibition of harassment does not apply equally to all grounds. As will be noted below, there has for several years been a specific prohibition on “racial vilification” in New South Wales, but there has been no specific extension of the racial discrimination provisions to include a broader prohibition on racial harassment.

7.19 Some Australian jurisdictions specifically prohibit harassment on other grounds. The *Sex Discrimination Act 1994* (Tas) (“SDA (Tas)”) prohibits conduct which offends, humiliates, insults or ridicules another person on the basis of gender, marital status, pregnancy, parental status and family responsibilities where a reasonable person in all the circumstances would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.<sup>10</sup>

7.20 The *Equal Opportunity Act 1984* (WA) (“EOA (WA)”) prohibits discrimination involving racial harassment.<sup>11</sup> Racial harassment occurs where a person threatens, abuses, insults or taunts another person on the ground of the person’s race, a characteristic that appertains generally or is generally imputed to persons of that race or to the race of a relative or associate of that person. The definition also requires that complainants have “reasonable grounds” for believing that they would be subject to a disadvantage if they objected to the conduct, or that they suffered actual disadvantage because they objected to the conduct. The definition applies to detriment in connection with employment or work, possible employment or work,<sup>12</sup> studies or application for admission to an educational institution as a student,<sup>13</sup> and accommodation or application for accommodation.<sup>14</sup>

7.21 The *Disability Discrimination Act 1992* (Cth) (“DDA”) prohibits “discrimination involving harassment” on the basis of disability or association with a person who has a disability in employment, education and the provision of goods and services.<sup>15</sup> The harassment must be “in relation to the disability”. The only reported case of disability harassment under the DDA is *Adams v Arizona Bay Pty Ltd*.<sup>16</sup> In that case Mr Adams alleged several instances of discrimination and harassment arising out of his use of the local taxi service. Allegations of harassment included abusive words by the cab driver to the complainant, being made to wait, having taxis fail to turn up and being hung up on when trying to make a booking. The Human Rights and Equal Opportunity Commission (“HREOC”) found the allegations made out and compensation was awarded. The order stated that the respondent engaged in unlawful conduct under the Act, “namely treating the disabled complainant more harshly than an able bodied customer”.<sup>17</sup>

### ***The case for extending the prohibition***

7.22 As already noted, the first extension to the definition of discrimination which flowed from the inclusion of a specific ground of “sexual harassment” was the avoidance of the need to compare the

treatment with that which would have been accorded to a person of the other sex. This was a particular issue in relation to treatment on the ground of sex, which can readily be identified as having a sexual element, even though it may be directed to a person of the same sex or the opposite sex. That difficulty may not arise in relation to the other grounds. Generally, the need to establish the ground of the treatment will itself reveal whether the treatment is directed to one particular class or not. In other words, unless the conduct involves a distinction based on race, it will not be possible to establish a contravention of the discrimination provision. Unlike sexual conduct, other forms of harassment either demonstrate a distinction based on a prohibited ground, or they do not. Only sexual harassment is directed to a particular human characteristic, namely sexuality, which is common to both classes. As such, the Commission sees the need for sexual harassment to have a separate definition, as is currently the case. Given that harassment has been held to be a form of discrimination, other forms of harassment may be brought within a complaint of discrimination, particularly in view of the proposed detriment-based definition of discrimination.<sup>18</sup>

7.23 Secondly, the prohibition on sexual harassment contained in Part 2A of the ADA extends the areas within which such conduct may be unlawful. For example, it makes it unlawful for an employee to sexually harass a fellow employee.<sup>19</sup> The discrimination provision imposes a prohibition on the employer only. Thus employee harassment will not constitute unlawful discrimination unless it affects the terms or conditions of employment and is authorised or permitted by the employer. There are other extensions including sexual harassment by persons engaged in sporting activity, in relation to others engaged in sporting activity.<sup>20</sup>

7.24 In part, these provisions reflect the need to reconsider the definition of areas in which discrimination is prohibited. This aspect of the prohibition is considered further below.<sup>21</sup>

## **Definition of harassment**

### ***Other jurisdictions***

7.25 The New South Wales definition of sexual harassment quoted above is very similar to that contained in the SDA and other jurisdictions which have harassment legislation.<sup>22</sup> The SDA, Victoria, Western Australia and the Australian Capital Territory further define “conduct of a sexual nature” to include making statements of a sexual nature orally or in writing to a person or in a person’s presence.<sup>23</sup>

7.26 The *Equal Opportunity Act 1995* (Vic) (“EOA (Vic)”) also specifies that subjecting a person to any act of physical intimacy and making any gesture, action or comment of a sexual nature in a person’s presence may amount to “conduct of a sexual nature”.<sup>24</sup>

7.27 The *Anti-Discrimination Act 1991* (Qld) (“ADA (Qld)”) uses the term “unsolicited” rather than “unwelcome” and also expressly refers to remarks made with sexual connotations relating to the other person.<sup>25</sup> The Northern Territory Act does not expressly state that remarks made relate “to the other person”, nor that other unwelcome conduct of a sexual nature be directed to the other person.<sup>26</sup> In that sense the Northern Territory definition may be broader than that in Queensland. In Tasmania, the SDA (Tas) requires remarks to be made “to another person or about another person in that person’s presence”. In addition to the other forms of behaviour listed in the Queensland definition, Tasmania includes “unwelcome gesture, action or comment of a sexual nature”.<sup>27</sup>

7.28 The *Equal Opportunity Act 1984* (SA) (“EOA (SA)”) may be narrower than other jurisdictions in requiring that an act of physical intimacy must be “intentional” and that remarks with sexual connotations must be made “on more than one occasion”.<sup>28</sup>

7.29 Overseas, the UK legislation on harassment is the most recent. The bulk of the *Protection from Harassment Act 1997* (UK) has been in force since June. It makes “harassment” both a crime and a civil wrong and forbids anyone “... to pursue a course of conduct ... which amounts to harassment of another”.<sup>29</sup> Although the term “harassment” is not defined in the Act, it is clear that an isolated incident



will not be caught by the Act. Only a “course of conduct” which is defined to mean “... conduct on at least two occasions ...” will fall foul of the Act. The only defence available is that “... in the particular circumstances the pursuit of the course of conduct was reasonable”.<sup>30</sup>

7.30 In Canada, federally, the *Human Rights Act* prohibits harassment on all prohibited grounds<sup>31</sup> of discrimination but harassment is not defined in the Act. Some Provinces of Canada also specifically prohibit harassment. For example, the Ontario *Human Rights Code* prohibits harassment in accommodation and employment. “Harassment” is defined as engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.<sup>32</sup>

7.31 The grounds on which harassment is prohibited differ according to the “area” where the harassment occurs. For example, harassment in employment is prohibited on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status, sex or handicap.<sup>33</sup> In accommodation, every occupier has a right to freedom from harassment by the landlord or agent or by an occupant of the same building on all the above grounds except record of offences, but including receipt of public assistance.<sup>34</sup> Discrimination in the provision of services, accommodation and employment is also prohibited on the ground of sexual orientation, which is excluded from the harassment provisions.<sup>35</sup>

7.32 There is a general prohibition of sexual solicitation, or reprisal or threat of reprisal for the rejection of a sexual solicitation, by a person in a position to confer, grant or deny a benefit or advancement. The test in relation to sexual solicitation or advance is whether the person making the solicitation knows or ought reasonably to know that it is unwelcome.<sup>36</sup> This provision is not limited to any specific areas.

7.33 In the *Human Rights Code* of Newfoundland harassment is defined in terms substantially the same as in Ontario.<sup>37</sup> A person is prohibited from harassing an occupant of a commercial unit or a self-contained dwelling unit or establishment. An “establishment” is defined as a place of business or the place where an undertaking or a part of an undertaking is carried on.<sup>38</sup> There is no requirement of relationship between the parties other than being in “the establishment”. It appears that this provision could encompass traditional areas such as employment, education, accommodation and goods and services and may have broader coverage than that of other statutes.

7.34 In the United States, Federal legislation does not expressly prohibit sexual harassment.<sup>39</sup> However cases have decided that sexual harassment is a form of sex discrimination.

7.35 The United States Equal Opportunity Commission states that sexual harassment in relation to work covers:

Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- (1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
- (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.<sup>40</sup>

### ***The victim’s perspective***

7.36 Several courts in the United States have also recently rejected a “reasonable person” standard in evaluating sexual harassment claims based on an abusive work environment.<sup>41</sup> Instead, these courts

have adopted a reasonable victim standard which “simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant”.<sup>42</sup> The salient sociological difference referred to was that “many of the actions women find offensive are perceived by men to be harmless and innocent”.<sup>43</sup> The comment continued:

Concern for the dignity of women would require courts to determine the wrongfulness of conduct from the standpoint of the victim: hence continual minor humiliations as well as flagrant assaults would become actionable.<sup>44</sup>

7.37 Similarly, a recent decision of the Canadian Human Rights Tribunal<sup>45</sup> considered whether the test to evaluate the seriousness of unwelcome behaviour in harassment cases is objective or subjective. The Tribunal stated that:

In order to give a human rights Act an appropriately broad and generous construction, there is growing agreement that the seriousness of the impugned conduct must be perceived from the perspective of the victim.<sup>46</sup>

7.38 The Tribunal limited this test in order to “protect employers against unwarranted complaints by hypersensitive employees” and to “avoid the pitfall of tolerating offensive conduct because most people would consider it acceptable”.<sup>47</sup> Thus the Tribunal adopted the test of the “reasonable victim”:

in the case of a complaint of racial harassment, a tribunal must strive to examine the impugned acts and conduct from the perspective of a reasonable person belonging to a racial minority ... The Tribunal must ask itself: from the standpoint of a reasonable black person, for example, can this conduct be perceived as injurious or humiliating?<sup>48</sup>

7.39 The factors to be considered in making this assessment include the nature of the conduct at issue, the workplace environment, the pattern or type of prior personal interaction between the parties, and whether an objection or complaint has been made.<sup>49</sup>

7.40 The subjective test of the complainant’s perception, according to his or her own personality and sensitivity, is relevant only in assessing the actual harm caused to the victim and resultant damages.<sup>50</sup>

### ***The Commission’s view***

7.41 The Commission has considered whether it is appropriate to adopt a general definition of harassment similar to that adopted in Ontario. There are two interesting differences between the Ontario approach and that adopted in the definition of sexual harassment in the current ADA. First, the ADA requires that the conduct be “unwelcome”, a test which depends upon the subjective response of the victim. The second limb requires the assessment on an objective or “reasonable person” basis of whether the victim would be offended, humiliated or intimidated. Presumably the second limb includes the element of unwelcomeness but requires that a more serious response be capable of reasonable anticipation. The Ontario test deems it sufficient that the unwelcomeness would reasonably have been anticipated. The comment or conduct is sufficiently characterised as “vexatious”. The Commission considers that the present definition is the more appropriate and that its elements can more readily be translated into a general definition of harassment.

7.42 In relation to the United States approach to the reasonable victim standard, although its aim is to eliminate stereotypes and create a harassment free workplace, it has been argued that the reasonable victim standard may in fact be counterproductive and result in establishing two standards in sexual harassment cases, one for women and one for men, similar to protective legislation for women.<sup>51</sup> This danger may be conceded; nevertheless, it is important to ensure that values and perceptions of dominant groups not be assumed to be those of all “reasonable persons”. The appropriate standard is a reasonable person standard, but one which explicitly and thoroughly addresses the reality of sexual harassment by determining whether the actions are unacceptable from the viewpoint of the victim and a reasonable person sharing the victim’s characteristics of race, gender, etc. The Commission is satisfied

that the current reasonable person test is adequate and should remain, but that there should be explicit reference to the need to take into account the pertinent characteristics of the victim.

### **Recommendation 89**

**Amend the current definition of sexual harassment to make specific reference to the need to take account of the pertinent characteristics of the victim.**

**Draft Anti-Discrimination Bill 1999: cl 71**

### **Areas of operation**

7.43 The recent amendments significantly broaden the groups of persons covered and the areas of public life in which sexual harassment is prohibited. The areas covered are:

employment (employer, employee, commission agents, contract workers, partner, workplace participant, by and of a member of Parliament);

qualifying bodies (harassment in connection with occupational qualifications);

employment agencies;

education (by staff member, by adult student over the age of 16);<sup>52</sup>

provision and receipt of goods and services;

provision of accommodation;

dealings with land;

sport; and

State laws and programs.

7.44 The most significant changes are in the areas of employment and education. In employment, the ADA now covers sexual harassment in a private household and in the workplace (including small business) and by or in relation to State members of Parliament. The definition of a workplace participant extends coverage to volunteers and unpaid trainees.<sup>53</sup> It is unlawful for an employee to sexually harass a fellow employee.<sup>54</sup> The discrimination provision imposes a prohibition on the employer only. Thus employee harassment will not constitute unlawful discrimination unless it affects the terms or conditions of employment and is authorised or permitted by the employer.

7.45 In the area of education, private educational authorities are now covered, thus removing the existing exception in relation to harassment. Harassment by adult students at an educational institution against other students or members of staff is also covered, but sexual harassment by students under 16 years of age of other students or staff will not be covered.

7.46 Sexual harassment in connection with the disposal or acquisition of land and in a sporting activity is prohibited for the first time. Sexual harassment by persons engaged in sporting activity, in relation to others engaged in sporting activity is also covered.<sup>55</sup> Sexual harassment in the course of performing any function under a State law or program is also prohibited.

7.47 Three areas which are not specifically covered in relation to sexual harassment (but are covered in relation to discrimination on all grounds) are local government councillors, industrial organisations and registered clubs. Whether a complaint in these areas may be covered under the general employment or goods and services provisions will depend on the circumstances of each case. The areas of registered organisations and clubs are specifically covered by the SDA.<sup>56</sup>

### ***The areas of operation in other jurisdictions***

7.48 Although sexual harassment most commonly occurs within the context of an employment situation, the prohibition applies across many other areas in all jurisdictions.<sup>57</sup> The broadest prohibition is found in Queensland as it is not restricted to any particular areas, such as employment or education. The ADA (Qld) simply states that a person must not sexually harass another person and can potentially cover all people in any situation, including on the street or in the home. No statistics are available on the number of complaints received outside the traditional areas of operation.

7.49 For reasons given in Chapter Four, the Commission has rejected, as a general proposition, the idea that the ADA should operate like the criminal law, without limitation on the areas of operation.<sup>58</sup> In particular, it was considered important that a dichotomy be maintained between public and private areas of activity. The policy reasons that justify extensions to the areas covered in relation to discrimination extend to harassment. The broader coverage applicable under the current Act in relation to sexual harassment should be retained, but the anomalous exception in this regard<sup>59</sup> should be repealed in relation to sexual harassment. Accordingly, the Commission does not recommend adopting the Queensland approach, at least within the context of the ADA but the prohibition against sexual harassment should extend to those areas which are covered, or recommended for coverage in relation to grounds of discrimination generally.

#### **Recommendation 90**

**The prohibition of sexual harassment should extend to all areas of discrimination, including the new areas proposed in Chapter Four.**

*Draft Anti-Discrimination Bill 1999: cl 72-81*

#### **Recommendation 91**

**The exception currently applicable to sexual harassment in relation to accommodation in a private household should be repealed.**

### **VILIFICATION**

#### **Introduction**

7.50 The Commission's Discussion Paper<sup>60</sup> ("DP 30") did not raise any specific issues in relation to vilification since a review of the vilification provisions in the ADA was being conducted by the Hon James Samios MLC at the time. The Samios Report<sup>61</sup> released in late 1993 made a number of recommendations, most of which were implemented in the *Anti-Discrimination (Amendment) Act 1994* (NSW). However, given the developments in the law since DP 30 and the Samios Report, both in New South Wales and at the Federal level, and the development by the High Court of a free speech jurisprudence, this section will consider the following issues:

Do expressions of hatred cause sufficient harm to warrant anti-vilification legislation?

Is such legislation constitutionally valid? Can it be justified in light of free speech principles?

How broad should the legislation be? Which groups should such legislation protect? Why should the legislation protect some groups and not others? Is the link to violence the key?

Is the current model using a division between vilification and serious vilification appropriate?

Should such laws be contained in anti-discrimination legislation? Is it preferable for them to be solely contained in the *Crimes Act* or *Summary Offences Act*?

What are the problems associated with the present definitions?

What limits should be placed on these offences? Which defences should apply?

### **Current statutory provisions**

7.51 With the passage of the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW), New South Wales became the first Australian jurisdiction to pass legislation which makes vilification on the ground of race illegal. The ADA has since been amended to prohibit homosexual vilification, HIV/AIDS vilification and transgender vilification, all of which have been modelled on the original racial vilification provisions.<sup>62</sup> Vilification complaints can be dealt with by conciliation or, if it is serious vilification, by way of a criminal prosecution.

7.52 In addition to the prohibition on vilification contained in the ADA, there are also provisions (discussed below) that can have application to hate speech, racist propaganda and incitement to violence in criminal and civil law. Thus, the serious vilification provisions which prohibit conduct which would constitute a breach of the criminal law in any event, do not criminalise a new area of conduct hitherto unregulated. Instead, they provide an alternative remedy. It is only the vilification provisions which create in any sense new restrictions on free speech.

### ***Existing criminal law provisions outside the anti-discrimination legislation***

7.53 It is a common law misdemeanour to incite or solicit another person to commit an offence. It would be a common law offence for a speaker at a rally to incite a crowd to do any criminal acts, such as damaging property. In addition, there are some statutory offences concerning incitement to perform particular acts. For instance, s 26 of the *Crimes Act 1900* (NSW) contains the offence of soliciting murder. There are many other criminal law provisions which could have relevance to some public expressions of hatred.<sup>63</sup> Unlike complicity or conspiracy, no agreement is necessary in order for incitement to be committed and it is not necessary that any steps have been taken towards the substantive offence.<sup>64</sup> Once the incitement takes place, the offence is complete.

### ***Vilification legislation in other jurisdictions***

7.54 Since the first vilification amendments to the ADA, most other jurisdictions in Australia have included some form of vilification protection in their anti-discrimination or criminal legislation, although the forms of protection provided vary.<sup>65</sup>

### **Is there a case for legal regulation?**

#### ***Arguments against regulating vilification***

7.55 There are many arguments against regulating vilification. Foremost among them is the conflict with the free speech principle. Indeed, it has been said that the regulation of vilification is "arguably the most difficult free speech question to resolve, at least in a culture where the traditional liberal theory still holds sway".<sup>66</sup> Other arguments include the lack of efficacy of legal regulation to change the views of vilifiers and the availability of other adequate remedies.

#### ***Freedom of speech concerns***

7.56 The essence of objections to governmental intervention by the introduction of vilification legislation is the fact that it constitutes an impediment to free speech. Freedom of speech is an important civil right for many reasons. The traditional justification for free speech holds that if dissenting views are restricted, a general climate of repression may develop, eroding democracy and leading to the abuse of other human rights. The argument is that in a democracy, all views, no matter how unpalatable, have a right to be heard and can stand or fall on their merits.<sup>67</sup>

7.57 Until recently, the concept of free speech had a greater symbolic value than legal basis in Australia. Since September 1992, in a series of cases commonly known as the free speech cases,<sup>68</sup> the High Court has held that an implied guarantee of freedom of political discourse exists in the Commonwealth Constitution. The judgments raised a number of questions about the nature and scope of this guarantee, including whether in due time it may ripen into a guarantee of freedom of expression in relation to matters of public interest generally. Although its ambit is yet to be fully determined, it has been argued that some vilification provisions are inconsistent with this implied constitutional guarantee of freedom of speech. In the context of the vilification amendments to the *Racial Discrimination Act 1975* (Cth) (“RDA”), Sir Maurice Byers QC expressed the view that the civil remedy in the *Racial Hatred Bill 1994* (now incorporated into the RDA) is unconstitutional and would interfere with the freedom of speech implied in the Constitution. He further said:

If speech is to remain free, offence, insult or humiliation cannot be banished. A certain force of expression and intensity of feeling are the inevitable characteristics of many forms of free expression and especially where political questions or historical antagonisms are being discussed or lie behind what is discussed. The amendment requires no more than that the speech or writing is reasonably likely to offend, insult or humiliate and that a reason for the speech or writing is the race, colour or national or ethnic origin of another person or of some or all in a group.<sup>69</sup>

#### **Other concerns**

7.58 It has been argued that attitudes are changed by debate and education, not by laws, and that vilification laws will not change the views of vilifiers. It has also been argued that suppressing the expression of racist (and other extremist) views could drive racists “underground”, where their activities would be more dangerous. Prosecuting racists for breaking the law would allow them to use the courts as a platform from which to gain publicity for their views and make martyrs of themselves. Many will escape, as anti-hate speech legislation is also notoriously difficult to interpret and enforce, thereby gaining apparent legitimacy for their views.

7.59 The Commission received several submissions from individuals opposing vilification legislation. For instance, Mr John Hollier said:

I am a supporter of free speech and therefore do not agree that there should be any vilification law. However, if any vilification law is to remain, then I submit that it is anomalous to have a racial vilification law where there is no religious vilification law, or other law protecting minority groups... As a third choice I submit that all vilification law have a ten year sunset clause which requires *re-enactment* if it is to continue.<sup>70</sup>

#### **The case for legal regulation**

7.60 The primary rationale for vilification legislation is to protect human rights, in particular the right to live free from hostility and violence.<sup>71</sup> This is enshrined in international instruments to which Australia is a party and which in turn have informed the law as it is currently framed. Thus, Article 7 of the *Universal Declaration of Human Rights* (“UDHR”) provides that all persons are entitled to equal protection against discrimination and any incitement to such discrimination. Article 4 of the international *Convention on the Elimination of all forms of Racial Discrimination* (“CERD”) imposes an obligation on State parties to undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, racial discrimination. Article 20 of the *International Covenant on Civil and Political Rights* (“ICCPR”) obliges States parties to prohibit by law any propaganda for war and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

#### **Free speech is not an absolute right**

7.61 While free speech is highly valued and is an important principle underpinning democracy, it is not an absolute right. It must be balanced against other conflicting rights and interests. Indeed many international instruments which enshrine freedom of speech as a fundamental human right clearly

recognise that certain restrictions may legitimately be imposed upon free speech to promote social harmony and public order.<sup>72</sup> The Human Rights Committee has accepted this and in *JRT and WG Party v Canada*<sup>73</sup> the relevant statute which proscribed racist speech was held to be an appropriate restriction on freedom of speech.<sup>74</sup> The Human Rights Committee said that Article 19 of the ICCPR, which protects freedom of speech, must be interpreted in the light of Article 20.<sup>75</sup> So also, our current law reflects the fact that freedom of speech must be compromised at least to the extent necessary to protect the democratic and relatively tolerant nature of society. This need to maintain public order and social cohesion suggests that freedom of speech ought to be contained where it may lead to a breach of the peace. Thus, laws relating to defamation, blasphemy, copyright, sedition, obscenity, use of insulting words, official secrecy, contempt of court and of Parliament, incitement and censorship place limits on free speech; they recognise that there are countervailing interests that must take precedence over freedom of speech in some circumstances. There are certain responsibilities and duties which come with freedom of speech – the freely aired views of one person may impede the rights of the other to go about his or her life “unmolested”.<sup>76</sup>

7.62 One of the most important rights that the right to free speech must be tested against is the emerging right to equality. Establishing such a right to equality requires reciprocity of respect and parity of regard for physical dignity and personal integrity.<sup>77</sup> Chapter Three of this Report has attempted to redefine the right of equality with a focus on substantive equality rather than formal equality. Legal restrictions on hate speech may be seen as a means of treating all people with equal concern and respect. This is particularly so because of the multi-cultural heritage of Australia where values such as equality of status, tolerance of a wide variety of beliefs, respect for cultural and group identity and equal opportunity for everyone to participate in social processes must be respected and protected. Laws prohibiting incitement to racist hatred and hostility indicate a commitment to tolerance, help prevent the harm caused by the spread of racism and foster harmonious social relations.<sup>78</sup>

7.63 In Canada, free speech is a constitutional right,<sup>79</sup> but was regarded as a right even before the advent of the *Canadian Charter of Rights and Freedoms* (“the Charter”). The courts in Canada have held provisions banning racist speech in public to be reasonable and necessary exceptions to the right of free speech.<sup>80</sup>

7.64 In *R v Keegstra*, the Canadian Supreme Court said that the interpretation of freedom of expression must involve resort not only to the Charter’s freedom of expression guarantee, but also to the values and principles of a free and democratic society.<sup>81</sup> The Court said that such principles are not only the genesis of rights and freedoms under the Charter generally, but also underlie freedom of expression in particular. Those values and principles include “respect inherent to the dignity of the human person ... and respect for cultural and group identity”. Accordingly, anti-hate legislation should be seen not simply as infringing free speech but as promoting and protecting the balanced values and principles of a free and democratic society.

7.65 The rationale for freedom of expression articulated in these cases is more communitarian than individualistic and more focused on the actual impact of speech on the disadvantaged members of society.<sup>82</sup> In order to justify not legislating against racist or homophobic speech, one must rely on Professor Dworkin’s argument in favour of the primary importance of free speech,<sup>83</sup> based on the constitutional protection found in the First Amendment to the United States Constitution. Australia does not have an explicit and broad constitutional guarantee, nor what may be termed the “ideological baggage” of First Amendment case law. The High Court’s recent recognition of the right to free speech as an implied constitutional guarantee appears, at present, to be limited to political discourse and it is most unlikely that the High Court will hold that the regulation of vilification is unconstitutional. Even in jurisdictions with explicit constitutional guarantees, such legislation has not been found to transgress these.

#### ***Other arguments in favour of legal regulation***

7.66 If racist and homophobic views can be freely disseminated, they may create an environment which encourages some people to do more serious acts, such as physically attacking minority groups.

One of the aims of vilification legislation is to reduce the threats to social cohesion, and reduce public disorder, by encouraging and preserving tolerance. This may assist in reversing the inferior status of historically disadvantaged groups.

7.67 It may also be argued that the normative power of a clear legislative expression that the community disapproves of certain behaviours will militate in favour of a more tolerant society. The inclusion of the vilification provisions in the ADA suggests that weight has been given to the view that the legislation sets out clear community standards which can positively influence behaviour. The use of the conciliation mechanism with regard to vilification also reflects the faith that has been placed in its educative potential. The ADB submitted that its success rate in conciliating complaints, particularly against the media, has been high and has assisted in achieving changes in policy and practice. The Samios Report found that several bodies believed that their efforts to combat racism were enhanced considerably by their ability to point to the law, in setting both a community and legal standard.<sup>84</sup>

7.68 Even though there are provisions in the criminal law which cover some of the ways in which racial vilification is expressed, they do not distinguish between actions which may be harmful for very different reasons. For example, a poster advertising a concert only damages the property on which it is stuck, whereas one attacking an ethnic group may also have other damaging consequences, such as inciting violence and severe hatred or ridicule of the group.

7.69 Often complainants do not want to use the criminal channels because they lose control of the cases when they are conducted by the police; they also prefer the privacy of conciliation, which may allow them to avoid having to go before a court. There is no other civil law remedy available to a group which has suffered harm to its standing in the community.<sup>85</sup>

7.70 It is also noteworthy that other jurisdictions around Australia<sup>86</sup> and overseas<sup>87</sup> have recognised the need for vilification legislation. Most Australian vilification legislation uses the human rights/anti-discrimination fora rather than the criminal law to deal with vilification.

### **Striking the balance**

7.71 Despite the incidence of vilification of minority groups and the obligations imposed by international instruments, striking a balance between dealing with vilification and restrictions on free speech is a delicate process. In this context the Supreme Court of Canada has developed a three part test to ascertain if a balance has been struck between the two. The test requires that:<sup>88</sup>

there is a rational connection between the impugned measure and the objective – (the measure is the law itself and the objective is to protect the rights of individuals and groups to live free from incitement to racial or other forms of hatred);

the measure impairs the right to freedom of expression as little as possible; and

the effects of the measure are not so severe as to represent an unacceptable abridgment of the right.

7.72 The application of this test involves judgments which tend to be impressionistic: very little hard data and limited statistical information is available on the effectiveness or otherwise of vilification legislation. The available information, however, tends to indicate that this balance has been appropriately struck in New South Wales by the vilification provisions within the ADA.<sup>89</sup> The broad exceptions are meant to define the parameters of vilification legislation such that only severe forms of hostility will be addressed.

7.73 Whatever view one might take of the scope and nature of the present provisions, great care must now be taken before suggesting they should be repealed. The Commission believes that the message which would be given to the community by such an action would be far stronger than a failure to introduce such provisions. The Commission is satisfied that, subject to the following consideration of the areas covered by the current provisions, repeal is not supportable. On the other hand, and again subject



to consideration of the areas covered, the Commission does not propose an extension of the conduct caught by the current prohibitions.

### **Which groups should anti-vilification legislation protect?**

7.74 Many submissions expressed concern about the manner in which groups were chosen for inclusion.<sup>90</sup> In deciding which groups should be included there are three options available. They are to cover:

- (a) all identifiable groups;
- (b) all groups presently covered by the ADA; or
- (c) groups selected on the basis of substantiated reports of vilification.

#### ***Coverage of all identifiable groups***

7.75 While vilification may be perpetrated against many minority groups, groups should be chosen for protection on the basis of a principle rather than on an ad hoc basis. Further, the idea that all identifiable groups be covered does not have much merit for a number of reasons. It would tend to create a broad range of ill-defined prohibitions. Such provisions would also tend to infringe unjustifiably on freedom of expression – they would tend to limit discussions on a wide range of matters, which may involve the exchange of challenging or hostile views. In principle, such laws should protect only those groups which are socially significant, and which are being harmed noticeably and actively by hatred directed against them.

#### ***Coverage of all groups covered by the ADA***

7.76 The argument in favour of adopting this option is that if there is sufficient justification for inclusion of a group for the purposes of the prohibitions on discrimination, it is more likely that such groups will suffer vilification and are sufficiently identified. While the ADA currently prohibits vilification because of race, homosexuality, HIV/AIDs status and transgender only, there are attempts to have gender vilification and disability vilification included too. If these moves are acted upon there will be few grounds not covered by vilification provisions. The question then arises as to whether vilification should be included as a prohibition in relation to all specified grounds.

7.77 For example, in relation to the *Canadian Criminal Code* which protects all of the groups protected by the equality provision in the Charter,<sup>91</sup> the Law Reform Commission of Canada has said that:

An excellent way to select criteria for protecting groups from hatred is to choose criteria which are clearly prohibited grounds of discrimination under Canadian law. While such criteria can be found in various human rights codes, the strongest statement of protection from discrimination is found in subsection 15(1) of the Charter. Although open-ended, this guarantees equality rights to individuals characterised by the specifically enumerated criteria of “colour, race, ethnic origin, religion, national origin, sex, age, or mental or physical disability”. If the Charter protects against individual discrimination on the basis of these specific criteria, it is entirely reasonable that groups characterised by the same criteria be protected by the criminal law when they are subjected to vicious expressions of hatred.<sup>92</sup>

7.78 Many submissions suggested the ADA should be amended so that there is one offence of vilification applicable across all grounds.<sup>93</sup> While this approach is clearly supportable, there are several problems which require attention. For example, there are particular problems which arise in relation to vilification on the basis of sex. It could be expected that an argument would be pursued that pornography incites “contempt” towards women generally. From a different perspective, it might be argued that right-to-life propaganda may also transgress the boundaries of vilification of women. Whether these arguments have merit or not, the Commission is not satisfied that the ADA is the

appropriate mechanism for their consideration. Regulation of such activities (if required) should be the result of direct consideration by Parliament and not the side-wind of litigation from an amendment to the ADA.

7.79 Further, some weight must be given to the argument that the greater the number of groups who are protected by vilification legislation, the greater the “chilling effect” on free speech.

7.80 On a practical note, a wide vilification provision will have a noticeable impact on resources available for investigation and conciliation of complaints, for which resources are already very limited.

### ***Coverage of selected grounds***

7.81 The approach currently adopted in New South Wales is to afford coverage only to some groups on the basis of a history of being the victims of hatred. Accordingly, as stated above, the ADA now covers racial, homosexual, HIV/AIDS and transgender vilification.<sup>94</sup> The basis of selecting such areas for coverage may have been the level of reported incidents of vilification against the members of the group. In other words, including vilification in the ADA was to an extent a response to problems of violence towards, and victimisation of, specific groups. Similarly, the physical violence reported by the Commonwealth inquiries into racist violence and Aboriginal deaths in custody led to recommendations in favour of anti-vilification legislation by the Commonwealth.<sup>95</sup>

7.82 While the advantage of this method of coverage is that the legislation responds to the needs in the community as it arises, the disadvantage is that inclusion may depend on the level of power and influence of the lobby group. Given that the purpose of vilification legislation is to protect minority groups, this method of selection is to some extent power-based, and may not necessarily result in protection of those most in need, nor limit protection only to those in most need.

7.83 The reaction of some groups being selectively chosen also gives rise to mixed responses. For instance, the New South Wales Council of Churches lobbied strongly against the Bill which introduced the homosexual vilification prohibition on the ground that it would “stifle freedom of speech and give gays a privileged position in the community”.<sup>96</sup> However, the Uniting Church was in favour of the Bill.<sup>97</sup> A Saulwick/Herald poll taken in October 1993<sup>98</sup> found that 50% of respondents supported the legislation and 45% opposed it. Five percent did not know or did not answer.

7.84 The Commission’s tentative view on coverage is that this current approach of selective coverage should be maintained. However, rather than merely responding to lobby groups, selective coverage should be justifiable and based on statistical information on the incidence of vilification of a particular group.

7.85 On balance, the Commission is satisfied that the current coverage is justifiable. In reaching this conclusion, the Commission has taken into account the undesirable negative message which would result from repeal of the protection currently provided to any particular group.

### ***Other grounds of vilification suggested for inclusion***

7.86 ***Gender vilification.*** Two members of the New South Wales Legislative Council, the Hon Dr Marlene Goldsmith, and the Hon Dr Meredith Burgmann, have raised the issue of amending the ADA to render gender vilification unlawful. The argument is that if racial and homosexual vilification have been adopted on the basis of the incidence of racist and homophobic violence in the community, then should not vilification on the ground of sex be included, based on the incidence of sexism, sexual assault and violence against women in our society? A number of submissions to the Commission in response to DP 30 have also argued for the specific inclusion of gender vilification within the ADA.<sup>99</sup>

7.87 An inevitable question raised by the issue of gender vilification is the correlation between pornography and violence against women. There is a related issue as to whether such provisions could be used in the pornography debate as a quasi-censorship or obscenity law. Anti-discrimination law is not the appropriate venue for such a debate. In North America Catherine MacKinnon and Andrea Dworkin

promoted a Model Anti-Pornography Civil Rights Ordinance which proceeded on the basis that pornography is a practice of sex discrimination.<sup>100</sup> It was enacted in Indianapolis, but was held to be constitutionally invalid by violating the freedom of speech guarantees in the First Amendment to the United States Constitution.<sup>101</sup> In light of the fact that the MacKinnon/Dworkin proposals polarise feminist scholars,<sup>102</sup> the prospect of the use of gender vilification laws in this context is highly controversial.

7.88 In addition, it can be argued that violence against women has long been (and should be) the subject of criminal laws covering a wide range of offences. It may be accepted that the level of violence against women in our society remains unacceptably high, but, the issue of pornography aside, the Commission is not persuaded that misogynist speech presents a specific problem which could be satisfactorily addressed by gender vilification laws.

7.89 **Religious vilification.** Currently, the provisions of the ADA cover vilification on the ground of race. The definition of race in s 4 now includes "colour, nationality, descent and ethnic, ethno-religious or national origin". The ADB stated in its submission that "a significant proportion of racial vilification complaints are made by Jews in relation to publications which contain material denying that the Holocaust occurred, or using the Bible to bring Jews into disrepute".<sup>103</sup> It has been suggested that this kind of publication may well be characterised as religious rather than ethno-religious or racial vilification and will only be dealt with if religious vilification is included. This suggestion is strengthened by the Commission's proposal to remove "ethno-religious origin" from the definition of race.

7.90 If the legislature adopts the Commission's recommendation that religion be included as a ground of discrimination, in light of the fact that religious vilification is covered by Article 20 of the ICCPR and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religions or Belief*, and that several jurisdictions have such laws which cover religious groups, there is a respectable argument in favour of covering all religions. A number of submissions to the Commission also supported the specific inclusion of religious vilification as unlawful conduct within the ADA.<sup>104</sup>

7.91 Whilst acknowledging the force of these arguments, the Commission found little evidence of widespread religious vilification in the community. For reasons already noted, Jews have long been recognised as a "race" or "ethnic group" and there is no reason to suppose that legitimate complaints about the existence or otherwise of the Holocaust would not be covered by the existing prohibition. The Commission also considered evidence that there had been significant levels of vilification of Muslims, particularly during and immediately after the Gulf War or some other identifiable incident of limited duration. Again, the complaints revealed conduct of legitimate concern, but most appear to have been appropriately based on race. Accordingly, the Commission is not satisfied that such an extension of the grounds covered is justified in this case.

7.92 **Disability vilification.** The ADB has received representations from various disability groups claiming that there is a need to have disability vilification provisions included in the ADA.<sup>105</sup> They have cited a number of instances where people with disabilities have been subjected to vilifying statements. The move away from keeping people with disabilities in institutions and integrating them into local communities has apparently met with hostility from some people. Hostility has been reported to be so severe that it has prevented the opening of some accommodation and life-style centres. This is clearly a violation of the human rights of people with disabilities. However, the evidence is at this stage still limited to a few specific situations. The question arises whether it is appropriate to cover all people with disabilities or whether vilification experienced by some is sufficient. While a precedent for selecting particular groups with an identifiable problem has already been set by including HIV/AIDS vilification within the ADA, that inclusion is explained by reference to its close connection with homosexual vilification. As a general principle, it is undesirable to make distinctions between groups of people by reference to specific disabilities. Once again, the Commission is not satisfied that the inclusion of a separate ground of disability vilification is necessary.

## **General conclusions**

7.93 The approach adopted by the Commission in relation to these issues may be summarised as follows. First, the Commission accepts that prohibition on vilification is an appropriate means of protecting human rights and fundamental freedoms. Secondly, because such prohibitions impose limitations on freedom of speech, a principle of restraint should be imposed in considering the introduction or extension of prohibitions. A further prohibition should not be recommended in the absence of evidence that:

there is a practical problem which needs to be addressed;

existing laws are not effective to address the problem;

the proposed measure is one which might reasonably be expected to have an appropriate impact on the problem; and

the measure, consistently with its legitimate object, does not cause a disproportionate diminution of freedom of speech.

7.94 The Commission is conscious that, in considering proposals for new prohibitions, the proponents may not have put as full a case as might have been available, the question of vilification laws not having been specifically raised in DP 30, for reasons already noted.

7.95 In considering the existing prohibitions, the Commission has not been able to assess whether, were the prohibitions not already in the ADA, it would have recommended their inclusion. However, different considerations arise in relation to the removal of a particular prohibition from the ADA. Whether or not the prohibition should have been included in the first place may be one factor, but a factor of considerable significance to be weighed against a possibly inappropriate inclusion is the consequence of subsequent exclusion.

7.96 Applying these principles, and given the limitations of the material available to the Commission, the Commission recommends the preservation of the present grounds as appropriate and sufficient.

## **Practical operation of the current vilification provisions**

### ***Elements of vilification***

7.97 The elements of the current provisions which prohibit racial, homosexual, HIV/AIDS and transgender vilification are substantially similar. The only difference in the provisions is the addition of an exception for "religious discussion or instruction" in relation to HIV/AIDS vilification. The main elements of vilification are that there must be the following:

a public act;

which incites;

hatred towards, serious contempt for or severe ridicule of;

a person or group of persons on the ground of their race.

7.98 For ease of reference, the provisions relating to racial vilification will be used as a basis for discussion.

### ***Definition of "public act"***

7.99 Section 20B defines "public act" to include:

(a) any form of communication to the public ...;

- (b) any conduct observable by the public ...; and
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

7.100 The fact that there is no definition of the word “public” in the ADA has given rise to two problems. First, there is no clear distinction between public and private acts. For example, where vilifying statements are made at a private function in the presence of a large number of people, it is unclear whether it is a public or private act.

7.101 Secondly, the legislation does not cover instances where the victim is alone with the “vilifier”. It is unclear whether the term “observable by the public” means it was actually observable by members of the public who are present or whether it was merely capable of being observed by the public if they had been present. The racial vilification provisions focus on the incitement of third parties to hatred, serious contempt or ridicule. As such, the ADB takes the position that a member of the public must be there for the conduct to be observable by the public. However, the damaging effect of being vilified for belonging to a minority group cannot be minimised by not being witnessed. Consequently, the ADB argues that one approach would be to focus racial vilification provisions on the offence caused to the individual as well as the potential for incitement to occur, rather than its actual reception.<sup>106</sup> On the basis of this argument, it is not the actual number of people who hear or see the communication that is significant, but rather the potential for members of the public to be likely to see or hear it.<sup>107</sup>

7.102 The Samios Report recommended that the definition of the criminal offence be expanded to encompass threats of violence on racist grounds, whether or not someone other than the victim or members of the victim’s racial group, heard the threats, and whether or not the conduct occurred in public. Where there is an incitement to threaten others with violence, the Report recommended that there be no need for the conduct to occur in public.

7.103 There have been recent decisions in other areas of law and in other jurisdictions which have shed some light on what constitutes “the public”. Decisions on the meaning of the phrase seem to include the possibility of being overheard by<sup>108</sup> or visible to passers by, even if the act took place on private property.<sup>109</sup> Within the copyright context in Australia, “in public” has been determined by the nature of the audience and whether persons are bound together by a domestic or private tie, or by an aspect of their public life.<sup>110</sup> In analysing copyright law, it has been said to be “wise to assume that unless a performance takes place in a purely domestic setting, the probability is that it will be regarded by the courts as taking place in public”.<sup>111</sup> In *R v D and E Marinkovic*<sup>112</sup> the respondents lived in the same block of units as the complainant and stuck a note on the complainant’s door. Even though the units were not open to the public generally, the note on the door was a “public act”. The respondents also shouted abuse from their balcony which was considered a public act as it could readily be heard by the neighbours.

7.104 Legislation in some countries defines the term “public act” as satisfied if the conduct takes place in the presence of a small number of individuals. For instance, Mexican legislation requires only one other person to be present, and Cyprus five.<sup>113</sup> There are other countries that do not require any public element in offences of serious vilification.<sup>114</sup> It is arguable that there is no need for the requirement that the relevant act be public, if the offence requires a relevant intention.

7.105 Part IIA of the RDA makes it unlawful to do a prescribed act, “otherwise than in private”, a concept which is satisfied if the act:

- (a) causes words, sounds, images or writing to be communicated to the public;
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

7.106 A public place is further defined to include “any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission”.

***Should vilification be confined to the public sphere?***

7.107 Clause 27 of the United Nations Draft Model Law states that the prohibited actions are deemed to constitute an offence “irrespective of whether they were committed in public or in private”. However, clause 28 provides that an action which occurs inside a private dwelling shall not constitute an offence. The rationale for including a public element is that the prohibition is not directed against conduct causing personal offence or humiliation, but against conduct which may incite third parties to act. So long as that rationale remains, the element of public activity is necessary.

7.108 In contrast, the RDA provisions are aimed at empowering victims of offensive, insulting, humiliating or intimidating conduct, not merely prohibiting the incitement of hatred. As such, the evaluation of such conduct is based on what is offensive to the “reasonable victim”.<sup>115</sup> By insisting on “incitement”, the ADA draws a basic distinction between “giving offence” and “inciting or encouraging racism in others”. Thus, the immediate impact of the conduct on the victim is likely to be ignored. The ADB suggested that an alternative approach would be to focus on the offence caused to the individual as well as the potential for incitement to occur.<sup>116</sup>

7.109 Of course, it may be argued that public insult is more serious than private insult. But there is a large distinction between even public insult and incitement of third parties, which is a more serious matter. Accordingly, the introduction of Part IIA into the RDA constitutes a significant extension of the prohibitions presently contained in the ADA.

7.110 Given that the RDA operates to provide its extended protection in New South Wales, at least in relation to race, an extension to the ADA would merely bring the State law into conformity with the Commonwealth law. Before taking this step, the Commission thought it appropriate to make inquiry of the HREOC as to its experience, albeit over a period of some three years, in relation to Part IIA of the RDA. The inquiries did not reveal any particular beneficial results flowing from this extended provision. The broad range of conduct that this provision covers also goes beyond the recommendations made by the various government reports that considered the need for federal racial vilification legislation before the RDA was amended.<sup>117</sup> The Commission is therefore not satisfied that it is necessary to extend the prohibition of vilification beyond the incitement of others.

***Clarification of the definition of “public”***

7.111 It is desirable that the requirement that there be a public element in vilification be more clearly identified. The terminology adopted by the ADA is unclear. Whilst the element of incitement is retained, the gravamen of the prohibition is directed to conduct or communications which may be observed or received by third parties. It should be sufficient that the person responsible intends that particular result, and that such a result is reasonably foreseeable. Those elements are consistent with the concept of prohibiting incitement. The second question is whether the identity of the third party or parties matters. If incitement of others is to be prohibited, it makes little difference whether the incitement takes place in a public place or not. This is particularly so where the act may be done on private property or in a home but the results are observable from public places. No doubt conduct may be more serious if it is addressed to a wider audience. However, even that proposition is not universally true. Conspiracies which may be prohibited by the criminal law may be hatched in private between a small number of people: the results may nevertheless be serious. The prohibition on offensive behaviour based on racial hatred in the RDA involves a public element, but only in circumstances where the conduct is offensive to the victim. The public nature of the conduct is difficult to define and of limited relevance. Accordingly, the Commission recommends that the reference in the vilification provisions to “the public” should be deleted, but that the communication should be one which is intended or likely to be received by someone other than a member of the group being vilified.

## Recommendation 92

**The prohibition on vilification in the ADA should not be limited by reference to “the public” but by reference to a “public communication”.**

Draft Anti-Discrimination Bill 1999: cl 91

### ***Distribution of vilifying materials***

7.112 Section 20B(c) includes within the definition of “public act”:

[t]he distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person, or group of persons on the ground of the race of the person or members of the group.

7.113 This definition appears to have been designed to deal with the distribution of handouts and leaflets either in public places or through mailboxes. The requirement that the person knew that the material was vilifying prevents those innocently distributing material, without being aware of its contents, from being liable. That element leads to a consideration of the concept of “incitement”.

### ***The “incitement” requirement***

7.114 The civil wrong of racial vilification is committed only where the offender *incites* “hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the persons or members of the group”.<sup>118</sup> The same precondition of incitement appears in the definition of the criminal offence of serious racial vilification in s 20D.

7.115 When the *Anti-Discrimination (Racial Vilification) Bill 1989* (NSW) was first introduced, it contained the words “promote or express”. The higher standard of incitement was later substituted. During the Parliamentary debate the word “incite” was said to refer to actual incitement.

7.116 In *Harou-Sourdon v TCN Channel Nine Pty Ltd*,<sup>119</sup> the EOT adopted the plain meaning of “incite”, quoting the definition in the Macquarie Concise Dictionary as to “urge on; stimulate or prompt to action”. In *Wagga Wagga Aboriginal Action Group v Eldridge*,<sup>120</sup> the EOT noted that s 20C does not make unlawful the use of words that merely convey hatred towards a person, or the expression of serious contempt or severe ridicule on the ground of race.

7.117 ***Intention to incite.*** The issue is whether there should be a subjective intention to “incite”, or whether it is sufficient that the conduct itself is intended, and has the objective quality of being likely, to incite hatred etc.

7.118 As a practical matter it may be difficult in most cases for a defendant to resist the inference that he or she had the subjective intention if the likely effect of the conduct is clear. Nevertheless, if it is appropriate to require a specific intention, that is not an adequate reason to avoid an express requirement to that effect.

7.119 The term “incite” is used in both the civil and criminal provisions of the ADA and should properly be interpreted in the same manner in each. However, the then Attorney General, the Hon John Dowd, said in his Second Reading Speech that the criminal provisions required intent to be proved but the civil provisions did not.<sup>121</sup> Commenting on the Federal Government’s Bill, which attempted to create the crime of inciting racist hatred with a requirement to prove intent (which was not proceeded with), one writer has argued that extreme forms of hate propaganda should not require proof of many cumulative elements.<sup>122</sup> In particular, the writer said that racial vilification should be proscribed

whether or not there is intent because of the destructive message that unpunished racial vilification gives to society.

7.120 The issue of intent was considered in *Wagga Wagga Aboriginal Action Group v Eldridge*<sup>123</sup> and *R v D and E Marinkovic*.<sup>124</sup> In both cases the EOT adopted the reasoning that the civil prohibition of racial vilification (s 20C(1)) does not require proof of intent to incite nor that any person was actually incited. Consequently the inciter would be held responsible, regardless of whether or not the specific consequence was intended.

7.121 Generally speaking the ADA does not require a specific intention to cause harm on a prohibited ground. Accordingly, it is argued that the civil consequences of racial vilification should not require a specific intention to incite hatred. The contrary view is largely based on an attempt to limit the intrusion on freedom of speech.

7.122 The Commission is satisfied that the civil consequences of vilification should not depend upon the proof of a specific intention. This is consistent with the view of the Attorney General in introducing the prohibition. It is also consistent with the approach subsequently adopted by the EOT. While this approach does not involve a change to the current law, the ADA should be amended to make express provision for this result.

### **Recommendation 93**

**Provide expressly that proof of specific intention to incite is not required for establishing vilification.**

**Draft Anti-Discrimination Bill 1999: cl 91(3)**

7.123 **Who must be incited?** There are two views on who must be incited. The EOT in *Harou-Soudon* quoted with approval from the *Casey* decision that:

the yardstick should not be a person peculiarly susceptible to being roused to enmity, nor one who takes an irrational or extremist view of the relations among racial groups. The hypothetical listener should in the Tribunal's view, be described as an ordinary, reasonable person not immune from susceptibility to incitement, nor holding racially prejudiced views.<sup>125</sup>

7.124 A contrasting view which is considered to be a more realistic test<sup>126</sup> is that it must be "anybody, even the most malevolent or unthinking person, who might be inspired to treat the targets with hatred or contempt".<sup>127</sup>

7.125 Once it is accepted that there is no need to prove that any individual was incited, it is clear that the focus of the test is on the capacity of the conduct or communication to have that effect. This gives rise to two questions: first, whether it is necessary to form a view as to the potential audience; and, secondly, how one should consider the susceptibility to such incitement of persons who may be within that audience.

7.126 In practice, the two questions are likely to be run together. In many cases, there will be no evidence of actual incitement, or of the identity of persons who may have received the communication or observed the conduct. More importantly, there are significant difficulties in a tribunal of fact assessing likely responses to particular words or conduct. According to *Harou-Soudon* the test should assume that the hypothetical listener does not hold "racially prejudiced views". However, most people are susceptible to prejudice or prejudgment in some degree and there is little basis, other than intuition, for assessing whether particular words in a particular context are likely to induce others to feel hatred or serious contempt. On the other hand, it is not appropriate to assume that an audience will necessarily include the most malevolent and unthinking persons. Rather, the Commission considers that the tribunal of fact



should be free to address the question of capability of incitement in the circumstances of the particular case. It should not assume that all members of the audience are necessarily free from prejudice or that some may be peculiarly susceptible to incitement. While there are limits to the assistance that can be given by way of definition in the legislation, the Commission considers that some reformulation of the relevant provisions are necessary in order to clarify these matters.

#### **Recommendation 94**

**Provide that the capacity to incite should be assessed in the circumstances of the particular case and without assuming that the audience is either malevolently inclined or free from susceptibility to prejudice.**

Draft Anti-Discrimination Bill 1999: cl 91(4)

#### ***Hatred, serious contempt or severe ridicule***

7.127 The third element of vilification is that it must incite “hatred, serious contempt for or severe ridicule” of the aggrieved group or class. The term “hatred” is used in vilification legislation in Australia<sup>128</sup> as well as overseas.<sup>129</sup> In *Harou-Sourdon* the meaning of hatred, serious contempt and severe ridicule was considered in the light of the plain meaning of those words in the Macquarie Concise Dictionary. The EOT found that the supposedly vilifying statement<sup>130</sup> could be “distasteful” but did not “constitute the higher threshold of conduct which s 20C proscribes”. In *R v Keegstra*, the promotion of hatred was held to be synonymous with the promotion of “active dislike”. The majority of the Canadian Supreme Court in that case held that the term should be interpreted in the relevant context to mean “the most intense form of dislike”, “emotion of an intense and extreme nature that is clearly associated with vilification and detestation”, “a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation”.<sup>131</sup>

7.128 The references to “contempt” and “ridicule”, though read in the context of the intensifying adjectives “serious” and “severe”, may still be considered to be less stringent criteria. Similar criteria are contained in overseas legislation. The drafters have declined to define what hatred means or to set a threshold to identify when the less stringent criteria are met. This is so in most jurisdictions. The Commission accepts that the common meanings of the terms are intended and provide appropriate guidance to the public and to courts and tribunals.

#### **Exceptions**

7.129 In an attempt to strike an appropriate balance between freedom of expression and freedom from vilification, the ADA has provided for three exceptions. They are:

a fair report of a public act;

certain communications which attract absolute privilege under defamation law; and

relevant acts done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

7.130 These exceptions apply to racial, homosexual, HIV/AIDS and transgender vilification. In addition, there is an exception in relation to a public act intended to provide “religious instruction” that applies to homosexual vilification and the broader category of “religious discussion or instruction” for HIV/AIDS and transgender vilification.

7.131 As in the case of exceptions to the prohibition against discrimination, the question at issue is whether the exceptions undermine the prohibition, which is the view of some commentators.<sup>132</sup>

### ***Fair report***

7.132 The notion of protecting “fair reports” of public acts arises from concerns for a free press and a desire to keep the public informed. It is similar to the defence in defamation law and in the context of defamation law has been explained to mean a report that:

must accurately express what took place. Errors may occur; but if they are such as not substantially to alter the impression that the reader would have received had he been present ... the protection is not lost.<sup>133</sup>

7.133 In other words, while it is valid for a journalist to report comments or incidents, they are not allowed to editorialise or encourage or support the comments. If the latter occurs, the report will cease to be a fair report.

7.134 The defence under the RDA is somewhat broader than the New South Wales defence. The RDA protects anything said or done reasonably and in good faith in making or publishing a fair comment “on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment”.<sup>134</sup> The breadth of this defence has been criticised on the basis that it has the potential for exempting any public comment made by a person who genuinely believes the truth of the statements regardless of how abusive or offensive the statements might be.<sup>135</sup> It is not proposed to adopt that standard in the ADA.

7.135 The Commission sees the desirability of guidelines and standards for the print media similar to those that exist for the electronic media in the form of television and radio broadcasting standards<sup>136</sup> that will clarify exactly what constitutes a fair report. The ADB should be expressly authorised to prepare and promulgate such guidelines. They should not have any special legal status.

### **Recommendation 95**

**The ADB should have express power to formulate guidelines including guidelines as to what constitutes a “fair report” under the exception to the vilification provisions.**

Draft Anti-Discrimination Bill 1999: cl 128(1)(c), 129(1)(c)

### ***Absolute privilege for defamation***

7.136 The vilification provisions exclude speech which would be protected by the *Defamation Act 1974* (NSW) or speech that would be subject to a defence of “absolute privilege”, such as Parliamentary debate or testimony before the EOT which is now the Equal Opportunity Division (“EO Division”) of the Administrative Review Tribunal (“ADT”). The matters covered in the *Defamation Act* include matters relating to the Ombudsman, Privacy Committee etc.<sup>137</sup> The Commission accepts that this exception should be retained.

### ***Purposes in the public interest***

7.137 Section 20C(2)(c) sets out categories for excluding a public act which incites hatred, serious contempt or severe ridicule: words or deeds which are done for “academic, artistic, scientific, research or other purposes in the public interest”. As stated above, homosexual, HIV/AIDS and transgender vilification have the added religious instruction exception. Neither the Samios Report, nor any of the submissions which the Commission received, addressed the scope of the present exceptions.

7.138 Professor Margaret Thornton has argued that the special status accorded to academic, artistic, scientific research or other acts in the public interest, is a “clear manifestation of the social reality that racist acts of social elites are privileged, even though the harm occasioned by such acts may be more pervasive than that arising from a crude tract”.<sup>138</sup> This view is shared by others who have written in the area.<sup>139</sup> Given the obvious difficulties associated with making the distinction between whether something is an artistic work or not, it has been suggested that such a defence could open the way for politically motivated organisations to use art as a facade to cover racist material.<sup>140</sup>

7.139 In the United Kingdom, s 20 of the *Public Order Act 1986* specifically provides for an action against producers or directors of a publicly performed play which uses “threatening, abusive or insulting words or behaviour” if it can be proved that those involved knew that it was likely that racial hatred would be incited.

7.140 Despite the above, the Commission believes that this defence, which allows for discussion and debate in the public interest, is appropriate, especially because, unlike the United States and Canada, Australia has no specific constitutional law guaranteeing freedom of expression.<sup>141</sup>

### **Serious Vilification**

7.141 The ADA offers the possibility in relation to each relevant ground of criminal prosecution for the offence of serious vilification.<sup>142</sup> However, the criminal sanctions have not been used to date.

7.142 The offence of serious racial vilification occurs where a person racially vilifies another person by means which include:

- (a) threatening physical harm towards, or towards any property of, the person or group of persons; or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

### **Prosecution**

7.143 Section 20D(2) provides that the consent of the Attorney General is required for the prosecution of this offence. After investigating a racial vilification complaint, if the President considers an offence may have been committed under s 20D, he or she must refer it to the Attorney General within 28 days of receiving the complaint. The ADB submitted that the time limit should be extended to 35 days. More recently, the ADB has stated that it favours the current requirement. The ADB has also suggested that complainants should be given the express right to seek leave from the Attorney General where the President has declined to refer a matter for prosecution. Once a complaint which raises questions of serious racial vilification has been referred to the Attorney General, the President must advise the complainant of his or her rights to have the civil aspects of the complaint referred to the Tribunal.

7.144 To date, fifteen matters have been referred to the Attorney General by the President under s 20D(2) for prosecution. However, the Attorney has decided not to prosecute five of these cases and a decision is pending on 10 matters (2 complaints involving five respondents each).<sup>143</sup>

7.145 The need to obtain the consent of the Attorney General was seen as an important reassurance for those doubting the wisdom of having a criminal provision in the ADA. However, it has serious problems. First, in practical terms, there is some doubt as to whether the police can arrest when an offence has obviously been committed without first seeking the necessary consent to prosecute. Referral could also politicise the use of the section and allow it to be seen as an instrument of executive oppression (or protection) for certain groups. The Samios Report stated that the need for senior responsibility in the area of prosecutions should not involve politicians. It recommended that the practice of delegating the power to the Director of Public Prosecutions (“DPP”) should be reflected in the ADA itself. If the complainant chooses not to have the complaint referred, it is not clear whether the civil aspect of the complaint lapses or whether it can still be the subject of a conciliated complaint.

### **Relocation of serious vilification provisions**

7.146 The Samios Report recommended that the offence of serious racial vilification should be relocated into the *Summary Offences Act 1988*.<sup>144</sup> The Commission believes that there are persuasive arguments for making an offence of serious racial vilification part of the *Crimes Act 1900* (NSW), so as to highlight the seriousness of the offence. On the other hand, the National Inquiry into Racist Violence raised concerns about the record of police in race relations and particularly in relation to Aboriginal people.<sup>145</sup>

7.147 It is clear that different views may be taken of particular conduct. In particular, any conduct which satisfies the definition of serious racial vilification would fall within the civil prohibition. As with other criminal conduct, there is no reason why, in appropriate cases, civil and criminal consequences should not follow.

7.148 The Commission is satisfied that the offence of serious vilification should be relocated in the *Crimes Act 1900* (NSW). Any appropriate consent to prosecution should be vested in the DPP. Further, the ADA should provide that the President may refer a matter to the DPP if of the view that it may constitute an offence of serious vilification. Neither the referral, nor any action taken by the DPP, should preclude the matter also being the subject of a complaint under the ADA which can be dealt with in accordance with the procedures available under that Act.

#### **Recommendation 96**

**Remove s 20D from the ADA and relocate the offence of serious vilification in the *Crimes Act 1900* (NSW).**

Draft Anti-Discrimination Bill 1999: cl 92(2) and Crimes Amendment (Serious Vilification) Bill 1999

#### **Recommendation 97**

**Provide the President with the power to refer a matter to the Director of Public Prosecutions where he or she is of the view that it may constitute the offence of “serious” vilification.**

Draft Anti-Discrimination Bill 1999: cl 92 (1)

## **VICTIMISATION**

### **Scope of prohibition**

7.149 Section 50(1) makes it unlawful for a person (the “discriminator”)<sup>146</sup> to subject another person (the “person victimised”) to any detriment on the ground that the latter person has:

brought proceedings under the ADA;

given evidence or information in relation to proceedings brought under the ADA;

alleged that the discriminator or any other person has breached the ADA; or

done anything under the ADA to the discriminator or any other person.

7.150 The principal concern of s 50(1) is to ensure that persons who believe they have been the subject of discrimination are not deterred from pursuing their rights under the ADA for fear of reprisals or further disadvantage. The provision has therefore been accorded a broad application consistently with its clear purpose.<sup>147</sup>

7.151 Victimization does not have to involve any element of discrimination on any of the substantive grounds under the ADA. A person victimised must simply prove, on the balance of probabilities, that the discriminator caused him or her to suffer a discernible disadvantage because of one of the four categories of conduct outlined in s 50(1).

### ***Subjecting a victim to detriment***

7.152 A person alleging victimisation must establish that they have been *subjected to* some detriment by the respondent. Whereas in a discrimination complaint, a complainant must prove that he or she was treated *less favourably* on the ground of race, sex etc than another person not of the same race, sex etc would have been treated in the same circumstances, no comparison is required in a victimisation complaint. However, this difference will no longer exist if the Commission's recommendation for a new detriment-based definition of discrimination is accepted.<sup>148</sup> The EOT has adopted a broad notion of "detriment" as any form of "loss, damage or injury".<sup>149</sup>

7.153 The phrase "subjected to" has been held to carry with it a requirement that the complainant prove that the respondent intended to cause the complainant harm.<sup>150</sup> Recently, however, the EOT has held that this implied requirement means no more than showing that the respondent's conduct was done on one of the grounds referred to in s 50(1).<sup>151</sup>

7.154 While there is a need to clarify the words "subjected to" in this regard, an amendment may also be desirable to ensure that s 50(1) covers both actual and threatened acts of victimisation. Currently, the words "subjected to" imply that the respondent must have done an act and the complainant must have consequently suffered a detriment. In contrast, similar provisions in most other Australian jurisdictions expressly provide that victimisation occurs where a respondent does an act, or threatens to do an act, causing harm or injury to the complainant.<sup>152</sup> While it is arguable that s 50(1) is sufficiently broad to encompass threatened acts of victimisation, the Commission believes that the ADA should distinctly prohibit any conduct, actual or threatened, which seeks to undermine the stated purposes of the legislation.

## **Recommendation 98**

**Extend the victimisation provision in the ADA to cover the situation where the respondent "threatens" to subject the complainant to any detriment.**

**Draft Anti-Discrimination Bill 1999: cl 83(1)**

### ***"On the ground of"***

7.155 A complaint of victimisation will not succeed unless the victim establishes a causal link between the detriment suffered by the victim, the conduct of the respondent and the victim's actions in bringing a complaint or allegation under the ADA.<sup>153</sup> The act of victimisation must occur on the ground that the complainant did one of the things described in s 50(1).

7.156 Problems have arisen, in complaints of both discrimination and victimisation, when the conduct which is the subject of the complaint is done on two or more grounds.<sup>154</sup> These problems were resolved, for the purposes of the discrimination provisions, by amendment in 1994. Section 4A now provides that an act done on the ground of two or more reasons will constitute unlawful discrimination provided that one of the reasons, whether or not it is the dominant or substantial reason, consists of unlawful discrimination.

7.157 However, s 4A does not apply to s 50(1).<sup>155</sup> In a victimisation complaint, the EO Division must therefore consider the relevant case law preceding the 1994 amendment. The EOT has previously held that it is sufficient to establish unlawful conduct under the ADA if the prescribed ground constitutes a “significant factor” in the decision-making process.<sup>156</sup> In a more recent judgment, however, the EOT has adopted the findings of Justice Clarke in *Waterhouse v Bell*, that an act will be unlawful provided that one of the real or operative grounds for doing the act was a proscribed ground of discrimination.<sup>157</sup> Though possibly less stringent than the previous “significant factor” test, this may set a higher standard than that under s 4A under which it is sufficient that one of the reasons for doing the act was a prohibited reason.

7.158 This inconsistent treatment of discrimination and victimisation is not justified and it is most likely an oversight which should be corrected.

### **Recommendation 99**

**Provide that where an act of victimisation is done for two or more reasons, it is sufficient if one of those reasons is a significant reason.**

**Draft Anti-Discrimination Bill 1999: cl 83(3)**

### ***Complainant must appear to have done one of the things described in s 50(1)***

7.159 Some anti-discrimination laws expressly provide that a failure by the complainant to do any proposed act or to pursue an action will not affect a complaint of victimisation.<sup>158</sup> A similar provision in the ADA is not necessary as it is already clear that, in New South Wales, the complainant need not have actually lodged a complaint or raised an allegation in order to fulfil the final element of a complaint of victimisation. It is sufficient under the ADA to show that the respondent knew that the complainant intended to do one of those things or suspected that the complainant had done or intended to do one of the acts described in s 50(1).

### **Section 50(2) defence**

7.160 An act will not constitute victimisation under s 50(1) if the allegation of discrimination which gave rise to the victimisation was false and lacking in good faith.<sup>159</sup> It operates like an exception under the ADA. If the elements of a complaint under s 50(1) are substantiated, the complaint prevails unless the respondent can affirmatively establish both elements of the defence.<sup>160</sup>

7.161 Identical provisions exist in other anti-discrimination legislation, except in South Australia, where the respondent need only prove that the allegation of discrimination was false *or* that it was not made in good faith.<sup>161</sup> The Commission does not accept this approach. Making the elements of the defence less stringent would blunt the purpose and significance of the anti-victimisation provision. In addition to this, the Commission is of the view that the falsity or otherwise of the allegation is, by itself, irrelevant and the primary consideration is whether the allegation was made in good faith. Only if lack of good faith is established, will the falsity of the allegation become significant.

### ***What happens if the original complaint of discrimination is dismissed?***

7.162 The fact that the original complaint of discrimination is dismissed is irrelevant when determining whether a person has victimised the complainant unless that person proves the two elements of the defence in s 50(2).<sup>162</sup> The failure or dismissal of the original complaint of discrimination is not, in itself, proof that the allegation of discrimination was false and lacking in good faith.

7.163 Compensation continues to be available for victimisation notwithstanding the absence of a finding of discrimination.<sup>163</sup> This is appropriate in giving effect to the purpose of the provision.

### **Should victimisation be a criminal offence?**

7.164 Victimisation is not a criminal offence under the ADA. It is an unlawful act which can be the subject of a complaint in the same manner as an alleged act of discrimination or vilification. The usual procedures in the ADA for the resolution of complaints, namely investigation, conciliation, referral to the EO Division and inquiry apply.<sup>164</sup> Remedies, including awards of damages, are available in relation to complaints of victimisation.<sup>165</sup>

7.165 It has been argued that the present procedures and remedies for dealing with victimisation are an inadequate deterrent. It is felt by some that making victimisation an offence under the ADA, punishable by a monetary penalty and/or imprisonment, as it is under Federal and some State anti-discrimination legislation,<sup>166</sup> would provide a more effective deterrent. However, the Commission is not convinced that it would.

7.166 The only prosecution brought for victimisation of which the Commission is aware occurred in the Federal sphere. The DPP chose to bring the matter under the Commonwealth *Crimes Act* rather than Federal anti-discrimination laws.<sup>167</sup>

7.167 The offence provision in the SDA has been criticised extensively for its ineffectiveness.<sup>168</sup> A number of submissions to the Lavarch Committee, for example, claimed that the difficulties involved in pursuing a claim of victimisation through the legal channels and the unwanted publicity that attaches to a court action deterred many people from pursuing their complaint.<sup>169</sup> Its other major flaw is that it places the onus of bringing an allegation to the police on the victim. Whether the HREOC may act as the complainant in a prosecution for victimisation has never been tested and therefore remains unclear.

7.168 Following this criticism, the SDA and RDA were amended in 1992 to allow complaints of victimisation to be brought in the same manner as complaints of discrimination, and for the same complaint resolution procedures to apply.<sup>170</sup>

7.169 Victimisation should, unquestionably, remain a ground for complaint under the ADA as it is important that complainants retain a right to seek damages for the often substantial economic loss suffered as a result of the victimisation. In one recent case, for example, the EOT awarded \$40,000 to an engineer dismissed from employment because he raised allegations of race discrimination. The EOT said that his loss was, in monetary terms, worth well in excess of the jurisdictional limit.<sup>171</sup> However, no useful purpose would be served by creating another offence.

## **UNLAWFUL ADVERTISEMENTS**

### **Scope of the prohibition**

7.170 Section 51(2) makes it unlawful to publish, or cause to be published, an advertisement that indicates an intention to do an act which is unlawful under the ADA. An advertisement is defined broadly to include any notice, sign, label, circular or anything which conveys a message, whether written or not. All forms of publishing, including publishing in newspapers, radio, television and film, come within the scope of the ADA. Because it places liability on publishers as well as those who place the discriminatory advertisements, the onus is on newspaper editors, television stations and radio broadcasters to ensure compliance with the provisions of the ADA.

7.171 The original purpose of s 51 was to prevent employers advertising positions with sex-based classifications or any other criteria which suggest that discriminatory factors would be used for the selection of employees.<sup>172</sup> This prohibition is therefore subject to the exceptions under the Act which permit discrimination on the basis that it is a genuine occupational qualification. Also, advertisements for junior employees are still exempt from the ADA.

7.172 Another issue raised in DP 30 was whether sex-based advertisements or advertisements based on other stereotypes should be unlawful under the ADA even if they do not indicate an intention to discriminate against any particular individual.

7.173 Pointing to the large amount of sexist or sex-related advertising in the media and the relative ineffectiveness of bodies such as the (now dissolved) Advertising Standards Council in regulating general advertising, several submissions received by the Commission supported a more pro-active approach.<sup>173</sup> The Department for Women and the Independent Teachers' Association, for example, submitted that the ADB's powers should be reviewed and strengthened so that it could bring prosecutions for breaches of s 51(2). The ADB, on the other hand, submitted that it did not see a "censorship" role as appropriate for it.

7.174 Whilst the Commission is conscious that the line between advertising which generally reveals sexist attitudes, and advertising which reveals an intention to discriminate under the ADA, may to an extent be arbitrary, it is nevertheless a line which needs to be drawn. If the ADA is not to contain a prohibition on vilification in all areas, it is difficult to justify a prohibition on advertising which may be distasteful to many but which does not satisfy the higher test of vilification. Indeed, even in those areas where vilification is made unlawful, it would be difficult to justify a lower standard which would trigger unlawfulness in relation to advertisements. Accordingly, the Commission is satisfied that the current provision should be retained in its present form.

#### ***News items and reports***

7.175 It was suggested, in DP 30, that the scope of s 51 be extended to cover news items and other reports in both the print and electronic media.<sup>174</sup> A number of submissions to the Commission in response to DP 30 suggested that sexist and other discriminatory advertising should be specifically prohibited under the ADA.<sup>175</sup> The Commission does not support this view. If news items or reports were believed to vilify a person or group (in relation to race, sexuality or HIV status), the item would constitute a public act for the purposes of anti-vilification laws and would thus already be covered.

7.176 The Commission is of the view that s 51 should continue to be limited to advertisements which indicate an intention to discriminate.

#### **Dealing with discriminatory advertisements**

7.177 There are numerous ways of dealing with discriminatory advertisements depending on how the advertisement is alleged to be unlawful, what outcome is sought and who wishes to bring the action.

7.178 Advertisements that indicate an intention to discriminate may either be the subject of an action in the local court, alleging a contravention of s 51(2), or may in appropriate cases form the basis of a complaint of discrimination to the ADB, under the substantive provisions of the ADA.<sup>176</sup> For example, a person who is excluded from selection in employment because the employer has advertised for applicants aged between 28 and 45 could lodge a complaint against the employer alleging a breach of s 49ZYB. This section makes it unlawful for an employer to discriminate against a person on the ground of age in the arrangements made for determining who should be offered employment.

7.179 Any person, whether affected by the advertisement or not, including the President of the ADB, may bring an action in the local court alleging a contravention of s 51(2) against the publisher, advertising placement agency and/or their client. If the offence is proved, the court can impose a fine of up to \$5000 on the advertiser. To the Commission's knowledge, however, this avenue has never been pursued.

7.180 In order to avoid liability, advertisers frequently consult the ADB over the content of their advertisements.<sup>177</sup>



## Defences and exceptions

7.181 Section 51(4) provides that a person will not be liable under s 51(2) if he or she believed on reasonable grounds that the advertisement did not show an intention to discriminate unlawfully under the ADA. This provision is consistent with the defence of honest and reasonable mistake of fact which is available in relation to many similar statutory offences. It should be retained.

## LIABILITY ISSUES

### Legislative history of sections 52 and 53

7.182 In addition to liability for primary acts of discrimination, the ADA also imposes liability on those who cause or permit discriminatory conduct<sup>178</sup> and on principals and employers for the discriminatory acts of their agents and employees.<sup>179</sup>

7.183 Under s 52 of the ADA it is unlawful for a person to “cause, instruct, induce, aid or permit” another person to do an act that is unlawful by reason of a provision of the ADA.<sup>180</sup>

7.184 Under s 53 of the ADA an act done by an agent or employee which if done by the principal or employer would be in contravention of the ADA is “taken to have been done” by the principal or employer. This is so unless the principal or employer did not authorise the doing of the act. Authorisation may be express or by implication and may be given before or after the doing of the act.

7.185 Both of these sections were amended in 1994<sup>181</sup> as a result of judicial confusion surrounding their interpretation. In its original form s 53 provided that “an act done in contravention of this Act” by an agent or employee was “deemed” to be done by the principal or employer for the purposes of liability under the ADA. However, because the Act does not attach liability for discriminatory conduct in employment to anyone but the employer<sup>182</sup> an argument could be made that only an employer could act in “contravention” of the ADA. As a result, because an employee could not relevantly “contravene” the ADA, an employer could not be vicariously liable for the discriminatory act of the employee.<sup>183</sup>

7.186 Similarly, in relation to s 52, it was argued that an act could not be “unlawful” under the ADA unless it was performed by the employer or educational authority itself. As a result, it was argued that liability for the acts of employees could not be attached to an employer or educational authority by use of s 52.

7.187 This argument was advanced in *Leves v Haines & Ors*,<sup>184</sup> where a female student made a complaint of sex discrimination on the basis that certain electives (such as technics and technical drawing) were not offered at the single-sex girls’ school which she attended. These electives were offered to her twin brother at the single-sex boys’ school in the same suburb. In this case the decision not to offer the electives was made by the high school Principal, but the relevant “educational authority” was the Minister for Education. Because the ADA only attaches primary liability in education to the “educational authority”,<sup>185</sup> it was held that the Principal of the school was not liable for the acts of discrimination. However, it was argued by the respondent that because the Minister had not made the discriminatory decision, the Minister could not be directly liable under the Act. In addition to this, it was also argued that because an action cannot be “unlawful” under the ADA (for the purposes of s 52) or “done in contravention of the Act” (for the purposes of s 53) unless it is done by the educational authority itself (ie the Minister), the Minister could not be held vicariously liable for the acts of the Principal of the school. In that case, rejecting this view, the EOT stated that:

In other words, a circular situation is reached, whereby the responsible body under the Act cannot be made liable for the acts of any other person because that other person was not the responsible body under the Act.<sup>186</sup>

7.188 The EOT went on to point out that such an interpretation could not have been intended by the framers of the legislation as it would render the section “virtually nugatory”. However in that case it was

not necessary to decide the question, because it was held that the Minister himself was directly responsible for the breach of the ADA, under an expansive reading of the primary liability provision.<sup>187</sup>

7.189 The issue of the correct interpretation of s 53 arose again for consideration in *M v R Pty Ltd and Anor*.<sup>188</sup> In that case the question was whether an employer could be held vicariously liable for acts of sex discrimination committed by one employee against another. Once again an argument was advanced that because s 25 of the ADA only imposes liability for sex discrimination upon employers, the discriminatory acts of the fellow employee could not amount to an “unlawful” act (for the purposes of s 52) or a “contravention of the Act” (for the purposes of s 53).

7.190 Similarly to *Leves*, in *M v R* it was held that the employer was *personally* responsible for the acts of discrimination under an expansive interpretation of the words “terms and conditions of employment” in s 25.<sup>189</sup> However, in *M v R* it was also held that the facts of the case were sufficient to ground a finding that the employer was vicariously liable under s 53 of the ADA. In coming to this conclusion, Judge Graham pointed to the difference in terminology between s 52 and 53 of the ADA. His Honour reasoned that the use of the phrase “act done in contravention of the Act” in s 53 (in contrast to “act that is unlawful” in s 52) indicated that actual legal liability was not required by s 53. His Honour held:

In other words, the act of the employee contemplated by s 53 is one which is discriminatory but, because done by a person who is not an employer, is not *prima facie* unlawful. It can only become an *unlawful* act if it is the act of the employer, or, as s 53 provides, is *deemed* to be the act of an employer, and thus becomes unlawful.<sup>190</sup>

7.191 Although the interpretation of the provision in *M v R* would operate to give the section its intended effect, it was seen as desirable to amend the provisions to remove any lingering confusion. In its Report *Balancing the Act*, the ADB recommended that the provisions be amended to put the vicarious liability of employers beyond doubt.<sup>191</sup> As a result, in 1994, s 53 was amended to provide that:

An act done by a person as the agent or employee of the person's principal or employer which *if done by the principal or employer would be a contravention of the Act* is taken to have been done by the principal or employer also, unless the principal or employer did not, either before or after the doing of the act, authorise the agent or the employee, either expressly or by implication, to do the act.<sup>192</sup>

7.192 This amendment also specifically provided that the liability of principal/employer and agent/employee was to be joint and several.<sup>193</sup>

7.193 The 1994 Act also amended s 52 to provide that:

It is unlawful for a person to cause, instruct, induce, aid or permit another person to do an act that is unlawful by reason of a provision of this Act.<sup>194</sup>

7.194 In the Second Reading Speech of the amending Act, it was stated that:

The amendments to sections 52 and 53 will clarify the vicarious liability provisions by providing that as long as the principal or employer is a person who is subject to the Act, it is not necessary that the employee or agent also fits that description.<sup>195</sup>

7.195 The only other change to the vicarious liability provisions occurred in 1997,<sup>196</sup> when s 53 was amended to provide that a principal or employer is not vicariously liable for the acts of their agent or employee if they “took all reasonable steps to prevent the agent or employee from contravening the Act”.<sup>197</sup> In addition, it was provided that, for acts of sexual harassment by volunteers or unpaid trainees, the employer is the person or body on whose behalf the volunteer or unpaid trainee provides their services.<sup>198</sup>

## **Other jurisdictions**

### ***Federal***

7.196 Each of the Commonwealth Acts contains provisions similar to those in the ADA relating to aiding and abetting and vicarious liability for discriminatory conduct. The aiding and abetting provisions of the SDA<sup>199</sup> apply to acts of sex discrimination but are worded slightly differently to those in the ADA. Under the SDA the act of discrimination must be done “in connection with the employment of the employee or the duties of the agent as an agent”.<sup>200</sup> There is a similar defence where the principal or employer “took all reasonable steps” to prevent the discriminatory acts,<sup>201</sup> but the SDA does not contain the additional requirement that the employee lack the authority of the employer.

7.197 Under the RDA there is no general provision relating to aiding and abetting racial discrimination. Instead, there is provision that it is “unlawful” to “incite” or to “assist or promote” the doing of an act that is unlawful under the race discrimination provisions of the RDA.<sup>202</sup>

7.198 Under the DDA it is an offence to “incite” or to “assist or promote” the doing of an act which is unlawful under the disability discrimination provisions of the DDA.<sup>203</sup> In addition to this provision, there is a general provision attaching liability to anyone who “causes, instructs, induces, aids or permits” an act which is unlawful under the Act.<sup>204</sup> In relation to vicarious liability, the DDA provides that any conduct engaged in on behalf of a body corporate or person other than a body corporate by a servant or agent acting “within the scope of his or her actual or apparent authority” is taken to have been engaged in also by the person or body corporate unless the person or body corporate establishes that they “took reasonable precautions and exercised due diligence to avoid the conduct”.<sup>205</sup>

### ***Other States***

7.199 The majority of other States have similar legislation to NSW, with occasional minor differences in the wording of the provisions.<sup>206</sup> None of the vicarious liability provisions in any of the other states contain the proviso in s 53(1) of the ADA that the discriminatory acts of the employee must be without authority, as, with the exception of Tasmania and the Northern Territory, each of the other jurisdictions merely deal with this issue through some formulation of the “reasonable steps” defence.<sup>207</sup>

7.200 The only other State legislation which is significantly different from the ADA is that of Tasmania. The SDA (Tas) places a positive obligation on an employer organisation to ensure that all members, officers, employees and agents are “made aware of the discrimination and prohibited conduct” to which the Act relates and that no member, officers, employee or agent “engages in, repeats or continues such conduct”.<sup>208</sup> An organization which does not comply with this provision is then made liable for any contravention of the SDA (Tas) committed by its members, officers, employees or agents.<sup>209</sup> It also provides that a person will be jointly and severally liable for any contravention of the SDA (Tas) if he or she “knowingly” caused, induced or aided such a contravention.<sup>210</sup>

## **Vicarious liability**

### ***Authorisation of discrimination by the employer***

7.201 Under s 53(1) a discriminatory act committed by an agent or employee is deemed to have been done by the principal or employer:

unless the principal or employer did not, either before or after the doing of the act, authorise the agent or employee, either expressly or by implication, to do the act.

7.202 In addition, s 53(3) provides that:

a principal or employer is not liable under [s 53] if the principal or employer took all reasonable steps to prevent the agent or employee from contravening the Act.

7.203 When originally enacted, s 53 only contained the provision relating to lack of authority, however the section was amended in 1997 to include the additional defence where the principal or employer has taken all reasonable steps to prevent discrimination.<sup>211</sup> Although there is no discussion of the rationale for this amendment in the explanatory memorandum or second reading speeches for the amending legislation, it appears that this amendment was made to bring the ADA in line with Commonwealth legislation and legislation in other States.

7.204 In both the SDA and the RDA, the corresponding vicarious liability provisions provide a defence where the principal or employer “took all reasonable steps” to prevent the discrimination.<sup>212</sup> The DDA also provides a defence where a body corporate took “reasonable precautions and exercised due diligence” to avoid discriminatory conduct.<sup>213</sup> The “reasonable steps” defence is also used in the legislation of the majority of other States throughout Australia.<sup>214</sup> None of these provisions contain an additional defence in relation to lack of authority.

7.205 There is little judicial discussion of the interpretation of the word “authorise” in s 53(1) of the ADA. However, in *M v R Pty Ltd*<sup>215</sup> the EOT held that the imposition of liability on an employer was “limited ... by the issue of absence of authority from the employer for the doing of the act by the employee”.<sup>216</sup> The EOT went on to say that, although it was not necessary to determine the extent of the limitation for the purposes of the case:

the existence of this limitation serves to soften the apparent rigour of the earlier part of the section and suggests a recognition on the part of the legislature that the unfettered imposition of vicarious liability could work manifest injustice to an employer and carry the legislation beyond the employment field marked out by the Act and into the realm of purely personal relations between employees.<sup>217</sup>

7.206 This case was determined prior to the insertion of the additional defensive provision in s 53(3) in 1997 and there has been no judicial discussion of the apparent overlap created by the amendments.

7.207 In *Moloney v Golden Ponds Pty Ltd*<sup>218</sup> it was held that an employer company in liquidation could be found liable for acts of discrimination committed by two receivers of the company who were appointed by the Liquidator of the company even though the employer had no effective control over the actions of the receivers at all. In that case the EOT noted that no submissions had been made as to whether the employer did or did not “authorise” the acts of the receivers. However, they held that it was open to the EOT to find that the receivers were liable under s 52 on the basis of the vicarious liability of the employer under s 53.<sup>219</sup>

7.208 Both *M v R* and *Moloney* suggest that there is a lack of clarity about the proper effect and interpretation of the authority provision in s 53(1). It is arguable that the provision requiring lack of authority is unnecessary in light of the defence in s 53(3) where the principal or employer has taken “all reasonable steps” to prevent the discrimination. No legislation in any other State contains the proviso that the act of the employee must be without authority. In each of the other States the equivalent provisions merely provide some formulation of the “reasonable steps” defence.

7.209 The “reasonable steps” formulation has achieved a practical approach to the issue of vicarious liability in the cases. In *Adams v Helios Electroheat Pty Ltd*<sup>220</sup> it was held that a company was vicariously liable for the manager’s sexual harassment of a secretary because it failed to have in place effective policies, complaints and grievance procedures to deal with sexual harassment in the workplace. In the Victorian case of *Bevacqua v Klinkert*<sup>221</sup> an employer was held not to be vicariously liable for the discriminatory acts of their employee because it had taken reasonable precautions against sexual harassment. Furthermore, in *Kolavo v Ainsworth Nominees*<sup>222</sup> it was held that where acts of discrimination by an employee are established, the onus is on the employer to show that s 52 and 53 do not apply to attach liability to the employer and employee.

7.210 Accordingly, the Commission is satisfied that the additional provision relating to lack of authority should be removed from s 53(1) and that an employer should only be relieved from liability for

the discriminatory conduct of their employees if they meet the test in s 53(3) that they “took all reasonable steps” to prevent the discrimination.

### **Recommendation 100**

**In relation to vicarious liability under the ADA, the only available defence should be where the employer took all “reasonable steps” to prevent the relevant conduct.**

Draft Anti-Discrimination Bill 1999: cl 85(2)

#### ***Joint and several liability***

7.211 Section 53(2) of the ADA specifically provides that where both principal or employer and agent or employee are subject to liability under the ADA “they are jointly and severally subject to that liability”. This means that the complainant may proceed against either of the parties individually or against both of them together. The legislation in Victoria and Queensland also provide specifically for joint and several liability of employer and employee.<sup>223</sup>

7.212 One possible issue which may arise in relation to this provision is that of its interaction with the *Employees Liability Act 1991* (NSW). Under the *Employees Liability Act*, where an employee commits a tort for which his or her employer is also liable, the employer is liable to indemnify the employee in respect of the employee’s liability and the employee is not liable to indemnify the employer in respect of the employer’s vicarious liability.<sup>224</sup> This legislation was introduced to reverse the position created by the decision of the House of Lords in *Lister v Romford Ice and Cold Storage Co Ltd*,<sup>225</sup> where it was held that an employee (who was unlikely to be insured) could be required to indemnify an employer for loss sustained by the employer as a result of a tort committed by the employee.

7.213 Although the liability created by the ADA has been described as a “statutory tort” it is unclear whether it is a “tort” for the purposes of the *Employee’s Liability Act 1991* (NSW). Liability imposed by operation of statute is wholly defined by the relevant statutory provision and is separate from liability imposed by the common law. A similar uncertainty arises in relation to the liability created under the *Fair Trading Act 1987* (NSW); there are divergent opinions as to whether the statutory cause of action created is a “tort” for the purposes of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) which provides for contribution between joint tortfeasors.<sup>226</sup> Ultimately, this question is a matter of statutory construction, but, the fact that the ADA expressly provides that employer and employee are “jointly and severally” liable<sup>227</sup> means that the *Employees Liability Act 1991* (NSW) is unlikely to apply.

7.214 This raises a question as to the consistency of the approach adopted under the ADA and whether there is a particular justification for maintaining separate liabilities.

#### **Aiding and abetting**

7.215 Section 52 of the ADA provides that:

It is unlawful for a person to cause, instruct, induce, aid or permit another person to do an act which is unlawful by reason of a provision of this Act.

7.216 An important aspect of the operation of s 52, in conjunction with s 53, is that, while no direct liability is imposed on employees for discriminatory acts committed by them against fellow employees, once an employer is found directly liable under the various provisions of the ADA or vicariously liable for the acts of their employee under s 53, the employee may then be held personally liable under s 52 for “aiding and abetting” the employer in unlawful conduct. This arises where the employee is the person who has actually performed the discriminatory acts and thus is argued to have “caused” the employer to have contravened the ADA.

7.217 In *O'Callaghan v Loder*<sup>228</sup> an allegation of sex discrimination was brought against Mr Loder, who was the Commissioner for Main Roads and the complainant's employer. Although the acts of sex discrimination were not made out in that case, the EOT held that it had jurisdiction to hear the case against the Commissioner both in his capacity as the complainant's employer and also in his personal capacity. This was because s 53 operated to make the Commissioner vicariously liable for the acts of sexual harassment as the complainant's employer and, once such principal liability was established, s 52 operated to make Mr Loder liable in his personal capacity for aiding and abetting the employer (the Commissioner) in "unlawful" conduct. Judge Mathews held:

It is difficult to use concepts such as aiding and abetting when in reality we are not talking about two or more people but one person who is joined in two different capacities. Nevertheless, in my view there is nothing in a literal reading of s 52 which precludes it from being used in these proceedings.<sup>229</sup>

7.218 The use of s 52 to make a fellow employee liable for acts of discrimination was affirmed in *M v R Pty Ltd*.<sup>230</sup> In that case an employer was held to be directly liable for acts of sex discrimination committed by an employee under s 25 and also to be vicariously liable for those acts under s 53. As a result of the liability of the employer, it was held that the employee who actually committed the acts could be held personally liable for aiding and abetting the employer in unlawful activity under s 52. This position has been affirmed in a number of subsequent cases.<sup>231</sup>

7.219 This interpretation of the aiding and abetting provisions creates a circuitous route for the imposition of liability on employees who discriminate against others in the workplace. Whilst this result is sensible, it may be thought anomalous that where the employer is not vicariously liable for the discrimination, for example, because of a comprehensive anti-discrimination policy, an employee would not be liable for his or her own act. However, in practice, the issue does not often arise because the ADA places significant obligations upon employers and educational authorities to provide an environment free from discrimination and in most cases of proven discriminatory conduct the employer has been found to be either directly or vicariously liable for the discriminatory acts of their employees.<sup>232</sup>

7.220 Liability for the acts of employees may also arise without reliance upon the express terms of s 52. For example, in keeping with general principles of tort law, some groups, including school authorities, may owe special responsibilities in relation to their pupils, sometimes described as "non-delegable duties".<sup>233</sup>

7.221 In *M v R* it was pointed out that s 52, in conjunction with s 53, operates to impose personal liability on the person committing the acts of discrimination where that person is the alter ego of the employer company. Consistently with the principles of company law:

it is quite possible for the acts of one natural person to constitute a principal offence on the part of a company and an accessory offence on the part of the natural person.<sup>234</sup>

7.222 It should also be noted that the majority of cases on s 52 have arisen in the context of sexual harassment and that the ADA has now been amended to include sexual harassment as a separate ground of discrimination and, in relation to this ground alone, the ADA places personal liability directly upon fellow employees.<sup>235</sup> In other areas, such as sex and race discrimination in employment, it would still be necessary to rely on s 52 in conjunction with s 53 in order to find fellow employees liable for their own discriminatory acts.

7.223 In situations where the employer may be found vicariously liable, however, it is arguable that if the legislature intends to make the fellow employees liable then the ADA should impose such liability directly.

7.224 Another indication that the effect of these provisions may require legislative clarification is the fact that the Human Rights and Equal Opportunity Commission has held that the corresponding aiding and abetting provision in the SDA does not apply to make an employee who has committed acts of sex

discrimination against a fellow employee personally liable for those acts. In contrast to the position taken by the EOT in the New South Wales cases, in *Sutton v Ultimate Manufacturing*<sup>236</sup> the Human Rights Commission held that, although a respondent company was liable for sex discrimination under s 14 of the SDA, the aiding and abetting provision<sup>237</sup> was not available to found individual liability in the manager or director of the company who actually performed the act of discrimination. In coming to this conclusion, the Inquiry Commissioner stated that:

I do not think that the imputation of an act of one person to another person by operation of law [under s 106] is properly described as the first person *causing* the other person to do the act [under s 105].<sup>238</sup>

7.225 However, the Commissioner went on to state that: "I concede that this point is not perfectly clear and may have to await definition by a court".<sup>239</sup> Similarly, in an early decision of the EOT, *Hill v Water Resources Commission*,<sup>240</sup> it was held that s 52 was not available to make an employer liable for "permitting" discrimination by its employees. No reasons were given for this determination in the judgment as the employer was ultimately held to be personally liable for the discriminatory acts of employees under s 25 of the ADA.

7.226 Apart from establishing the liability of employees, s 52 has also been used to attach personal liability to the receivers of a company in liquidation. In *Moloney v Golden Ponds Corporation Pty Ltd*<sup>241</sup> an employee of an insolvent company was dismissed by the receivers of the company on the basis of her relationship with one of the previous directors. The dismissal was held to be an act of unlawful discrimination on the basis of sex under the ADA and it was held that the employer was vicariously liable for those acts under s 53. As a result, s 52 was held to be available to establish personal liability not only in the receivers themselves, but also in the creditor company, which had appointed the receivers, for causing, instructing, inducing, aiding or permitting the unlawful acts.<sup>242</sup>

7.227 Whilst discrimination can obviously occur in circumstances where the workplace is subject to a racially or sexually hostile environment, liability for discriminatory conduct can arise outside the workplace or away from the school or grounds of the educational authority. In *Metwally v University of Wollongong*<sup>243</sup> it was held that a university was vicariously liable for the acts of its employees under s 53 even though many of the relevant incidents of race discrimination occurred on social occasions. This interpretation is supported by the recent Federal Court decision in *McManus v Scott-Charlton*<sup>244</sup> where it was held that, under the vicarious liability provisions of the SDA, in some situations there may be a positive obligation upon employers to take disciplinary action against employees who discriminate against fellow employees outside the workplace where that discrimination significantly affects workplace relations.

7.228 In view of the fact that the current wording of s 52 does not appear to have given rise to any significant practical problems, the Commission does not recommend amendment to this provision.

## Footnotes

1. Anti-Discrimination Board, *Harassment in the Workplace: Guidelines for Managers* (1997) at 3.
2. ADB, *Harassment in the Workplace: Guidelines for Managers* at 4.
3. *O'Callaghan v Loder* [1984] EOC 92-023 at 75,499. For a further discussion of harassment as a form of discrimination see below at para 7.12.
4. ADA s 22A Pt 2A, inserted by *Anti-Discrimination (Amendment) Act 1997* (NSW).

5. See *Metwally v University of Wollongong* [1984] EOC 92-030. The decision was later overruled on constitutional grounds on the basis of inconsistency between the RDA and the ADA: *Wollongong University v Metwally* (1984) 158 CLR 447. The RDA was later amended to allow for the concurrent operation of both laws.
6. *Henson v City of Dundee* 682 F 2d 897 (1982). The concept of harassment as a form of discrimination was recognised in 1976 in *Williams v Saxbe* 413 F Supp 654 (1976).
7. [1983] 3 NSWLR 89 per Mathews DCJ.
8. (1988) 20 FCR 217 per Lockhart, Wilcox and French JJ.
9. A number of submissions advocated the inclusion of a specific prohibition against sexual harassment within the ADA: Commissioner for Equal Opportunity (SA), *Submission* at 4; Disability Discrimination Legal Centre, *Submission* at 2; Gay and Lesbian Rights Lobby, *Submission* at 6; NSW Ministry for the Status and Advancement of Women, *Submission* at 19; and NSW Women's Advisory Council, *Submission* at 8.
10. SDA (Tas) s 17(1).
11. EOA (WA) Div 3A s 49A-49D.
12. EOA (WA) s 49A.
13. EOA (WA) s 49B.
14. EOA (WA) s 49C.
15. DDA Pt 2 Div 3 s 35-40.
16. [1997] EOC 92-885.
17. *Adams v Arizona Bay* at 77,188.
18. See Chapter 3 at 3.33.
19. ADA s 22B.
20. ADA s 22I(1).
21. See below at para 7.43.
22. SDA s 28A; EOA (Vic) s 85; EOA (WA) s 24-26; DA (ACT) s 58.
23. SDA s 28A(2); EOA (Vic) s 85(2); EOA (WA) s 24(4), 25(3) and 26(3); and DA (ACT) s 58(2).
24. EOA (Vic) s 85 (2)(a) and (c).
25. ADA (Qld) s 119.
26. ADA (NT) s 22.
27. SDA (Tas) s 17(3).
28. EOA (SA) s 87(11).
29. *Protection From Harassment Act 1997* (UK) s 1(1)(a).



30. *Protection From Harassment Act 1997* (UK) s 1(3)(c).
31. "Prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted": *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1).
32. Section 10(1).
33. Sections 5(2) and 7(2).
34. Sections 2(2) and 7(1).
35. Sections 1, 2(1) and 5(1).
36. Section 7(3).
37. Section 2(g).
38. Section 2(e). "Undertaking" is not defined.
39. *Civil Rights Act of 1964* (US) – Title VII. Note that the application of the Act is limited to employers engaged in interstate commerce with more than 15 employees, labor organisations and employment agencies. The Act prohibits discrimination based on race, colour, religion, sex or national origin. Sex includes pregnancy, childbirth or related medical conditions. Other Federal legislation prohibits discrimination in employment on the grounds of age and disability. See *Age Discrimination in Employment Act of 1967* (US), *Rehabilitation Act of 1973* (US), *Americans with Disabilities Act of 1990* (US).
40. US Equal Opportunity Commission, *Guidelines on Discrimination Because of Sex* at s 1604.11(a).
41. See *King v Board of Regents of University of Wisconsin* 898 F 2d 533 (1990) at 537; *Ellison v Brady* 924 F 2d 872 (1991) at 878; *Andrews v City of Philadelphia* 895 F 2d 1469, 1482 (1990).
42. *Rabidue v Osceola Ref Co* 805 F 2d 611 (1986) at 626. The dissent in this case relied on a note published in (1984) 97 *Harvard Law Review* 1449 which suggested the reasonable victim standard and provided a full explanation for adopting it to evaluate sexual harassment claims by women.
43. "Sexual Harassment Claims of Abusive Work Environment Under Title VII" (1984) 97 *Harvard Law Review* 1449 at 1451.
44. "Sexual Harassment Claims of Abusive Work Environment Under Title VII" (1984) 97 *Harvard Law Review* 1449 at 1452. Many courts have followed this approach: *Yates v Avco Corp* 819 F 2d 630, 637 (1987). In *Ellison v Brady* 924 F 2d 872 (1991) the rationale for adopting a reasonable victim standard was that "conduct that many men consider unobjectionable may offend many women". It was held that such a standard was necessary "primarily because we believe that a sex blind reasonable person standard tends to be male biased and tends to systematically ignore the experiences of women"(at 879).
45. *Dhanjal v Air Canada* (1996) 28 *Canadian Human Rights Reports* D/367 at para 200 and 201.
46. *Dhanjal v Air Canada* at para 210.
47. *Dhanjal v Air Canada* at para 211.
48. *Dhanjal v Air Canada* at para 211-212.

49. *Dhanjal v Air Canada* at para 213.
50. *Dhanjal v Air Canada* at para 214.
51. T Adams, "Universalism and Sexual Harassment" (1991) 44 *Oklahoma Law Review* 683.
52. Note that this age limit exists under the SDA; cf Victoria where no age limit exists.
53. Under the amendments it is unlikely that harassment by local government councillors of employees of the council will be covered because councillors are neither the employer nor providing a service to the employee. However, a recent exposure draft of the *Anti-Discrimination Amendment (Pregnancy and Carer's Responsibility) Bill 1997* (NSW) includes an amendment making it unlawful for a local government councillor to sexually harass another local government councillor.
54. ADA s 22B.
55. ADA s 22I(1).
56. SDA s 28D and 28K.
57. *Employers and employees (and prospective employees)* – SDA s 28B(1) and 28B(2); ADA s 22B(1) and 22B(2); EOA (Vic) s 86; EOA (SA) s 87(1) and 87(2); DA (ACT) s 59(1) and 59(2); EOA (WA) s 24(1); ADA (NT) s 31; and SDA (Tas) s 21.

*Common workplace/workplace participant* – SDA s 28B(6); ADA s 22B; EOA (Vic) s 87; DA (ACT) s 59(6).

*Partners in a firm* – SDA s 28B(5); ADA s 22B; EOA (Vic) s 88; DA (ACT) s 59(5).

*Commission agents or contract workers* – SDA s 28B(3) and 28B(4); ADA s 22B; EOA (SA) s 87(4) and 87(5); DA (ACT) s 59(3) and 59(4); EOA (WA) s 24(2); and EOA (Vic) s 86 and s 4 definition of employment.

*Registered organisation* – SDA s 28D.

*Industrial organisation* – EOA (Vic) s 89; and ADA (NT) s 32.

*Qualifying bodies* – SDA s 28C; ADA s 22C; EOA (Vic) s 90; and ADA (NT) s 33.

*Educational institutions* – SDA s 28F; ADA s 22E; EOA (Vic) s 91; EOA (SA) s 87(3); DA (ACT) s 60; EOA (WA) s 25; SDA (Tas) s 21; and ADA (NT) s 29.

*Provision of goods and services* – SDA s 28G; ADA s 22F; EOA (Vic) s 92; EOA (SA) s 87(6); DA (ACT) s 62; SDA (Tas) s 21; and ADA (NT) s 41.

*Provision of accommodation* – SDA s 28H; ADA s 22G; EOA (Vic) s 93; EOA (SA) s 87(6); DA (ACT) s 63; EOA (WA) s 26; SDA (Tas) s 21; and ADA (NT) s 38.

*Clubs* – SDA s 28K; EOA (Vic) s 94; DA (ACT) s 64; SDA (Tas) s 21; and ADA (NT) s 46.

*Councillors in local government* – EOA (Vic) s 95.

*Land* – SDA s 28J.

*Laws and programs* – SDA s 28L; and SDA (Tas) s 21.

*Access to premises to which the public or a section of the public have access* – DA (ACT) s 61; and EOA (Vic) s 92 and definition of “services”.

*Employment agencies* – SDA s 28E; and ADA (NT) s 34.

*Awards, enterprise agreements and industrial agreements* – SDA (Tas) s 21.

*Insurance and Superannuation* – ADA (NT) s 48.

58. See Chapter 4 at para 4.8.
59. ADA s 22G(2).
60. DP 30 at 87.
61. J Samios, *Report of the Review by the Hon James Samios, MBE, MLC into the Operation of the Racial Vilification Law of New South Wales* (Legislative Council, Sydney, 1992) (the “Samios Report”).
62. Homosexual vilification was added in 1993 by the *Anti-Discrimination (Homosexual Vilification) Amendment Act 1993* (NSW) Sch 1; HIV/AIDS vilification was added in 1994 by the *Anti-Discrimination (Amendment) Act 1994* (NSW) Sch 2; and transgender vilification was added in 1996 by the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW) Sch 1.
63. *Crimes Act 1900* (NSW) s 547, which relates to apprehended violence by any person to the person of another or of apprehended injury to his or her property;  
  
*Summary Offences Act 1988* (NSW) s 4(1), which relates to a person conducting himself or herself in an offensive way, or using offensive language in or near or within hearing of, a public place or school;  
  
*Inclosed Lands Protection Act 1901* (NSW) s 4A;  
  
*Crime Prevention Act 1916* (NSW) s 2;  
  
*Crimes Act 1900* (NSW) s 545C, relating to unlawful assembly;  
  
*Crimes Act 1900* (NSW) Pt 15A, which relates to apprehended violence orders;  
  
*Crimes Act 1914* (Cth) s 85S, which provides that a person must not use a telecommunication service to menace or harass another person;  
  
*Crimes Act 1914* (Cth) s 24D, which provides that a person must not write or publish any statement which intentionally promotes feelings of ill-will and hostility between different “classes” of Australians, if the statement threatens public order (sedition); and  
  
*Crimes Act 1914* (Cth) s 85S, which prohibits the use of Australia Post to menace or harass another person, or use it in an offensive way.
64. D Brown, D Neal, D Farrier and D Weisbrot, *Criminal Laws* (Federation Press, Sydney, 1990) at 1210.
65. Western Australia was the second Australian jurisdiction (after NSW) to legislate against racial vilification, amending the *Criminal Code 1913* (WA) to include a vilification offence. The ACT included racial vilification provisions in the DA (ACT) in 1991, closely followed by the ADA (Queensland) which contained a section dealing with limited forms of racial and religious vilification. In 1992 the *Racial and Religious Vilification Bill* was brought before the Victorian

Parliament, but eventually lapsed after the second reading. In 1995 the Commonwealth amended its RDA to include a racial vilification section, and the South Australian Parliament passed its first vilification legislation in 1996 in the form of the *Racial Vilification Act 1996* (SA).

66. A Flavin, "Can Legislation Prohibiting Hate Speech be Justified in Light of Free Speech Principles? 18(2) *University of New South Wales Law Journal* 327.
67. Some submissions argued that the prohibition on vilification is an unjustifiable incursion on free speech in a democratic society: Call to Australia, *Submission 1* at 6; J Hollier, *Submission* at 1; Dr T Johnston, *Submission* at 2.
68. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v State of Victoria* (1997) 189 CLR 579; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Theophanous v The Herald and Weekly Times* (1994) 182 CLR 104; *Cunliffe v Commonwealth of Australia* (1994) 182 CLR 272; *Nationwide News v Wills* (1992) 177 CLR 1; and *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.
69. M Byers, "Free Speech a Certain Casualty of Race Law" *The Australian* (21 November 1994) at 11.
70. J Hollier, *Submission* at 1-2.
71. N Hennessy and P Smith, "NSW Racial Vilification Laws Five Years On" (1994) 1(1) *Australian Journal of Human Rights* 249 at 250.
72. S Ch'ang, "Legislating against Racism: Racial Vilification Laws in NSW" in S Coliver (ed), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (Human Rights Centre, University of Essex, London, 1992).
73. DOC A/38/40 at 231.
74. In that case, the prohibition was clearly political: the speech of a racist political party in a liberal democratic society.
75. See para 7.60 above. See also S Akmeemana and M Jones, "Fighting Racial Hatred" in Australia, Race Discrimination Commissioner, *Race Discrimination Act 1975: A Review* (AGPS, Canberra, 1995) at 136.
76. Western Australia, Equal Opportunity Commission, *Legislation Against Incitement to Racial Hatred: A Report to the Attorney General of Western Australia* (Occasional Report No 2, 1988).
77. K Mahoney, "Hate Vilification Legislation and Freedom of Expression" (1994) 1(1) *Australian Journal of Human Rights* 369.
78. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 10 May 1989, the Hon J M Samios, Second Reading Speech at 7817 and the Hon RJ Carr, Second Reading Speech at 7921-7922. See also Australia, *Parliamentary Debates (Hansard)* House of Representatives, 15 November 1994, the Hon M Lavarch, Second Reading Speech at 3341-3342.
79. *Canadian Charter of Rights and Freedoms* s 1 sets out the fundamental premises for balancing competing rights:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free society.
80. In December 1989, three cases involving freedom of expression and hate propaganda were joined for hearing viz *R v Keegstra* [1990] 2 SCR 697; *R v Andrews* (1990) 77 DLR (4th) 128;

*Taylor v Canadian Human Rights Commission* (1990) 75 DLR (4th) 577. Canada's anti-hate legislation was challenged as being an unconstitutional infringement of the freedom of expression guarantee of the Charter. In all of these cases, there were two central issues before the court which are likely to be the focuses of any challenge in a democratic society called upon to decide such a case:

whether the incitement to racial hatred is protected expression; and

even assuming that racial incitement is prima facie protected speech, whether it can nonetheless be subject to reasonable limitations, proscribed by law.

81. *R v Keegstra* at 734.
82. K Mahoney, "R v Keegstra: A Rationale for Regulating Pornography?" 37 *McGill Law Journal* 242.
83. According to Dworkin, it is an essential and "constitutive feature of a just political society that government treat its adult members as responsible moral agents": R Dworkin, "The Coming Battles over Free Speech" (1993) 150 *Civil Liberty* 11 at 13.
84. The Samios Report at 12.
85. For instance, there is no provision in the current law for a cause of action for defamation of a group. The possibility of creating such a claim has been previously considered and expressly rejected in the Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (ALRC 11, 1979).
86. **Commonwealth.** The RDA was amended by the *Racial Hatred Act 1995* (Cth) by inserting a new Pt 2A to prohibit racial vilification which came into force on 13 October 1995. The original proposal in the *Racial Discrimination Amendment Bill 1992* (Cth) was to make racial vilification unlawful by amending the RDA and racial incitement a criminal offence by amending the *Crimes Act 1914* (Cth). However, the Bill was amended significantly in the Senate with the criminal provisions being removed in their entirety. The amendments now incorporated prohibit, in s 18C, a public act which "is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate" another person or group of people on the basis of their race, colour, or national or ethnic origin. Section 18D provides for a wide range of exemptions designed to achieve a balance between the rights to equality and dignity of the targets of racial vilification and freedom of speech. The vilification provisions will be administered under the existing structures with cases being lodged by an aggrieved person.

**Western Australia.** Sections 76 to 80 were inserted in the *Criminal Code 1913* (WA) in 1990, and are aimed at written or pictorial material which is threatening or abusive on racist grounds. The provisions criminalise the publication or display of such materials or the possession of such materials with the intent of threatening or abusing on racist grounds. Verbal communication is not within the ambit of the provisions, and no provision is made for the mediation or conciliation via a civil mechanism such as the ADB.

**Queensland.** Section 126 of the ADA (Qld) creates an offence, attracting a penalty of 35 penalty units for individuals and 170 penalty units for corporations:

"A person must not, by advocating racial or religious hatred or hostility, incite unlawful discrimination or another contravention of the Act."

The provisions are limited to prohibiting the advocacy of breaches of other provisions of the anti-discrimination law. The requirement that there be an incitement to unlawful discrimination or some other breach of the ADA (Qld) empties it of any substantive content as a vilification law. No civil mechanism is created to deal with incitement to racial or religious hatred.

**Australian Capital Territory.** The DA (ACT) contains provisions not identical to, but clearly modelled on the NSW provisions. Section 66 makes it a civil wrong for a person, by public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group. Section 67 creates the offence of “serious racial vilification”, which is in identical terms to the NSW provision. Unlike the NSW provision, it is not necessary to obtain the Attorney General’s consent in order to prosecute those charged with serious racial vilification. Further, the civil structure differs from the NSW model; the ACT Discrimination Commissioner has investigative and decision-making powers. Appeals lie to the ACT Administrative Appeals Tribunal.

**Victoria.** Victoria introduced the *Racial and Religious Vilification Bill 1992* (Vic) in 1992. The bill has subsequently lapsed, and there is no indication that it will be re-introduced. [RE-check]

87. **Canadian Federal Legislation.** *Canadian Human Rights Act*: s 12 (publication of discriminatory material) and s 13 (communication of hate messages); *Criminal Code*: s 281.1 (criminalises advocacy of genocide); s 282.2 (creates two offences: communicating statements in any public place inciting hatred against an identifiable group where such incitement is likely to lead to a breach of the peace; and wilfully promoting hatred against any identifiable group by communicating statements other than in private conversation); s 318 (promotion of hatred); s 319 (incitement of hatred which is likely to lead to a breach of the peace, wilful promotion of hatred).

**Canadian provincial legislation.** All of the provincial human rights Codes and Acts prohibit one narrow category of hate speech; namely, the publication or public display of “any notice, sign, symbol emblem or other similar representation” with intent to infringe, or to incite infringement, of a fundamental right.

A few provinces have adopted legislation specifically addressing the issue of hate propaganda. In 1981, British Columbia adopted the *Civil Rights Protection Act* which makes the promotion of hatred on the basis of colour, race, religion, ethnic origin or place of origin a tort actionable by the person, or by any member or class of persons, against whom the conduct or communication was directed. Manitoba has included a section dealing with group libel in its *Defamation Act*.

**Denmark.** *Penal Code* – s 266B.

**Cuba.** *Constitution* – Art 349; and *Criminal Code* Art 295.

**Cyprus.** *Criminal Code* s 51.

**France.** *Penal Code* Art 187 and 416.

**Germany.** *Criminal Code* Art 130, 131 and 185 ff.

**Argentina.** Art 1, 2 and 3 of the *Argentine Republic*.

**United Kingdom.** *Race Relations Act 1976* (UK) s 14; *Protection from Harassment Act 1997* (UK) s 1(1); *Public Order Act 1986* (UK) Pt 3 and *Football (Offences) Act 1991* (UK) s 3.

**New Zealand.** *Race Relations Act 1971* (NZ) s 25.

**Netherlands.** *Criminal Code* s 137.

**India.** *Penal Code* s 153A and 153B.

**Israel.** *Penal Law 1986* s 144A-144E.

88. *Canada v Taylor* (1991) 75 DLR (4th) 577.

89. N Hennessy and P Smith, "NSW Racial Vilification Laws Five Years On" (1994) 1(1) *Australian Journal of Human Rights* 249. See also the Samios Report; and L McNamara, "A Profile of Racial Vilification Complaints in New South Wales: Preliminary Findings" (unpublished paper, July, 1996).

90. For instance, one submission said:

"I see no good reason why "x" vilification as such should be made a crime even though public acts of communication which promote or express hatred towards, serious contempt for, or severe ridicule of, particular people or groups are quite unacceptable to most of us, especially if the individual or group is identified by religious or other characteristics.

It is socially divisive and personally distressing to victims ... it nonetheless does bruise free speech. Why, for example, should vilification of homosexuals be unlawful and not vilification of women who are forced to seek abortions? Who is to decide what is reasonable and what is not?"

(T Johnston, *Submission* at 2).

This view was also expressed by E Fitzpatrick, *Submission* at 1 and R Gibbs, *Submission* at 1.

91. Section 15.

92. Canada, Law Reform Commission, *Hate Propaganda* (Working Paper 50, 1986) at 32.

93. P Fitzgerald, *Submission* at 15; Gay and Lesbian Rights Lobby, *Submission* at 8; NSW Women's Advisory Council, *Submission* at 10. A number of other submissions to the Commission also supported the extension of the vilification provisions to the grounds of gender, disability and religion. See below at para 7.86, 7.89, 7.92.

94. The definitional problems in relation to race, homosexuality and transgender status have been specifically dealt with and HIV/AIDS is considered within the wider definition of disability in Chapter 5 of this Report.

95. Australia, Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence in Australia* (AGPS, Canberra, 1991) at 389-98.

96. "Churches Set to Split Over Gay Vilification" *Sydney Morning Herald* (19 October 1993) at 6.

97. Perhaps a most articulate defence of vilification legislation in the context of the debate in NSW on homosexual vilification was provided by the Rev Ann Wansbrough of the Uniting Church, NSW Synod:

The point of the proposed legislation is to protect a group of people who, because of characteristics by which they are identified, are at far greater risk than the population generally with regard to vilification itself, and the violence which erupts from vilification. Similar arguments apply in the case of people who have HIV/AIDS ... Barry George and the *Herald* editorial of August 31 are wrong when they associate vilification with freedom of speech. Human rights instruments protect the right of people to exchange views and opinions, not the right to undermine the human dignity of those with whom one disagrees, or to put them at risk of physical violence. Vilification is itself an abuse of human rights.

98. "Dumping of Gay Hate Bill Angers Many, Poll Finds" *Sydney Morning Herald* (5 October 1993) at 2.

99. NSW Ministry for the Status and Advancement of Women, *Submission* at 19; NSW Women's Advisory Council, *Submission* at 10; M Santin, *Submission* at 1; and H Walsh, *Submission* at 1.

100. It defined pornography as the sexually explicit subordination of women through pictures or words that also included such things as women presented as dehumanised sex objects, things or commodities – women presented as sexual objects who enjoy humiliation, or print or other similar presentations of women. It also censored pornography by making it sex discrimination to produce, sell exhibit or distribute pornography: R Graycar and J Morgan, *The Hidden Gender of Law* (The Federation Press, Sydney, 1990) at 376-379.
101. *American Booksellers Association v Hudnut* 771 F 2d 323 (1985), affirmed by the Supreme Court 475 US 1001 (1986).
102. For the anti-censorship feminist position see: V Burstyn (ed), *Women Against Censorship* (Douglas and McIntyre Ltd, Vancouver, 1985); L Segal and M McIntosh (eds), *Sex Exposed* (Virago Press, London, 1992); N Strossen, "Convergence of Feminist and Civil Liberties Principles in the Pornography Debate" (1987) 62 *New York University Law Review* 201.
103. Anti-Discrimination Board, *Submission 1* at 51.
104. The Bretheren (Universal Christian Fellowship), *Submission* at 5; Church of Scientology, *Submission* at 1; J Hollier, *Submission* at 1; Scientologists Taking Action for Non-discrimination, *Submission* (8 February 1994) 1; H Segal, *Submission* at 1; Seventh-Day Adventist Church, *Submission* at 3. However, the submission of the Seventh-Day Adventist Church argued that religious vilification should be included only "provided it is not interpreted to disallow any expression of opposition, or vehement disagreement."
105. A number of submissions also supported the inclusion of disability vilification provisions within the ADA: Disability Council of NSW, *Submission* at 3; P Jenkin, *Submission* at 3; and NSW Council for Intellectual Disability, *Submission* at 1.
106. Anti-Discrimination Board, *Submission 1* at 52.
107. In *Stutsel v Reid* (1990) 20 NSWLR 661 the Supreme Court dealt with the offensive language provisions in the *Summary Offences Act 1988* (NSW). The Court held that no evidence need be adduced to prove that there was a person who could have heard the offensive words in the public place at the relevant time.
108. *R v Ashley* (1991) 77 NTR 27 at 30. The Supreme Court of the Northern Territory held that "the public" includes "all persons who would have been clearly foreseen by an ordinary person ... to have been within the ambit of danger created by the alleged act, because their presence in the vicinity at that time might be reasonably anticipated".
109. *Kane v Church of Jesus Christ Christian Aryan Nations (No 3)* (1992) 18 CHHR 268 was a case where the display of signs, swastikas and burning crosses on the private property of one of the respondents was held to be a display "before the public" as the displays were easily visible to passers by. It was held that "public" did not necessarily mean the whole public and that it was "before the public" even though it was held on private property. "Public" was defined to mean "open to general observation, done or existing in public".
110. *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 111 ALR 671 at 685.
111. *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* at 679 citing findings of the Gregory Committee 1952 (UK).
112. [1996] EOC 92-841.
113. Mexico: *Press Act*, Art 1; and Cyprus: *Criminal Code*, s 51.



114. Cuba: *Constitution*, Art 349 and *Criminal Code*, Art 295; Bulgaria: *Constitution*, Art 35(4) and *Criminal Code*, Art 162; Denmark: *Penal Code*, Art 136(1) and 266; Germany: *Penal Code*, s 130; Ukraine: *Criminal Code*, Art 66; and USSR: *Act on Criminal Liability for State Crimes*, Art 11.
115. K Eastman, "Drafting Vilification Laws: Legal and Policy Issues" (1994) *Australian Journal of Human Rights* 285 at 290.
116. Anti-Discrimination Board, *Submission 1* at 52.
117. Australia, Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS, 1991); Australia, Royal Commission into Aboriginal Deaths in Custody, *Final Report* (AGPS, 1991) Vol 4; Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report 57, 1992.
118. ADA s 20C(1).
119. [1994] EOC 92-604. The EOT quoted with approval the Australian Broadcasting Tribunal's decision in the *Inquiry into Broadcasts by Ron Casey* (1989) 3 BR 351.
120. [1995] EOC 92-701.
121. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 4 May 1989 at 7490.
122. T Solomon, "Problems in Drafting Legislation Against Racist Activities" in (1994) 1(1) *Australian Journal of Human Rights* 265 at 284. The Canadian Supreme Court held a similar view in *Canada v Taylor* (1992) 13 CHRR 435, emphasising that the objective of the *Canadian Human Rights Act*, RSC 1985, c H-6 can only be achieved by ignoring intent.
123. [1995] EOC 92-701.
124. [1996] EOC 92-841.
125. (1989) 3 BR 351 at 357.
126. N Hennessy and P Smith, "NSW Racial Vilification Laws Five Years On" (1994) 1(1) *Australian Journal of Human Rights* 249 at 253.
127. *Nealy v Johnston* (1989) 10 CHRR 6450 at 6470.
128. ADA (Qld); *Criminal Code* (WA); and DA (ACT).
129. Canada: *Canadian Human Rights Act*, RSC 1985, c H-6, s 13; Bulgaria: *Constitution*, Art 35(4); and *Criminal Code*, Art 162; Dominica: *Nationality and Racial Offences Act*, s 6; Germany: *Penal Code*, s 130; Mexico: *Press Act*, Art 1; Netherlands: *Penal Code*, s 137.
130. "I thought the French had class. I knew they weren't too good on personal hygiene, but I thought at least they had class".
131. *R v Keegstra* [1990] 2 SCR 697 discussed in T Solomon, "Problems in Drafting Legislation Against Racist Activities" (1995) 1(1) *Australian Journal of Human Rights* 265 at 282.
132. K Eastman, "Drafting Racial Vilification Laws: Legal and Policy Issues" (1995) 1 *Australian Journal of Human Rights* 285; T Solomon, "Problems in Drafting Legislation Against Racist Activities" (1995) 1 *Australian Journal of Human Rights* 265.
133. *Thom v Associated Newspapers Ltd* (1964) 64 SR (NSW) 376 at 380.

134. RDA s 18C.
135. K Eastman, "Drafting Racial Vilification Laws: Legal and Policy Issues" (1995) 1 *Australian Journal of Human Rights* 285; T Solomon, "Problems in Drafting Legislation Against Racist Activities" (1995) 1 *Australian Journal of Human Rights* 265.
136. Radio Program Standard (RPS) 3 and Television Program Standard (TPS) 2.
137. *Defamation Act 1974* (NSW) Pt 3, Div 3.
138. M Thornton, *The Liberal Promise* (Oxford University Press, 1990) at 50. Thornton provides the following example: "... the well publicised views of the prominent academic historian, Professor Geoffrey Blainey, on Asian immigration in 1984 notably increased the extent of racist discourse in Australian society. Blainey's own book, *All for Australia* encapsulated his views in an acceptable academic form, which would effectively bring him within the protection of the New South Wales exception".
139. K Eastman, "Drafting Vilification Laws: Legal and Policy Issues (1995) 1(1) *Australian Journal of Human Rights* 285 at 292.
140. S Akmeemana and M Jones, "Fighting Racial Hatred" in Australia, Race Discrimination Commissioner, *Race Discrimination Act 1975: A Review* (AGPS, Canberra, 1995) at 171.
141. However see discussion above at para 7.61.
142. ADA s 20D.
143. Information supplied by the ADB (17 September 1998).
144. Samios Report, Recommendation 10.
145. Australia, Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS, Canberra, 1991) at 69ff.
146. This terminology was probably borrowed from the *Race Relations Act 1976* (UK) s 2 where victimisation is treated as a form of discrimination: *Metwally v University of Wollongong* [1984] EOC 92-030 at 75,554 per Barbour J.
147. *Bogie v University of Western Sydney* [1990] EOC 92-313 at 78,145.
148. See Chapter 3 at para 3.57.
149. *Shaikh v Commissioner, NSW Fire Brigades* [1996] EOC 92-808 at 78, 986; *Bailey v Australian National University* [1995] EOC 92-744 at 78,553.
150. *Bhattacharya v Department of Public Works* [1984] EOC 92-117 at 76, 133; *Bogie v The University of Western Sydney* [1990] EOC 92-313.
151. *Shaikh v Commissioner, NSW Fire Brigades* [1996] EOC 92-808 at 78, 986.
152. See EOA (WA) s 67(1); ADA (Qld) s 130; EOA (Vic) s 97(1); SDA (Tas) s 18(2); ADA (NT) s 23(2); SDA s 94(2); RDA s 27(2); and DDA s 42(2).
153. *Bhattacharya v Department of Public Works* [1984] EOC 92-117.
154. See for example: *Reddrop v Boehringer Ingleheim Pty Ltd* [1984] EOC 92-031; *Waterhouse v Bell* [1991] EOC 92-376.

155. *Shaikh v Commissioner, NSW Fire Brigades* [1996] EOC 92-808 at 78, 986. See also *Lyon v Godley* [1990] EOC 92-287 in relation to the application of a similar provision (s 5) to the victimisation provision in the EOA (WA) and similarly, *Bailey v Australian National University* [1995] EOC 92-744 in relation to the SDA.
156. *O'Callaghan v Loder* [1984] EOC 92-023 at 75,499. See also *Reddrop v Boehringer Ingleheim Pty Ltd* [1984] EOC 92-031 at 75, 569.
157. *Shaikh v Commissioner, NSW Fire Brigades* [1996] EOC 92-808 at 78, 986 per King J, citing Clarke JA in *Waterhouse v Bell* (1991) 25 NSWLR 99.
158. EOA (WA) s 67(3); and ADA (Qld) s 131.
159. ADA s 50(2).
160. ADA s 109.
161. EOA (SA) s 86(3).
162. *R v Sex Discrimination Board: Ex parte Koh* [1986] EOC 92-175 (SA SC).
163. *Walker v Radio Cabs of Wollongong Co-operative Society Ltd* [1988] EOC 92-240; *Harrison v Department of Technical and Further Education* [1992] EOC 92-429; *Bevacqua v Klinkert & Ors* [1993] EOC 92-515 (Vic); *Shaikh v Commissioner, NSW Fire Brigades* [1996] EOC 92-808.
164. *Bogie v University of Wollongong* [1990] EOC 92-313 at 78,145.
165. *Walker v Radio Cabs of Wollongong Co-operative Society Ltd* [1988] EOC 92-240.
166. SDA s 94(1); RDA s 27(2); DDA s 42(1); and ADA (Qld) s 129. Complaints of victimisation may also be brought under these laws.
167. Information supplied by Ms Merryl Lees, Legal Officer, Human Rights and Equal Opportunity Commission (2 February 1997).
168. See NSW Bar Association, *Submission*.
169. Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (Canberra, 1992) (the "Lavarch Report") at 234.
170. In 1992, s 47A was inserted in the SDA. Essentially it allows inquiries and civil proceedings to be commenced in respect of complaints of victimisation. Similarly s 19A was inserted in the RDA.
171. *Shaikh v Commissioner, NSW Fire Brigades* [1996] EOC 92-808. See also *Edwards v Council of the Municipality of Kogarah* [1995] EOC 92-664 where the complainants were awarded \$15,000 each for victimisation; and *Harrison v Department of Technical and Further Education* [1992] EOC 92-429.
172. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 26 November 1982 at 3642.
173. Anti-Discrimination Board, *Submission 1* Attachment 3 at 18; NSW Ministry for the Status and Advancement of Women, *Submission* at 18; and NSW Women's Advisory Council, *Submission* at 1. See also Law Society of NSW, *Submission* at 6; and NSW Independent Teacher's Association, *Submission* at 4. See also protests of Women's Electoral Lobby reported in A Harvey, "Movie Poster Has Lobby Group Up in Arms" *Sydney Morning Herald* (10 February 1997) at 2.

174. DP 30 at 120-121.
175. Law Society of NSW, *Submission* at 6; Ministry for the Advancement and Status of Women, *Submission* at 26; and NSW Independent Teachers' Association, *Submission* at 4. However, the NSW Women's Advisory Council, *Submission* at 1 argued that education and industry codes of practice are a more effective means of dealing with the problem of discriminatory advertising than prohibition.
176. Advertisements which vilify may be dealt with as a complaint of vilification to the ADB. Alternatively, complaints can be brought to the relevant industry council alleging a breach the industry code of ethics, most of which contain provisions that advertisers should comply with anti-discrimination laws.
177. New South Wales, Anti-Discrimination Board, *Annual Report 1993* and *Annual Report 1995*.
178. ADA s 52.
179. ADA s 53.
180. It is important to note that the inclusion of the word "permit" in s 52 suggests that in certain situations there may be a positive obligation to prevent others from engaging in discriminatory conduct.
181. *Anti-Discrimination (Amendment) Act 1994* (NSW).
182. In 1997 the ADA was amended to attach liability directly to fellow employees in relation to sexual harassment alone. See *Anti-Discrimination Amendment Act 1997* (NSW) inserting Pt 2A into the ADA.
183. The same argument was made in relation to educational authorities.
184. (1987) 8 NSWLR 442.
185. ADA s 31A.
186. *Leves v Haines* at 76,624.
187. ADA s 31A.
188. [1988] EOC 92-229.
189. In *Hill v Water Resources Commission* [1985] EOC 92-127 it had been held that an employer could be directly liable for failure to provide.
190. *M v R Pty Ltd* [1988] EOC 92-229, at 77,174.
191. Anti-Discrimination Board, *Submission 1* at 109.
192. *Anti-Discrimination (Amendment) Act 1994* (NSW), emphasis added.
193. ADA s 53(2).
194. *Anti-Discrimination (Amendment) Act 1994* (NSW). The previous s 52 had provided that "[w]here a person causes, instructs, induces, aids or permits another person to do an act that is unlawful by reason of this Act, they both shall be subject, jointly and severally, to any liability arising under this Act in respect of the doing of that act".

195. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 4 May 1994, the Hon J Hannaford at 1831.
196. *Anti-Discrimination Amendment Act 1997* (NSW).
197. ADA s 53(3).
198. ADA s 53(4).
199. SDA s 105.
200. SDA s 106.
201. SDA s 106(2).
202. RDA s 17.
203. DDA s 43.
204. DDA s 122.
205. DDA s 123. This provision specifically provides that if, for the purposes of the ADA, it is necessary to establish the state of mind of a person or a body corporate, it is sufficient to establish that a director, servant or agent of the person or body corporate had the requisite state of mind.
206. See EOA (Vic) s 98, 99, 102 and 103; ADA (Qld) s 122, 123 and 133; EOA (SA) s 90 and 91; EOA (WA) s 160-162; DA (ACT) s 108H and 108I; and ADA (NT) s 27.
207. EOA (Vic) s 103; ADA (Qld) s 133(2); EOA (SA) s 91(3); EOA (WA) s 161(2); and DA (ACT) s 108I(3).
208. SDA (Tas) s 73.
209. SDA (Tas) s 73(2).
210. SDA (Tas) s 20.
211. *Anti-Discrimination Amendment Act 1997* (NSW).
212. SDA s 106(2); and RDA s 18A(2) and 18E(2).
213. DDA s 123(4).
214. EOA (Vic) s 103; ADA (Qld) s 133(2); EOA (SA) s 91(3); EOA (WA) s 161(2); and DA (ACT) s 108I(3): "reasonable precautions".
215. [1988] EOC 92-229.
216. *M v R* at 77,174.
217. *M v R* at 77,174-77,175.
218. [1995] EOC 92-674.
219. *Moloney v Golden Ponds* at 78,142.
220. [1996] EOC 92-856.

221. [1993] EOC 515.
222. [1994] EOC 92-576.
223. EOA (Vic) s 102; and ADA (Qld) s 133(1). Compare this to the EOA (SA) which provides that a principal or employer is “vicariously liable” for the discriminatory acts of their agent or employee unless the defence of “reasonable diligence” is made out, in which case the agent or employee is liable for those acts: EOA (SA) s 91.
224. *Employees Liability Act 1991* (NSW) s 3.
225. [1957] AC 555.
226. See New South Wales Law Reform Commission, *Contribution Between Persons Liable for the Same Damage* (Discussion Paper 38, 1997) at para 4.18.
227. ADA s 53(3).
228. [1984] EOC 92-022.
229. *O’Callaghan v Loder* at 75,493-75,494.
230. [1988] EOC 92-229.
231. *Murphy v Rasmus Pty Ltd* [1989] EOC 92-308; *Moloney v Golden Ponds Corporation Pty Ltd* [1995] EOC 92-674; *Hawkins v Malnet* [1995] EOC 92-767; and *Adams v Helios Electroheat Pty Ltd* [1996] EOC 92-856.
232. *Hill v Water Resources Commission* [1985] EOC 92-127; *M v R Pty Ltd* [1988] EOC 92-229; *Moloney v Golden Ponds Pty Ltd* [1995] EOC 92-674; and *Hawkins v Malnet* [1995] EOC 92-767.
233. See *Commonwealth v Interovigne* (1982) 150 CLR 258.
234. *M v R* at 77,175.
235. ADA s 22B(2).
236. [1997] EOC 92-891.
237. SDA s 105.
238. *Sutton* at 77,280, emphasis added. Section 106 is the vicarious liability provision in the SDA and s 105 is the aiding and abetting provision.
239. *Sutton* at 77,280. It does not appear from the report that the recent NSW authorities were drawn to the Commissioner’s attention.
240. [1985] EOC 92-127.
241. [1995] EOC 92-674.
242. *Moloney v Golden Ponds* at 78,142.
243. [1989] EOC 92-030.
244. (1996) 70 FCR 16.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 8. The Complaint Process

#### INTRODUCTION

8.1 The five preceding chapters of the report have dealt with a range of issues concerning the definition of what conduct is proscribed by the *Anti-Discrimination Act 1977* (NSW) ("ADA"). The present chapter and the two which follow are concerned with procedures available to prevent or remedy unlawful discrimination. For these purposes, the ADA establishes two public bodies and it confers particular powers and functions on them. These two bodies are currently known as the Anti-Discrimination Board ("ADB")<sup>1</sup> and the Equal Opportunity Division ("EO Division") of the Administrative Decisions Tribunal ("ADT").<sup>2</sup> Prior to the enactment of the *Administrative Decisions Tribunal Act 1997* (NSW), equal opportunity disputes were heard in the Equal Opportunity Tribunal ("EOT"). The following discussion will refer to the EOT and the EO Division of the ADT as "the Tribunal" unless specific reference to one or the other is necessary.

8.2 The functions of the Tribunal are more limited than those of the ADB: its basic role is to hear disputed claims about unlawful discrimination; determine whether such unlawful conduct has occurred; and, where a complaint of unlawful conduct is upheld, provide a remedy. The powers and functions of the Tribunal are discussed in Chapter Nine and the remedies available from the Tribunal are separately discussed in Chapter Ten.

8.3 The present chapter is concerned with the powers and functions of the ADB. The ADB is established by Part 8 of the ADA, which deals with largely formal matters. Those matters will not be addressed in this chapter. However, it should be noted that Part 8 provides that the ADB shall have a full-time member known as the President. The President has important functions conferred by Part 9 which will be addressed below. The ADB also has officers and employees to enable both it and the President to carry out their functions.<sup>3</sup> Those officers are employed under the *Public Sector Management Act 1988* (NSW).

8.4 The general functions of the ADB include carrying out research, disseminating information, consulting across the community generally and reviewing laws of the State.<sup>4</sup> These functions will also include educational and advisory roles which may have significant effects in preventing or limiting unlawful discrimination. These matters are not, however, dealt with in this chapter. Rather, the Commission focuses on the various aspects of the ADA's enforcement process. This chapter will consider the ADB's current approach to complaint resolution and evaluate the effectiveness of its mechanisms in meeting its stated aims. In so doing, this chapter also canvasses the issue of self-initiated public enforcement as a possible new strategy for the ADB. The Commission has not sought to embark on an inquiry into the administration and operation of the ADB, nor of other bodies and offices established under the ADA. Rather, it has focused on the process and procedures set out in the ADA for dealing with complaints.

8.5 In general terms, the complaint handling function of the ADB is vested in the President. Accordingly, the ensuing parts of this chapter will deal almost exclusively with the powers of the President. However, it should be appreciated that the President will not personally be responsible for carrying out the various functions conferred by the ADA; rather, those functions will be exercised by a delegate.<sup>5</sup> On the other hand, certain functions are not capable of delegation and must ultimately be exercised by the President. It will be necessary in due course to consider the extent to which delegation is properly permitted under the ADA, particularly in relation to any new functions which may be recommended by the Commission.

#### COMPLAINT HANDLING PROCESS

8.6 Since the EOT was constituted as a separate body in 1981,<sup>6</sup> the role of the ADB has not extended to the "quasi-judicial" function of resolving disputed claims. The ADB or, more accurately, the

President presently performs a screening role which depends upon the lodgement of complaints, their investigation and attempted conciliation. Only if conciliation fails is a complaint referred to the Tribunal.

8.7 For ease of discussion, this process has been divided into five stages:

lodgement of a complaint;

investigation;

conciliation;

termination of the complaint; and

referral to the Tribunal.

8.8 Finally, the chapter considers whether, and in what circumstances, it may be appropriate to allow a complainant to bypass the processes of the ADB and the President.

8.9 Submissions received in response to *Review of the Anti-Discrimination Act 1977 (NSW)* ("DP 30")<sup>7</sup> and the findings of the empirical research conducted on behalf of the Commission,<sup>8</sup> raised a number of concerns in relation to this process. Particular concerns raised included the following:

the procedures for handling complaints are not clear;

the ADB is perceived to be biased in favour of complainants;

there is a lack of support for persons wishing to lodge complaints;

the existing representative action procedure is rarely used because of the inordinately onerous requirements that must be satisfied in order to lodge a successful claim; and

persistent delays at the ADB drive many people to pursue other, less preferable, fora,<sup>9</sup> accept less than satisfactory offers of settlement or simply abandon valid complaints.<sup>10</sup>

8.10 The ensuing sections of this chapter seek to address these matters insofar as they can properly be dealt with in a review of the legislation. A further problem, namely the inability of the individual complaints mechanism to identify and address systemic discrimination adequately and the need for a public enforcement strategy, is dealt with as a separate issue.<sup>11</sup>

## **LODGEMENT**

8.11 The ADA states that a complaint alleging a breach of the ADA must be made in writing to the President of the ADB and should be made within six months of the occurrence of the alleged conduct.<sup>12</sup> Although this is technically the first stage of the ADB's complaints handling process, many people first contact an officer of the ADB by telephone or letter, or visit the ADB with inquiries about possible discrimination. Information provided by the ADB's inquiries service on available options may help people to resolve problems without proceeding to make a formal complaint.

### **Who can lodge a complaint?**

8.12 There is no doubt that a person who has suffered loss, or who has otherwise been personally affected by allegedly unlawful conduct may lodge a complaint of discrimination with the President.<sup>13</sup> It is also clear that such a person can lodge a complaint not only on his or her own behalf, but also on behalf of another person or other persons.<sup>14</sup> The ADA also provides for joint complaints to be made by more than one person.<sup>15</sup> However, it is not clear that a complaint may only be lodged by or on behalf of a person personally affected by the conduct complained of. The terms of s 88 do not refer to "an aggrieved person"<sup>16</sup> or a person who claims that another person has contravened a provision of the



ADA “in relation to” the first person.<sup>17</sup> In other words, s 88 is, arguably, an open standing provision. So far as the Commission is aware it has, however, never been used as such and there does not appear to be any case which discusses this issue.

8.13 If this is the correct interpretation of s 88, it raises an important issue of policy. If it is not the case, it is nevertheless necessary to consider whether the right to lodge a complaint should be vested in any person or limited to persons having a particular interest in the conduct complained of.

8.14 There are arguments in favour of granting “open standing” in circumstances where contraventions of law involve matters of at least potential public interest or matters going beyond the interests of particular individuals who may be affected. The policy is reflected at the Federal level in the consumer protection provisions of the *Trade Practices Act 1974* (Cth).<sup>18</sup> At the State level it is reflected in the *Environmental Planning and Assessment Act 1979* (NSW).<sup>19</sup> Open standing provisions have been opposed from time to time by those who argue that they tend to open a floodgate to litigation or allow for officious intermeddling by third persons who are not directly affected by the conduct in question.

8.15 The fact that this issue appears not to have given rise to any concern in anti-discrimination law in New South Wales, despite the possibility that s 88 is itself an open standing provision, suggests that the floodgate argument, generally discredited in other jurisdictions, carries little weight. Similarly, it is unlikely that persons with no interest in a matter will incur the costs and trouble of invoking the legal process inappropriately. Further, if that fear were to be realised, there should be (and are) appropriate remedies available to prevent prejudice to other persons.

8.16 Two other factors are of particular importance in relation to the use of the ADA. First, there is currently no power which would allow a person to institute proceedings, as opposed to making a complaint to the President of the Board. There is thus a universally applicable screen which applies to discrimination complaints. Secondly, as will appear in a later section of this chapter, the Commission is seriously concerned that an individual complaints based enforcement system has not proven adequate in dealing with some aspects of discrimination, especially systemic discrimination. The Commission proposes giving general power to the President to institute proceedings. Where such powers are vested in regulatory authorities, there is usually a reasonable case for including generally available private enforcement mechanisms. So long as there are appropriate protections against abuse, public enforcement will often be ineffective to some extent because of the limits on public resources available to the authority concerned. The opportunity for private enforcement provides a legitimate alternative.

8.17 Finally, as will be noted below, the current ability for a “representative body” to complain on behalf of others means that most elements of open standing are also available under the ADA through that mechanism.

8.18 Accordingly, the Commission does not consider it necessary to restrict the class of persons who may complain under the ADA to those who are personally affected or aggrieved by conduct which is said to be in contravention of the Act.

### **Lodgement by agents**

8.19 Subject to specific provisions in relation to persons under 18 years of age, and people with disabilities, there is no specific provision which allows for a complaint to be lodged by an agent of a complainant. For reasons set out in the next section, the Commission is satisfied that the ADA appropriately requires that a complaint be in writing. There is in fact no requirement that the document be signed by the complainant, so long as it is “lodged” by him or her. In practice, such documents are signed by the person making the complaint. However, there seems no reason in principle why the document could not be signed by a lawyer as the legal representative of the complainant.

8.20 A question considered by the Commission is whether it is appropriate to permit any agent to sign a complaint on behalf of another person. On balance, the Commission does not consider that such a broad principle should be accepted. The complaint is a formal document which effects the

commencement of a legal process of inquiry and investigation and may possibly lead to a tribunal hearing. Except in circumstances where a complainant lacks capacity or suffers from a particular disability, the Commission considers that a written complaint should be signed by the complainant or by his or her lawyer. Generally speaking, lawyers are a professional group who, by training and by professional regulation, are the appropriate people to act for others in relation to the processes of the law. In areas of taxation, accountancy and real estate, there are other professional groups who often perform functions interchangeably with lawyers. However, there is no such group playing a significant role in relation to discrimination complaints. A significant number of complaints are made after an individual obtains advice from a solicitor, a community legal centre, legal aid authority or other community organisation. Even in those cases, it is common practice for the complaint to be signed by the complainant personally. Indeed that may happen in circumstances where the complaint has been reduced to writing by, or with the assistance of an officer of the ADB. Cases of disability aside, a complaint not signed by an individual personally, should be signed by his or her lawyer. Further, a lawyer should only be able to take such a step on behalf of another person (the client) where the client is or may be affected by the conduct complained of.

### **Recommendation 101**

#### **A complaint may be lodged by a legal practitioner on behalf of a complainant.**

**Draft Anti-Discrimination Bill 1999: cl 94(4)**

### **Representative complaints**

8.21 The ADA has always allowed a complaint to be made in representative form, that is, not only on behalf of the individual concerned, but also on behalf of "other persons".<sup>20</sup> However, there has always been some doubt as to how the former Counsellor or the present President should deal with such a complaint. It is not technically a "representative complaint", as defined in s 87 of the ADA, until it has been treated as such by the Tribunal. That some significant representative complaints have been satisfactorily resolved prior to referral to the Tribunal demonstrates that, at least in some cases, a pragmatic approach reflecting the spirit, if not the letter, of the ADA has been followed. This is entirely admirable; nevertheless, it is clear that the ADA should cater appropriately for the handling of representative complaints before referral to the Tribunal and a determination on such a preliminary matter by the Tribunal.<sup>21</sup>

8.22 In the past, it has been necessary to determine whether a complaint is a representative complaint or not, at least at the Tribunal hearing stage, because the ADA has precluded an award of damages to the complainant where the inquiry is held in respect of a representative complaint.<sup>22</sup> This somewhat arbitrary and inflexible rule should be removed and, if the Commission's recommendations in that regard<sup>23</sup> are followed, this particular difficulty will be avoided. It is nevertheless highly desirable that both the complainant and the respondent should be on notice as to whether the President is dealing with the complaint as a representative complainant or otherwise. Accordingly, it is appropriate to require the President to make a determination at an early stage of the investigation.

8.23 It is important to make an early determination because there are a number of factors which are relevant in relation to representative complaints which do not necessarily apply in relation to individual complaints. For example, a representative complaint may be brought on behalf of a number of people who have not individually consented to the commencement of the legal process, nor appointed the representative as their agent. Such a course has particular relevance and applicability in relation to contraventions of the ADA.<sup>24</sup> But it is necessary as in relation to class actions and representative proceedings generally in courts, to provide sufficient safeguards to protect the interests of absent class members.<sup>25</sup>

8.24 There are, two particular matters which need to be dealt with in relation to the process before the President. The first matter concerns the standing of the complainant. In that regard, under the ADA<sup>26</sup> the Tribunal is required to satisfy itself that:

the complainant is a member of a class of persons, the members of which class have been affected or may reasonably be likely to be affected by the conduct of the respondent.<sup>27</sup>

8.25 In other words, a representative complaint cannot be made by or on behalf of persons who have no particular legal interest in the subject matter of the complaint. The Commission is satisfied that this is an appropriate pre-condition for a representative complaint and one which should be incorporated into a provision specifying the circumstances in which a representative complaint may be made.

8.26 Secondly, it is necessary to give consideration to the settlement or other termination of a representative complaint prior to referral to the Tribunal. The issues which arise include the extent to which class members are given notice of the existence of the proceeding and the extent to which they are bound by any settlement or other form of agreement between the complainant and the respondent. There are two means of dealing with these problems in the absence of a complex procedure designed to protect the interests of absent class members. First, reliance can be placed upon the discretion and independence of the President not to permit a result which appears not to be in the interests of class members generally. Secondly, the procedures considered appropriate in relation to Tribunal proceedings can be imposed by requiring that any settlement or agreement in relation to a representative complaint shall not be binding upon absent class members unless the matter has been referred to the Tribunal to be dealt with as it considers appropriate. The Commission prefers the latter course, which will be discussed in more detail in the next chapter.

#### **Recommendation 102**

**A person who is a member of a class affected (or likely to be affected) by the conduct of the respondent should be able to lodge a representative complaint.**

Draft Anti-Discrimination Bill 1999: cl 95

**In relation to such a representative complaint, any settlement or resolution should only be binding upon the class members if the matter has been approved by the Tribunal.**

Draft Anti-Discrimination Bill 1999: cl 117(2)

#### **Complaint by a representative body**

8.27 In addition to individual complaints and representative complaints, there is also express reference in the ADA to a complaint lodged "by a representative body on behalf of a named person or named persons".<sup>28</sup> A "representative body" is defined in s 87 of the ADA, as a body:

(whether incorporated or unincorporated) which represents or purports to represent:

- (a) a group of people within New South Wales; or
- (b) a group of people within New South Wales on the basis of their homosexuality,

(whether or not the body is authorised to do so by the group concerned) and which has as its primary object the promotion of interests and welfare of the group.

### ***Historical background of “representative body” provisions***

8.28 The principle which underlay the ADA when it was enacted in 1977 was that a complaint should be lodged by a person who was aggrieved by the conduct complained of. This was not intended to be an “open standing” provision, but reflected the principal purpose of the ADA, which was to provide individual redress to the victims of discrimination.

8.29 The ADA provided that a representative complaint could be made by an aggrieved person on behalf of others who were, or might become, victims of unlawful discrimination.<sup>29</sup> In 1989 the ADA was amended to provide that a racial vilification complaint could be made on behalf of a member of the racial group concerned or by a “representative body” which represented or purported to represent a racial group.<sup>30</sup> This provision was extended when homosexual vilification was proscribed.<sup>31</sup> In 1994, the provision for a complaint to be lodged by a “representative body” was generalised, so as to apply to all forms of complaint under the ADA and without limitation on the nature of the body, other than to require that the body have as its primary object “the promotion of the interests and welfare of the group”.

8.30 The purpose of this amendment is not fully revealed by the Second Reading Speech which accompanied the Bill. The then Attorney General, the Hon J P Hannaford, speaking on the introduction of the Bill into the Legislative Council, said:

At present, section 88(1) of the Act deals with the making of complaints and provides that a person can lodge a complaint on behalf of himself and other persons. It does not allow a person to lodge a complaint on behalf of another if that first person is not affected by the alleged discrimination. The amendments broadly reflect the principle of a “next friend” acting on behalf of an aggrieved individual and will include bodies such as community and ethnic organisations. A similar provision already exists for racial vilification complaints and complaints lodged on the ground of intellectual impairment. The amendments will also enable complaints to be made on behalf of a person with a disability where that person, the parent or guardian or any other person who the President of the Board considers has a genuine concern for the person’s welfare consents.<sup>32</sup>

8.31 In the Commission’s view, it is appropriate to distinguish the cases of a person under a disability and a person of full legal capacity. In relation to the latter, the Commission does not believe it appropriate for complaints to be lodged on behalf of an aggrieved person except in circumstances where representative proceedings might appropriately be taken by a third person. In particular, there is a real basis for concern that proceedings might be brought in the name of someone (albeit with their consent) by a body which may itself have an interest, though not necessarily the same interest as that of the aggrieved person. The opportunity for a conflict of interests is real. Further, if the matter were to proceed to the Tribunal or a court, there would need to be (and presently are not) appropriate procedures in place to allow for orders to be made, appeals taken and other steps followed by the representative body, which may itself not be a legal entity.

8.32 The original provisions in the ADA allowed for such steps to be taken by a trade union, now identified as an industrial organisation. Such a body traditionally has the function of representing its members in employment situations. The Commission accepts that a trade union or industrial organisation may properly be accepted as the representative of its members, although its powers should be limited to complaints relating to employment.

8.33 In relation to vilification complaints, a different procedure is appropriate. The purpose of such complaints is not individual relief, but rather the prevention or deterrence of what has sometimes been loosely described as “group defamation”. Thus, where a particular group has been vilified, it is appropriate that any complaint be brought by a body which has as its primary function the protection of the interests of group members. In such circumstances, there may be positive benefits in not requiring an individual to bring proceedings in his or her own name. Accordingly, the Commission considers that the lodgement of complaints by representative bodies be restricted to vilification complaints.

### ***Persons requiring assistance***

8.34 The Act presently makes specific reference to the lodgement of complaints by persons under 18 years of age and people with a disability. Section 88(2) provides that a complaint may be lodged on behalf of such a person by another person but only if two conditions are satisfied, namely:

- (a) the President is satisfied that the person on whose behalf the complaint is to be lodged consents to the complaint being lodged on his or her behalf by the other person; and
- (b) in the case of a complaint to be lodged on behalf of a person (whether or not a person who has a disability) who is under the age of 18 years, the other person who is to lodge the complaint is, or does so with the consent of, the person's parent or guardian.

8.35 These provisions have resulted from a number of amendments over the years and the ultimate purpose sought to be attained is unclear. In *Haines v Leves*<sup>33</sup> the Court of Appeal held that a complainant before the EOT, who was 14 years of age at the time of lodging her complaint, had the necessary capacity to pursue her complaint without the interposition of a next friend. As s 88(2) is permissive, it would not appear to derogate from that principle and, accordingly, a person with the capacity to understand the nature of other steps being taken, should be able and entitled to lodge a complaint without the assistance of a third person. If the provision is meant to cater for cases where a child is too young to understand the nature of the proceeding or a person suffers from an intellectual disability which precludes the giving of informed consent, then s 88(2) will have no operation. The first of the two cumulative conditions requires that the person on whose behalf the complaint is to be lodged "consents". Furthermore, where the person concerned is under 18 years of age, not only must he or she consent, but so must the relevant parent or guardian.

8.36 The Commission considers that the proper function of s 88(2) is to cater for the child or person with a disability, who is not able to give informed consent and who should, in principle, have a guardian or next friend acting on his or her behalf. In such a case, the consent of the person on whose behalf the complaint is lodged is conceptually inappropriate. In these circumstances, the next friend or guardian will be the person having effective carriage of the proceedings on behalf of the complainant. That person can, but need not, be a solicitor.

8.37 The remaining question is whether it is appropriate to provide for a complaint to be lodged by any person in circumstances where the complainant has a physical disability which precludes the lodgement of a complaint, but not the intellectual ability to comprehend the action. Under the proposals so far considered, such a person would be required to seek assistance from a lawyer. However, people with physical disabilities obtain support and advocacy services from various groups within the community which generally act independently of lawyers. In the case of persons with such disabilities, it is appropriate that they be able to choose the assistance they require from those to whom they are accustomed. Accordingly, a complaint should be able to be made by them through a person authorised by them to act on their behalf.<sup>34</sup>

8.38 Finally, although not limited to such circumstances, the Commission considers that the President (or an officer of the ADB) should also be required to provide assistance to persons seeking to formulate a complaint of unlawful conduct under the ADA. A general provision to this effect will give statutory support for a practice which currently operates.<sup>35</sup>

### **Recommendation 103**

**A complaint may be lodged by a parent or guardian on behalf of a child or other person who lacks the capacity to give informed consent. Consent of the child or disabled person is not to be required.**

**Recommendation 104**

**In the case of a disabled person who does have the capacity to give informed consent, a complaint may be lodged on behalf of that person, by an agent who may be, but need not be a lawyer.**

Draft Anti-Discrimination Bill 1999: cl 94(6)

**Form of complaint**

8.39 The ADA presently requires that a complaint be in writing.<sup>36</sup>

8.40 The complaint is the document which identifies a contravention of the law. It sets in motion a process which, if not resolved before the ADB, will involve a judicial hearing. The content of the complaint must be answered by the respondent and principles of procedural fairness require that the content be specified with a reasonable degree of precision. Indeed, it is the “complaint” which is referred to the Tribunal for a hearing.

8.41 The Commission is satisfied that the lodgement of a complaint should involve the preparation and signing of a written document. It is important that the procedures available under the ADA be capable of use by all sections of the community, including those who are likely to be disadvantaged in various ways, without the need to resort to professional legal assistance. If assistance is required in relation to the formulation of a complaint, such assistance should be available from the officers of the ADB. An obligation to provide such assistance is included in other legislation<sup>37</sup> and, while the Commission understands that in practice assistance is given by officers of the ADB, it considers that an explicit obligation to provide such assistance should be included in the ADA.

8.42 If a complainant has a legal practitioner acting in relation to the matter, there is no reason why the complaint cannot be signed by the legal practitioner. It is also necessary to cater for circumstances where a complainant, as a result of a disability, is not physically able to prepare and sign the document. In such circumstances, the document may be signed by an agent for the disabled person (including, but not necessarily, a solicitor). Thus, while an oral complaint will not constitute a valid complaint, an oral complaint reduced to writing by an agent and signed by the complainant will constitute a valid complaint.

**Recommendation 105**

**The President (or an officer of the ADB) should be required, if requested, to assist a complainant in formulating his or her complaint.**

Draft Anti-Discrimination Bill 1999: cl 96

**Content of complaint**

8.43 The ADA presently requires no more than that the complaint identify a contravention of the Act. That can be done in one of two ways: first, it may be sufficient to identify conduct which may involve a contravention such as:

I used to be employed by X company. On 6 December the manager told me I was fired because there were too many women working for the company.

8.44 Such a statement would identify a potential respondent and the conduct complained of with sufficient precision. There is no reference to the ADA or a contravention of any particular provision of the

Act: as a trigger to an investigation, this statement would appear to be sufficient. If, on the other hand, the complainant had stated:

On 6 December my employer terminated my employment in contravention of section 25 of the Anti-Discrimination Act

that too would constitute a valid complaint.

8.45 The lodgement of the complaint is intended to trigger a process, which will include investigation by the President. It is both inevitable and desirable that the precise matters of complaint will be refined, clarified and possibly altered in scope as a result of such an investigation. No useful purpose is to be served by requiring that the terms of the investigation and the scope of any referral to the Tribunal should be unalterably frozen by the terms of the original complaint. Until recently, both the President and the parties adopted a pragmatic approach to such matters. In part this was no doubt because a complainant could at any time during an investigation or conciliation simply lodge a further document formally taking into account the new material uncovered by the investigation. Doubt was, however, cast upon this approach by a decision of the EOT in 1996 which required that "the matter required to found jurisdiction must be found within the walls of the complaint itself".<sup>38</sup> The EOT further held:

It is not to the point in the view of the Tribunal that the complainants formally claim that there had been discrimination on the grounds of age. What was required was a statement of facts or particulars showing prima facie how such a claim could arise.

8.46 The complaint in that case had alleged with precision the conduct complained of and the persons responsible for the conduct, and asserted that the conduct constituted discrimination on the ground of age, contrary to the ADA. The case involved difficult issues concerning the application of the age discrimination provisions and whether it was discriminatory on the ground of age to provide disproportionate benefits to current employees as compared with past employees who had, for the most part, retired from employment.

8.47 The approach adopted by the EOT in that case did not further the policies underlying the ADA. Accordingly, the ADA should expressly provide both that the complainant need not establish a prima facie case, nor indeed specify details as to the manner in which the allegations are said to fall within the ADA. Secondly, where a complaint is ultimately referred to the Tribunal, subject to requirements of procedural fairness, it should be treated as including all matters which have been the subject of investigation by the President prior to the referral, which could properly form the basis of a complaint under the ADA, and which are referred by the President to the Tribunal.

#### **Recommendation 106**

**A complainant need not establish a prima facie case in his or her original letter of complaint.**

Draft Anti-Discrimination Bill 1999: cl 93

**A complaint as referred to the Tribunal should be defined as the original letter of complaint and any supporting documentation referred by the President to the Tribunal.**

Draft Anti-Discrimination Bill 1999: cl 116(10)

#### **Time for lodgement of complaint**

8.48 Currently, a complaint must be lodged with the ADB within six months of the occurrence of the alleged discriminatory conduct.<sup>39</sup> However, the President may accept a late complaint if good cause is shown.<sup>40</sup>

8.49 Where the allegedly unlawful conduct relates to a series of discriminatory acts, the EOT has held that a complaint is in time if it is lodged within six months of the last of the acts occurring.<sup>41</sup> The Commission believes that the ADA should be amended to reflect this decision. Although time should run from the termination of a course of conduct, there should be no constraint on lodgement of a complaint before that conduct ceases.<sup>42</sup>

8.50 Further, the six month statutory limitation period is inadequate, as some victims of discrimination may not be aware of their rights under the ADA or feel able to confront the perpetrator within such a short time of the alleged unlawful incident. Some may have been advised to pursue a claim in another jurisdiction first. The majority of the submissions received supported extending the limitation period to 12 months.<sup>43</sup> Extending the time limit would reduce a source of delay in the complaint resolution process<sup>44</sup> and would promote uniformity with Federal laws and more recent State legislation, which provide for a 12 month statutory limitation period.<sup>45</sup>

8.51 The Commission has considered whether it is appropriate to have a special limitation period for complaints of discrimination under the ADA. An alternative approach would simply be to apply the same limitation period as applies in relation to common law torts.

8.52 Subject to a broad discretion vested in the President to allow complaints to be lodged outside the specified period, the Commission is satisfied that a relatively short period should be identified. The justifications for this approach are as follows. First, there is little doubt that the statutory causes of action provided under the ADA are generally accepted to be an extension of the common law. Accordingly, the approach applicable to common law torts is not necessarily applicable under the ADA. Secondly, the ADA provides a mechanism for resolution of complaints which places emphasis on conciliation. It is consistent with this policy that complaints be brought promptly. Thirdly, there is no doubt that a large proportion of complaints give rise to relatively small claims for compensation.

8.53 As a practical matter, since similar considerations appear to have been accepted in other Australian jurisdictions, the Commission is satisfied that, subject to the possibility of obtaining an extension of time if good cause is shown, a complaint should be lodged within 12 months of the conduct complained of.

#### **Recommendation 107**

**Subject to a discretion to extend the time limit where good cause is shown, a complaint should be lodged within 12 months of the relevant conduct. Where there has been a course of conduct, the limitation period should run from the time of the termination of the conduct.**

Draft Anti-Discrimination Bill 1999: cl 98(3)

#### ***Showing good cause***

8.54 Although complaints now lodged within 12 months of the alleged discrimination are generally accepted, the ADB must, in each case, initiate a long and onerous process to assess whether the complaint should be accepted out of time. The complainant is required to show cause to the President. In *McAuliffe v Puplick*,<sup>46</sup> the Supreme Court held that the President should not, when deciding whether to accept a complaint outside the statutory limitation period, consider the merits of the case or the credibility of the complainant. The relevant factors to consider, in conformity with applications under court rules, are the explanation for the delay and whether any prejudice has been created. If the President is minded to accept the complaint, the respondent is notified and given an opportunity to reply to the complainant's material in support of that course.



8.55 A number of submissions supported retaining the President's discretion to accept a complaint out of time provided the complainant shows good cause and no undue prejudice is caused to the parties.<sup>47</sup>

8.56 The Commission accepts that the approach adopted in *McAuliffe v Puplick* is sound in principle. The right of a complainant to have his or her case considered by the Tribunal, whatever the view of the President as to the merits, suggests that issues of merit and credibility should not be taken into account adversely to the interests of the complainant when considering whether to accept a complaint out of time. Such matters may have indirect relevance in considering whether to accept a reason given for delay in lodging the complaint, where, for example, the President is satisfied that failure to lodge a timely complaint was not based on a claimed ignorance of the law, but rather on a full appreciation of the lack of merit. The relevant criteria should be stated in the ADA.

### **Recommendation 108**

**When deciding whether to accept a complaint outside the 12 month limitation period, the President should only consider the explanation for the delay and whether prejudice has been created and not the merits of the complaint.**

Draft Anti-Discrimination Bill 1999: cl 98(4)

### **Acceptance of complaint**

8.57 The ADA implies that the President will accept all complaints received by the ADB provided the three conditions set out in s 88 are satisfied, namely, that the complaint is lodged in writing, by or on behalf of an aggrieved person with that person's consent<sup>48</sup> and the complaint is lodged within six months of the incident complained of.<sup>49</sup> Currently, senior conciliation officers assess complaints to determine whether the complaint is prima facie within jurisdiction.

8.58 There is no express provision within the ADA for consideration by the President of a complaint, and a decision as to whether to accept it or not. In the interests of transparency and efficiency, the Commission considers that express provision should be made in the ADA, requiring the President to determine whether or not to accept a complaint. In practice, it will be necessary for the President to consider whether a particular document constitutes a "complaint" within the meaning of the ADA. However, if satisfied that it complies with the basic formal requirements, the requirements in relation to investigation and conciliation will attach, subject to the power to decline to entertain the complaint at any stage if satisfied that it is frivolous, vexatious, misconceived or lacking in substance.<sup>50</sup> However, in that circumstance the complainant may require that the President refer the complaint to the Tribunal.

8.59 The proposal in relation to acceptance is intended to formalise and give a statutory basis to the power now exercised by the President. It is not intended to confer on the President any particular discretion to assess the merits of the complaint. Although in some circumstances the President may need to make some brief inquiries, it is not suggested that the President should commence any investigation prior to acceptance or rejection of the complaint. For example, an employment complaint should identify the employer. Employees are frequently unclear as to the precise identity of their employer, especially if the employer is a partnership or one of a group of companies. It is not intended that the President inquire as to the precise identity of the company or carry out a search to determine its correct name. However, if the employer is asserted to be "J Smith" the President may think it appropriate to inquire of the complainant as to some further detail which may identify the "J Smith" in question.

### **Recommendation 109**

**The President is required to determine whether a complaint is accepted or not.**

## INVESTIGATION

### Nature of the process

8.60 The President is obliged to investigate every complaint lodged under the ADA.<sup>51</sup> The process of investigation is not prescribed in the legislation, a circumstance which allows the President to tailor the examination to the complaint, but without indicating how the discretion is to be exercised. In some cases, investigation may entail a simple exchange of correspondence. More complex complaints may require a fuller examination, including seeking legal advice.

8.61 The aims of, and procedures for, investigating discrimination complaints are outlined by the ADB in its manual for conciliation officers. The manual describes the purpose of investigation as a process “to establish the facts of the complaint and to identify the areas of agreement and disagreement”.<sup>52</sup> Conciliators are advised that they need to obtain “as complete and detailed an account as possible from the complainant” including finding out what outcomes the complainant is seeking, and should therefore err on the side of seeking too much information rather than too little.

8.62 An interview is generally undertaken with the complainant after which the conciliator prepares a summary of the complaint and the allegations. This is then forwarded to the respondent for a reply.

8.63 In *Re NSW Corporal Punishment in Schools Case*, Mathews DCJ stated:

I have dealt in detail with the provisions of the Act relating to the President's investigation in order to reveal the relatively restricted nature of the decisions she is empowered to make during the investigatory process. In essence, she has the following powers:

First, to determine whether the complaint alleges a contravention of the Act.

Second, to satisfy herself whether, by reason of any of the other circumstances set out in s 90(1), she should decline to entertain the complaint.

Third, she can form the opinion that the nature of the complaint is such that it should be referred to the Tribunal.

Fourth, she should form an opinion as to whether the complaint is capable of resolution by conciliation.

Fifth, if the complaint is not resolved by conciliation, she should, at some point, determine that her attempts to resolve it have not been successful.

The sixth decision, which is not spelt out in the Act, ... is the President's power to determine who is the proper respondent to a complaint. In other words, she must ascertain who is allegedly responsible for the contravention of the Act raised in the complaint.<sup>53</sup>

8.64 Her Honour identified these decisions in the course of considering a submission that there had been a failure on the part of the President to investigate or conciliate the complaint in question. In that context, her Honour was concerned to identify the decisions which might be made during the investigatory process which might adversely impact upon a respondent. However, her Honour also stated:

Indeed, it is clear from the Act that the President's primary function relates to conciliation.<sup>54</sup>

8.65 Whilst this may be so, it is also apparent that the powers of investigation given to the President are intended not merely to assist in the resolution of complaints, but also in preparing the complaint for reference to the Tribunal. Where a complaint is referred, the President is required to provide to the Tribunal “a report relating to any inquiries made by the President into the complaint”.<sup>55</sup>

#### **Powers of the President at investigation**

8.66 The President may request the production of documents and information relevant to the case under investigation but presently has no power to compel the production of documents or information. Federal and several State equal opportunity laws, on the other hand, variously empower their equivalent officers to require the production of documents.<sup>56</sup> The Sex Discrimination Commissioner, for example, may order any person to furnish relevant information or produce relevant documents within a certain time period at a named place. The Commissioner may take possession of the documents, copy them and retain them for as long as is necessary for the purpose of the inquiry. Failure to furnish such information or produce such documents is an offence under the *Sex Discrimination Act 1984* (Cth) (“SDA”).<sup>57</sup>

8.67 Some of the submissions received by the Commission supported an extension of the President’s investigative powers in order to facilitate the effective and expeditious resolution of complaints.<sup>58</sup> The ADB submitted that the SDA model be adopted to give the President power to order any person to produce documents, furnish information or both, where relevant for the purpose of the investigation.<sup>59</sup> This would bring NSW law into line with Federal law.

8.68 People who assist before the ADB (and similar discrimination complaints-handling agencies) and the ADB itself argue that there is a need for such powers: negotiating a resolution of the complaint is difficult when the parties are not apprised of all the relevant information about the alleged discriminatory incident. Consequently, it is argued, conciliation is often more successful when a complaint is referred to the Tribunal, which does have the power to order the production of relevant documents and information.

8.69 However, it may be argued that to give the President power to order the production of documents would tend to undermine the informal and co-operative nature of the conciliation process.<sup>60</sup> The Commission notes that a proposal to allow the examination of witnesses was considered briefly in a review of the South Australian Equal Opportunity Commission,<sup>61</sup> but was rejected because of the potential to infringe the rights of those who are subject to the compulsory process. The review concluded that such powers should therefore exist only where there is a substantial need.<sup>62</sup>

#### **Compulsion and parties**

8.70 Currently, the ADB uses its power to call compulsory conferences in order to compel unco-operative parties to discuss the issues raised and in order to inspect documents held by them.

8.71 However, this pragmatic approach can be frustrated by non-co-operation. Where a matter is not resolved by conciliation, it will be referred to the Tribunal which is vested with appropriate powers to summon persons to appear before it and to subpoena documents and information relevant to its inquiry. An unco-operative party may, as a result, thwart the effective conciliation of a complaint by forcing a referral to the Tribunal, to the possible detriment of the other party.

8.72 Although the emphasis in conciliation is on co-operation, the Commission considers the President should have power to order a party to produce documents where it is believed that he or she may possess documents which are relevant to the investigation of the complaint.

8.73 The Commission also considers it appropriate to give the President a power to require that a party provide information relevant to the carrying out of the functions of the President.

8.74 It may be noted that the power contained in the Commonwealth legislation does not involve the power to require attendance at a particular place or time, nor the power to require answers to questions. Rather, provision is made for a person to supply information in writing. Given the role of the Tribunal, in

relation to a complaint which is not resolved by conciliation, to deal with witnesses and questions of credibility, it is not necessary to give the President equivalent powers.

### ***Compulsion and non-parties***

8.75 Two further questions arise: first, should the power to obtain documents and information extend to those who are not parties to the inquiry; and, secondly, what sanctions should apply to a failure to comply with a request?

8.76 In relation to the first matter, the Commission considers it appropriate that the President have a power to require the production of documents. In relation to the supply of information, the Commission is not persuaded that it is necessary to give the President a power to require a non-party to supply information. If, as already noted, it is not appropriate for the President to require persons to attend to give evidence, a requirement to supply information must in effect amount to a power to administer something in the nature of interrogatories. That is not a power available in relation to court proceedings generally, except with respect to parties. Further, the preparation of interrogatories requires considerable skill and effort and the results are often of doubtful value. If people are willing to provide information, they will do so without the need for compulsion; if they are not willing, it may well be that the information will not be obtained from them except pursuant to a subpoena to give evidence issued by the Tribunal. Given the nature of the powers and functions of the President, the Commission is not persuaded that the President (as opposed to the Tribunal) should have the power to require the creation of documentary evidence.

### ***Sanctions***

8.77 A power to require the provision of documents or information must, in practical terms, be backed by a penalty for failure to comply. However, in relation to both the parties and other persons, the legislation should make clear that legal privileges will provide a reasonable excuse for non-production. Subject to that requirement, the ADA should provide that it is an offence to fail to comply with a requirement of the President.

8.78 Whilst the creation of an offence in relation to the supply of information or provision of documents may provide a theoretical sanction, in practice, prosecution will rarely take place. In relation to the parties, where one is non-compliant, there may be more practical value in permitting the other party to short-cut the process of investigation and conciliation and require the complaint to be referred to the Tribunal for determination. The Commission recommends that such a sanction be available, subject to the discretionary power of the President to accede or not accede to the request as he or she thinks appropriate in the circumstances. Thus, if the requested information or documents are not provided within a specified time from the date of request (say 28 days), the President should be empowered to notify the other party of the failure and that party should be entitled to request that the matter be referred directly to the Tribunal. The other party should be notified of this request within 7 days and should within 14 days show cause why the matter should not be referred to the Tribunal. Unless the President is satisfied with the reasons given, he or she should be empowered to refer the matter to the Tribunal as requested.

### **Recommendation 110**

**The President should be given power to:**

**order a party or non-party to produce documents where they may be relevant to the investigation of the complaint; and**

**order a party to supply information relevant to the carrying out of the functions of the President in investigating the complaint.**

## **Recommendation 111**

**Non-compliance with a direction of the President should constitute an offence under the ADA and the President should have the power to refer the matter directly to the Tribunal where the non-compliance is by a party and the other party so requests.**

Draft Anti-Discrimination Bill 1999: cl 105

### **Declining a complaint**

8.79 Although the President must investigate every complaint validly lodged under the ADA,<sup>63</sup> he or she may, at any stage of the investigation, decline to entertain the complaint if satisfied that it reveals no breach of the ADA or is frivolous, vexatious, misconceived or lacking in substance.<sup>64</sup>

8.80 The President must notify the complainant and give reasons for any decision to decline the complaint. The President may also withdraw a complaint at any time if satisfied that the complainant no longer wishes to proceed with the complaint.<sup>65</sup> Unless the President declines to entertain a complaint on the ground that it does not reveal a contravention of the ADA, the complainant may request that the matter be referred to the Tribunal for inquiry.<sup>66</sup>

8.81 Of the complaints which the ADB finalised in the year ending June 1997, 11.6% were found to be outside jurisdiction, and hence were declined by the Board.<sup>67</sup> Unlike equivalent Federal legislation, the ADA does not provide for a right of review in respect of a decision to decline to entertain a complaint. Such a decision could have dramatic consequences for a complainant, as the ADA precludes any form of relief for a contravention of the ADA, except by lodgement of a complaint with the President and referral to the Tribunal. In the absence of any form of merit review of such decisions, the ADA avoids the dire consequences for the complainant of such an adverse decision by permitting the complainant to require the President to refer the complaint to the Tribunal upon receiving written notice from the President that he or she declined to entertain the complaint further.<sup>68</sup> However, the ADA was amended in 1982 to prevent the complainant requiring referral to the Tribunal where the reason given for declining to entertain the complaint was that it did "not disclose any contravention" of the ADA. This amendment constituted a serious erosion of the right of a complainant to pursue a matter before an independent tribunal. As well, there was still no right of merit review provided in relation to a decision to decline. Further, the very vagueness of the test, and President's ability to identify the reason for declining the complaint, gives rise to serious concerns as to the fairness of the procedure.

8.82 The Commission is conscious of the concerns which led to the restriction on the right of referral to the Tribunal. Especially during the years when the ADA provided a novel cause of action, the President was intended to be a screen against the prosecution of misguided complaints. Similarly, while the ADA provided a regime which encouraged complainants to bring legitimate complaints, without fear of incurring undue legal costs or other unnecessary burdens, it was also intended that there be a safeguard against the danger that respondents would be forced to defend themselves against unmeritorious claims in a jurisdiction where costs orders were not routine.

8.83 On balance, the Commission is not satisfied that the President should be able to prevent a complaint from being heard before an independent tribunal. To vest such a power in a bureaucrat, especially in the absence of merit review, is to diminish the nature of the relief provided by the ADA and downgrade the symbolic importance placed upon upholding fundamental human rights and equality of opportunity. On the other hand, to permit a merit review of a decision to the interests of the complainant will tend to distract the parties from the real issues in dispute and will require further administrative machinery. So long as the Tribunal has power to dismiss a frivolous or vexatious complaint summarily, there should be no restraint on a complainant requiring referral to the Tribunal. This is the approach accepted in other Australian jurisdictions in recent legislation.<sup>69</sup>

8.84 In making this recommendation, the Commission notes that its proposal is consistent with a relaxation in relation to the procedural steps required before adjudication upon complaints of contraventions of the ADA.<sup>70</sup> The Commission also notes that the proposal is unlikely to have significant practical consequences as, despite the concerns in relation to the power of the President to decline to entertain complaints, in practice that power has been exercised with appropriate caution and discretion, as might be expected. However, the matter is not without significance as there are cases which have been declined by the President and which have subsequently been upheld before the EOT. In some circumstances, the difficulty has arisen because the complainant (usually not represented at the investigation and conciliation stage) has been unable to convince the President that there is a basis for a complaint, especially where the circumstances are unusual or novel.

### **Recommendation 112**

**Where the President dismisses or declines to entertain a complaint for any reason, the complainant should be able to require the President to refer the complaint to the Tribunal.**

Draft Anti-Discrimination Bill 1999: cl 111(6)

### **Effectiveness of the current process of investigation**

8.85 There is concern that the failure to provide statutory guidance for the process of investigation has led to poor understanding and awareness of the ADB's complaints service, inconsistent decision-making by the ADB and uncertainty about the application of the ordinary rules of fairness. This concern has led to support for greater prescription of the process of investigating and conciliating complaints in the ADA or in subordinate legislation, as provided in other State equal opportunity jurisdictions.<sup>71</sup>

8.86 On the other hand, it can be argued that the absence of legislative prescription for the process of investigation is not a shortcoming, but rather allows the ADB flexibility to tailor its procedures to suit the needs and circumstances of the complaint. The scope of investigations under the ADA is, properly, a matter for the President. Investigation need not be a comprehensive examination of every complaint. A preliminary assessment should, in some cases, be sufficient to discharge the duty of the President to investigate complaints.

8.87 One concern of the Commission, resulting from submissions to it and its own research, is the significant delay in dealing with complaints. Clearly, the extent and explanation of any such delay will depend upon the workload of the ADB and the resources available to it. However, the Commission has been greatly troubled by the concession by the Board itself that there is generally a period of some six to eight months between the time of lodgement of a complaint and consideration by an officer. In circumstances where the ADA provides that the complainant must lodge a complaint within six months of the conduct complained of, a delay of a similar period, or greater, before action is taken in relation to the complaint is inconsistent with the clear intention of Parliament that such matters be promptly addressed, and is unacceptable. Without seeking to identify the causes of such delay, the Commission has given serious consideration to recommending that the current system, which precludes a complaint being pursued otherwise than through the officers of the ADB, be abandoned. For reasons which will be outlined below, the Commission has concluded that there should not be a universal prohibition on the seeking of relief by other means and, in some limited circumstances, prompt access to a court should be available. However, it remains likely and desirable that the vast majority of complaints should be investigated by the ADB and conciliation attempted. Accordingly, it is necessary to consider the imposition of statutory requirements which will ensure that complainants and respondents have clear entitlements and the ADB is subject to statutory obligations, contravention of which can be the subject of appropriate forms of administrative review.

8.88 The first appropriate requirement should be that the President determine whether or not a complaint is to be accepted within a specified period. Except where the President considers it necessary

to undertake some preliminary investigation, that decision should be made within 28 days of the lodgement of a complaint.

8.89 The Commission has considered whether other steps required to be taken by the President should also be the subject of specific time limits or guidelines. Although it is proposed that the time for lodgement of complaints be extended to 12 months, that period continues to reflect a policy that complaints should be made and addressed expeditiously. On the other hand, the seriousness, complexity and urgency of complaints will vary greatly. Accordingly, the Commission is not satisfied that it will be useful to impose universal time limits on the exercise of the functions of the President. On the other hand, it is both good administrative practice, and provides a level of transparency to the process, if the ADB is required to inform the parties of steps being taken in relation to a complaint and the results thereof. Accordingly, the Commission considers that the President should, on a two monthly basis, ensure that all parties are notified of the progress of the complaint. Where the ADB is in contact with the parties during any particular period, no further formal notice would be required. Similarly, formal notice might not be required where the parties have been notified that no steps will be taken for a particular period and are aware of that fact and the reason for it. On the other hand, the Commission does not consider that any steps should be taken to encourage the President to formalise a system whereby no action is taken for a period exceeding two months without good reason.

8.90 Some cases may require a level of urgency in order to provide effective relief. The *Equal Opportunity Act 1995 (Vic)* ("EOA (Vic)") makes special provision for "expedited complaints".<sup>72</sup> Under these provisions, the Equal Opportunity Commission ("EOC") must, on the application of either side, determine within seven days of receiving the application whether the complaint should be expedited. Special grounds and circumstances for expediting a complaint are prescribed and the respondent or complainant can apply for a review of the EOC's decision within seven days of receiving the determination. Strict timelines are prescribed for conciliating and referring expedited complaints to the Victorian Civil and Administrative Tribunal. Provision is also made for a complaint to be referred directly to that Tribunal for hearing without the complaint going to conciliation. A procedure which permits interim relief and urgent referral to the Tribunal is available in New South Wales. The Commission is not persuaded that any novel procedures are required.

8.91 As already noted, the President should be given specific powers to terminate the investigation or conciliation by referral of complaints, where one or other of the parties is unco-operative.<sup>73</sup> Specific provision should also be made for termination of the investigation where the complainant appears to have abandoned the complaint.

### **Recommendation 113**

#### **In relation to the investigation of a complaint:**

**The President should be required to determine within 28 days of lodgement whether a complaint is to be accepted or not and should notify parties of such acceptance within a further 28 days from the date of acceptance.**

**Draft Anti-Discrimination Bill 1999: cl 99, 100**

**The President should notify the parties at periods not exceeding 60 days of the steps taken for the purpose of the investigation if no contact is otherwise made during that period.**

**Draft Anti-Discrimination Bill 1999: cl 103**

**The President should be empowered to terminate the investigation or conciliation of a complaint where one or other of the parties is unco-operative and when the complainant appears to have abandoned the complaint.**

## **CONCILIATION**

### **Nature of the process**

8.92 Conciliation is an informal process facilitated by an independent third party who is neither an advocate for the parties nor an arbitrator of the facts. Conciliation improves access to justice by providing a quicker and less costly method for resolving disputes. A principal feature of the conciliation model under the ADA is the confidentiality of proceedings. Any information gathered at conciliation is inadmissible as evidence in any subsequent proceedings relating to the complaint, thus encouraging a free and frank discussion of the issues by the parties at conciliation.<sup>74</sup>

### **Differentiating the investigation and conciliation functions**

8.93 Although identified and often treated as discrete processes, investigation and conciliation are generally performed by the same officer and often occur simultaneously. The indistinct nature of the processes of investigation and conciliation is a particular source of dissatisfaction to both complainants and respondents. Where a conciliation conference is held, the line between investigation and conciliation is usually more clearly defined, resulting in higher levels of understanding and, subsequently, greater satisfaction.<sup>75</sup>

8.94 Whether investigation and conciliation are discrete processes which can be separated is a matter of some debate. Some maintain that the functions are distinct and a clear separation is appropriate and desirable. That separation, it is suggested, would remove perceptions of bias, enable the recruitment of persons with specialist investigative and negotiation skills and clarify the process of complaint resolution by the ADB. Those opposed to separation argue that investigation and conciliation are integral parts of a continuum of complaint resolution. Separation, it is argued, would shift the focus from issues of substance to procedural issues and would thus formalise and lengthen the process of complaint resolution. Rates of settlement, particularly early settlement, may also decrease where the conciliator has little opportunity to develop a relationship of trust with the parties. Separation of the functions also clearly has resource implications.

8.95 Another body which places importance on the function of conciliation is the Family Court of Australia. Family Court counsellors are required, however, not only to conciliate disputes, but also to prepare reports for the court. These functions are not dissimilar to the functions of conciliation and investigation under the ADA. Administratively, they are handled separately within the Family Court.

8.96 In the Commission's view, the functions should be separated within the ADB also. There seems little doubt that this will ameliorate dissatisfaction and concerns about bias. As a matter of statutory function, investigation and conciliation are vested in the President. It is appropriate that there be a formal power of delegation granted to the President, but a condition of delegation should be that the same officer not be granted power with respect to investigation and conciliation of the same complaint, except with the consent of the parties.

### **Recommendation 114**

**The President should be able to delegate powers of conciliation but only to an officer who has not been responsible for the investigation of the complaint, except with the consent of the parties.**



## **Confidentiality of conciliation proceedings**

8.97 Section 94(2) of the ADA provides that:

Evidence of anything said or done in the course of conciliation proceedings under section 92 shall not be admissible in subsequent proceedings under this Part relating to the complaint.

8.98 Considering a similar provision under the SDA,<sup>76</sup> Justice Einfeld has commented:

The obvious purpose of this wise provision is to permit the parties to speak and negotiate freely at the time conciliation is being attempted, making such admissions or concessions as they wish during “conciliation proceedings” without prejudicing their positions at a later hearing.<sup>77</sup>

8.99 If parties are unable to negotiate privately and confidentially, they may be reluctant to engage in conciliation for fear of making admissions which may be used against them.<sup>78</sup>

8.100 While confidentiality is clearly an incentive to parties to participate in conciliation, it is said to be a “double-edged sword”.<sup>79</sup> Some commentators argue that because most complaints are resolved at conciliation, which takes place in a confidential setting, discrimination issues are effectively removed from the public agenda.<sup>80</sup>

8.101 In reality, the gravamen of this criticism is the emphasis placed on promoting conciliated outcomes. The assurance of confidentiality under s 94 protects from disclosure that which is said or done by the parties in the course of attempting to conciliate a complaint, and which may otherwise be admissible in subsequent proceedings. Such information may be distinguished from the private outcome which is agreed between the parties at conciliation,<sup>81</sup> but there is little reason to provide protection where there is a resolution of the dispute, but not the disclosure made during a process which fails to reach an agreement.

8.102 The confidentiality of information divulged during conciliation proceedings does, however, raise two issues: first, because of the indistinct nature of investigation and conciliation, it remains unclear exactly what information is protected under the ADA; and, secondly, it is unclear to what extent information about the outcomes of conciliation can be used without compromising the privacy of the parties.

### ***What information is confidential under the ADA?***

8.103 Although the term “conciliation proceedings” is not expressly defined, s 92 clearly contemplates a conference between the President and the parties, either separately or together, for the purpose of conciliating the complaint. Confidentiality would not appear to attach to any information obtained by the ADB during the course of its investigation nor, arguably, that which is said or done outside a conciliation conference setting. Taking this view in *Bennett*, Justice Einfeld said:

The section does not ... prohibit the introduction into evidence of statements made by, or written or taped records of interviews of, witnesses or parties during the investigation of complaints whether prior to or after attempts at conciliation.<sup>82</sup>

8.104 Apparently taking a broader view of “conciliation proceedings” Judge Barbour has held that the statutory bar on admissibility applies to anything said or done during a compulsory conciliation conference “or incidental thereto”.<sup>83</sup> His Honour continued:

While I am of the opinion that s 94(2) does not extend further to cover things said or done at other stages of the conciliation process it may well be that depending on the particular facts sound reasons may exist for excluding evidence of such acts and expressions upon

the basis of the common law exception against admission of evidence of privileged communications.

8.105 Arguably, therefore, information provided or statements made by the parties prior to a conciliation conference for the purpose of negotiating a resolution of the complaint may also be protected from compulsory disclosure. This result would be achieved by applying the evidentiary rules relating to “without prejudice” negotiations.

8.106 The Commission considers, however, that some problems arise because of structural difficulties with the process which should be resolved by the separation of functions recommended above.

8.107 Statements made by parties expressly on a “without prejudice” basis should be confidential and thus be inadmissible as evidence in any subsequent proceedings. Confidentiality does not, nor should it, extend to information or documents which relate to the facts of the incident and which may duly be the subject of discovery in proceedings before the Tribunal. Such information is not rendered confidential merely because it is repeated in a conciliation conference. For instance, an employment time sheet produced at conciliation is not in itself a confidential document. However, any comments made by the parties during conciliation in relation to that document are confidential and would be inadmissible at a Tribunal hearing.

***Confidentiality: secrecy provisions***

8.108 The purpose of providing confidentiality for statements during the complaint resolution process is to encourage a free and frank discussion of the issues in order to assist the conciliation of the complaint. Secrecy provisions, on the other hand, relate to the duties and obligations of employees and agents in respect of information about a person’s affairs which they acquire in the course of their duty as employees or agents of a particular body.

8.109 Currently, information acquired or held by the ADB about a complaint, other than that information which is protected from disclosure under s 94, may be subpoenaed by a court or may be subject to a request for production pursuant to the *Freedom of Information Act 1989* (NSW) (“FOI Act”).

8.110 The ADB reports that its documents are regularly subpoenaed in relation to proceedings in other jurisdictions. Its policy is to oppose the production of confidential information contained in its files. It may oppose production on one of three grounds:

the information is confidential under s 94(2) of the ADA;

the information falls under an exception to the FOI Act; or

disclosure of the information would be contrary to the public interest.

8.111 Due to the limited scope of s 94(2) of the ADA, the ADB can only protect that information which is obtained in the course of conciliation proceedings. Any information or documents which it acquires on a “without prejudice” basis outside of conciliation proceedings is not expressly protected under the current provision.

8.112 Relying on the exception under the FOI Act for documents containing confidential information is also inadequate, according to the ADB.<sup>84</sup> Presumably in recognition of the importance of ensuring confidentiality for persons lodging complaints, the FOI Act expressly exempts several complaints bodies under Schedule 2 including the office of the Ombudsman, the office of the Legal Services Commissioner, the Health Care Complaints Commission and the Health Care Conciliation Registry.

8.113 The complaint handling function of the ADB cannot, in the Commission’s view, be distinguished from that of these other complaints bodies. For the purpose of ensuring the integrity of the complaint resolution process and of encouraging persons to bring complaints, it is vital to protect from disclosure confidential information, whether provided in relation to a complaint of discrimination, or a complaint

about the police, a lawyer or a health professional. Further, the function of the ADB in relation to complaints is an unusual and compulsory interposition of a government agency between an injured citizen and his or her right of access to justice. The Commission accepts that for consistency the FOI Act should be amended to add the ADB (at least in its complaint-handling role) to the list of exempt bodies under that Act.

8.114 Where the ADB believes it would be contrary to the public interest to disclose documents, it has sought to rely on the common law defence of “public interest immunity”. While the defence has been successful on some occasions, the ADB submits that information which is provided to it for a specific purpose should not, as a matter of statutory rule, be able to be subpoenaed in another jurisdiction for another purpose. In some cases, sound reasons for excluding this information could come under the common law exception against admission of privileged communications.<sup>85</sup> In other cases, the common law rules may not provide protection.

8.115 It is also argued that complainants may be discouraged from lodging complaints if there is a risk that details of their complaint will be disclosed by the ADB for example, to the media, a relative or a prospective employer.

8.116 Apart from being quite common in numerous statutes which govern the actions of public officers,<sup>86</sup> secrecy provisions are contained in all other State equal opportunity jurisdictions, with the exception of South Australia.<sup>87</sup>

8.116 The Commission considers that a secrecy provision should be inserted in the ADA.<sup>88</sup> This would make it an offence for an employee or agent of the ADB or the Tribunal to produce, disclose or communicate to any person (including a court or tribunal) any information about a person’s affairs which the employee or agent has acquired in the course of duty unless it is necessary for the purposes of performing a function under, or for a prosecution arising out of, the ADA. The secrecy provision should only attach to that information which is not public information. Therefore, communication of any material which is in the public arena would not be an offence under the ADA.

#### **Recommendation 115**

**It should be an offence for an employee or agent of the ADB or the Tribunal to produce, disclose or communicate to any other person, including a court or tribunal, any information or document about the affairs of a person which is acquired by the employee or agent in the course of duty unless it is necessary to do so for the purposes of performing a function of, or prosecuting an offence arising out of, the ADA.**

Draft Anti-Discrimination Bill 1999: cl 139

#### **Recommendation 116**

**The ADB should be listed as an exempt body under the FOI Act in relation to its complaint handling functions.**

#### **Representation**

8.118 Although it ameliorates the power disparity which exists between parties in adversarial proceedings, conciliation is not a leveller of power imbalances.<sup>89</sup> Without adequate support, a complainant continues to be at a disadvantage in negotiations against an opponent who is in a position of authority over the complainant, who has access to greater financial resources or who is better informed or familiar with government systems.<sup>90</sup> Lack of support is a primary factor affecting levels of

satisfaction with the process and outcomes of conciliation. It is one of the major reasons for the withdrawal of complaints.<sup>91</sup>

8.119 In order to provide an informal and inexpensive system of complaint resolution, the ADA requires parties to seek leave to be represented at conciliation proceedings, but legal representation appears to be unusual. Few complainants surveyed by the Commission specifically stated a concern that they had no legal representation at conciliation. The majority did, however, regret the failure of the ADB, perceived by complainants as champions of discrimination victims, to provide any support. As one complainant said:

Contact with [the] ADB would indicate help seeking behaviour – yet [the] ADB does not provide this in any manner i.e. instrumental, emotional, legal ... I still have a lot of anger – the ADB added to this.<sup>92</sup>

8.120 The general tenor of submissions to the Commission in relation to legal representation was that the current provisions should remain unchanged.<sup>93</sup> It was argued that lawyers will not solve power imbalances or, if they do ameliorate the disparity between the parties, will do so at too great a cost.<sup>94</sup> It is perceived that lawyers, trained in the adversarial system, are unsuited as representatives in a conciliation setting and, given their propensity to focus rigidly on technicalities, will:

cause delays in reaching a mutual agreement;

formalise the dispute resolution process and lessen the degree of control exercised by the parties;  
and

increase the cost of conciliation to the parties.

8.121 Anecdotal evidence obtained from the ADB suggests that some represented parties are dissatisfied with their lawyers and often blame them if no agreement has been reached. It is not unusual, according to the ADB, for parties to return for a second attempt at conciliation without their lawyers.

8.122 Some even suggest that allowing lawyers as of right may aggravate the power imbalances between the parties.<sup>95</sup> The current provision at least gives the conciliator an opportunity to assess the circumstances of each case before deciding whether legal representation should be permitted. Although there is no empirical data on which to draw, the ADB has advised that leave is generally granted when requested by both parties and the circumstances of the case are believed to justify it. When it is requested and granted to a complainant, the ADB usually allows the respondent to be represented. Recent Tasmanian legislation has codified this practice.<sup>96</sup>

8.123 In view of the above, the Commission proposes that legal representation in conciliation continue only by leave of the President. A party should be advised if the other party has sought representation. The Tasmanian requirement that, where leave is granted to one party, the other party should be notified, implies that leave may be granted to one party without prior warning to the other. Such a practice is not acceptable except in special circumstances.

## **Remedies**

8.124 There is no limit imposed by the ADA on the range or extent of remedies available at conciliation, nor should there be according to the submissions which addressed this issue.<sup>97</sup> It is consistent with one of the major strengths of conciliation that parties should be able to agree on settlement alternatives that are not available from the Tribunal.<sup>98</sup> However, if the agreement is to become enforceable by way of consent orders made by the Tribunal, a practical limitation may be imposed.

## **Enforcement of conciliation agreements**

8.125 Section 164 of the *Anti-Discrimination Act 1991* (Qld) (“ADA (Qld)”) provides that the written terms of the agreement, signed by the parties, with a copy retained by each party and the Tribunal, is then enforceable as if it were a decision of the Tribunal. A similar recommendation was made by the Victorian Law Reform Commission in its 1990 Report, which led to the inclusion of a similar section in the EOA (Vic).<sup>99</sup>

8.126 One issue which is often raised is who should be able to pursue breaches of the terms of the agreement. While the parties should clearly be able to initiate proceedings for breach of the agreement, complainants may not be able nor willing to commence fresh proceedings. In an employment discrimination complaint, it is likely that they would have left the workplace. They may therefore have no interest in ensuring that the employer abides by the terms of the agreement where such terms include reviewing recruitment or promotion policies or developing codes of practice for managers in relation to sexual harassment. Yet, in terms of achieving the objects of the ADA, it is important to monitor compliance with and, where necessary, enforce conciliation agreements. For this reason, the Victorian Law Reform Commission recommended that the Commissioner be able to prosecute offences under the EOA (Vic) including non-compliance with agreements filed with the Equal Opportunity Board (now called the Victorian Civil and Administrative Tribunal).<sup>100</sup>

8.127 The Commission accepts that while the parties should be able to enforce any agreement, the President should also have standing to enforce compliance with a conciliated agreement in appropriate circumstances. Further, the party not in breach of the agreement should have the option of treating a fundamental breach of the agreement as avoiding the settlement, with the result that the complaint is able to be referred to the Tribunal as an unconciliated complaint. This option may prevent a complainant being forced to take enforcement action in a court, or have no right of redress.

8.128 The role of the President should be primarily directed to the enforcement conditions of a settlement which are capable of benefiting third parties. In special circumstances the President should be able to take steps to enforce an agreement, where the person likely to benefit is a party, if requested to do so by that party, who is willing and able to comply with any obligations imposed by the agreement on him or her. This role for the President is consistent with that of initiating action for a contravention of the ADA, as discussed below.

### **Recommendation 117**

**An agreement reached pursuant to conciliation should be enforceable by the President.**

Draft Anti-Discrimination Bill 1999: cl 115

## **TERMINATION OF A COMPLAINT**

8.129 A complaint is considered finalised by the ADB when either:

the matter is settled at conciliation;<sup>101</sup>

the matter is withdrawn by the complainant under s 90A or lapses;<sup>102</sup>

the matter is declined by the President under s 90; or

the matter is referred to the Tribunal.<sup>103</sup>

## **Settlement by agreement**

8.130 Like settlements in many other areas of law, conciliation outcomes are generally private unless the parties agree otherwise. As a condition of settlement, respondents usually require the complainant to keep the terms of the agreement confidential. Under s 94 of the ADA, the terms of the agreement are inadmissible as evidence in any subsequent proceedings under that Part.

8.131 It has been argued that, because the majority of complaints of discrimination are resolved at successful conciliation and because the outcomes reached at conciliation are private, conciliation precludes the development of community education initiatives and thus impedes efforts to promote awareness of, and compliance with, provisions of the ADA.<sup>104</sup> The concept of a public register of discrimination cases, outlining the circumstances of the complaint and the outcomes reached at conciliation, has been mooted.<sup>105</sup> Whilst the factual premise may be conceded, it does not follow that promotion of conciliation is not a sound policy.

8.132 First, it is not correct to treat all cases as significant in a public sense: most are routine. Secondly, the fact that a case may have broad implications for the development of the proper practices under the ADA may itself be a reason for determining that it is inappropriate for conciliation and referring it to the Tribunal. Thirdly, the conciliation process, properly operating, should improve the chances of achieving a fair result between the parties – itself an important objective of the ADA. Fourthly, the educative function of the example is not entirely lost.

8.133 Information gathered in the course of its complaints-handling functions forms part of the ADB's internal intelligence. This information is utilised to inform new policy initiatives, target the development of models for community education and training programs and to assist staff training. Facts of interesting cases are extracted from complaint files, with any material that would identify the parties removed, and used for the development of case studies. Examples of cases dealt with by the ADB are discussed (with appropriate protection for anonymity) in its Annual Reports and in information brochures. Conciliators also flag interesting cases for the attention of the Information Services Branch, which is responsible for the development of education and training initiatives, including the updating of information brochures and the promotion of activities performed by the ADB.<sup>106</sup>

## **Withdrawing a complaint**

8.134 In its original form, the ADA did not recognise the concept of a “withdrawn” complaint, except implicitly in the limited sense of a conciliated agreement. The ADA now envisages the possibility of withdrawal,<sup>107</sup> but does not provide any procedure for identifying when this occurs. Even failure to prosecute a complaint is not a basis for terminating an investigation.

8.135 The ADA was amended in 1994 to enable the President to “withdraw” a complaint where he or she is satisfied that the complainant no longer wishes to pursue the matter.<sup>108</sup> Up until that time, inactive complaint files tended to remain open indefinitely.

8.136 The section was further amended in 1997 to enable the President to deal with the complaint under s 90A without notifying the respondent, if the respondent had not been notified that the complaint had been made in the first place.<sup>109</sup>

8.137 The section was inserted to ensure that the President would dispose of complaints which were not properly characterised as frivolous, vexatious, misconceived or lacking in substance and which could, for that reason, have been dealt with under s 90. Although s 90 permitted the President to decline to entertain the complaint “for any other reason”, there was an understandable concern that the breadth of that phrase would be read down by a court so that it reflected the genus of frivolous or vexatious complaints, which appears in the immediately preceding terms of the section.

8.138 The title to the section, referring to “withdrawal of complaint” is inapt. The power which is given to the President is “to decide not to proceed” with a complaint if satisfied that the complainant “does not wish to proceed with the complaint”. It might be more appropriate to empower the President to decline to

entertain the complaint further rather than to withdraw the complaint or, in the terms of the section, decide not to proceed with it. An additional power, also curiously worded, allows the President to “amend a complaint” by removing from it a person who does not wish to proceed with it.<sup>110</sup>

8.139 A complainant may not prosecute a complaint for one of a number of reasons. First, the dispute may have been resolved or settled by agreement. Alternatively, the complainant may have made no conscious decision to abandon the complaint, but may simply have taken no steps for a period of time. He or she may have changed address without notifying the President. A further possibility is that the complainant has actually decided to abandon the complaint, but has not notified the President.

8.140 The Commission takes the view that the active management of complaints which will be required in the future will render it less likely that complaints will be abandoned simply because the complainant loses interest and forgets to notify the President of his or her whereabouts. Nevertheless, it is necessary to have a mechanism by which a complaint which has been abandoned or allowed by the complainant to remain inactive for a specified period to be finally disposed of. However, there may be good reason why a particular complaint is allowed to remain inactive, even where contact is lost with the ADB. For example, complainant A may be told that her complaint should remain inactive for a period whilst a test case in relation to the same issue is litigated by complainant B. The ADA should contain safeguards to prevent complaints being disposed of in a manner which would preclude further action being taken by the complainant where the lack of contact is reasonably capable of being explained or justified. In short, the policy behind s 90A is sound, but the ADA should deal separately with the different circumstances which may presently be covered by s 90A, define the criteria which will allow the President finally to dispose of a complaint and provide a mechanism for a complainant to revive a complaint or lodge a further complaint where such a course is justified.

#### **Recommendation 118**

**The President may decide not to proceed with a complaint where:**

**the dispute has been settled or resolved by agreement between the parties;**

**Draft Anti-Discrimination Bill 1999: cl 111(1)(f)**

**the complainant, or person on whose behalf the complaint was made, does not wish to proceed with the complaint; or**

**Draft Anti-Discrimination Bill 1999: cl 109**

**the complainant has allowed the complaint to remain inactive for an extended period of time or abandoned the complaint.**

**Draft Anti-Discrimination Bill 1999: cl 110(1), 111(1)(b)**

#### **Revival of terminated complaint**

8.141 As noted above, complaints may be inactive for a variety of reasons. Parties may have privately settled the matter, or for some other reason complainants may no longer wish to pursue the complaint and have failed to advise the ADB of this. Before it issues a s 90A notice to a complainant, the ADB has generally not heard from the complainant for some time.

8.142 The issue of whether the complainant can revive the complaint after a s 90A notice has been served has not yet arisen. In fairness, the Commission believes that a provision to this effect should be available where there is good cause for the complaint to be revived and provided the complaint is revived within a reasonable time. A similar provision exists in other equal opportunity laws.<sup>111</sup>

### **Recommendation 119**

**A complaint which has been withdrawn or has lapsed under s 90A should be able to be pursued afresh provided the complainant shows good cause for the complaint to be newly pursued and the pursuit takes place within a reasonable period of the withdrawal or lapsing of the complaint.**

Draft Anti-Discrimination Bill 1999: cl 110(2)

### **Timelines**

8.143 For the purpose of reducing delays, it has been suggested that statutory time frames be imposed at various stages of the complaint resolution process as is provided in some recent State equal opportunity laws. In Queensland, for example, the Commissioner must decide whether to accept or decline to entertain a complaint within 28 days of receiving a complaint.<sup>112</sup> If a complaint has not been finalised within six months of its acceptance, either party may request the Commissioner to refer the complaint to the Tribunal. The complainant must agree to the referral. If the complainant objects to the referral, the complaint lapses and the complainant's rights in respect of that incident are extinguished.<sup>113</sup>

8.144 In principle, the Commission does not support the imposition of a strict statutory time frame for the processing of discrimination complaints, as it is difficult to predict how long investigation and conciliation may take. It may depend on several variables which are beyond the ADB's control, such as the parties' participation and willingness to settle and the levels of resources available, as well as the resources available to the ADB. It is important that the parties not be penalised for bureaucratic inefficiency.

8.145 However, there may be some value in drawing a cut-off point at which a decision must be made either to refer a complaint to the Tribunal or to withdraw the complaint if conciliation is unlikely. It is said that complaints are more likely to be resolved quickly if lodged soon after the incident occurs and if dealt with while the incident is "fresh" in the parties' minds.<sup>114</sup> But these requirements should be treated as sound goals, rather than prescriptive rules for inclusion in the ADA. An alternative method of encouraging parties to participate in conciliation and thus finalise the complaint within an acceptable period is to allow the parties to request the President to refer the matter to the Tribunal if the complaint remains unresolved at a specified time after it was lodged.<sup>115</sup>

8.146 The Commission is of the view that, wherever practicable, a complaint should be finalised by the ADB within 12 months of the date of lodgement of a complaint. The Commission therefore proposes that the ADA should be amended to provide that, if a complaint remains unresolved 12 months after it was lodged, either party to the complaint may request the President to refer the matter to the Tribunal. Unless the complainant objects to the referral or the President believes there is a possibility that the matter may yet be conciliated, the complaint should be referred to the Tribunal within 28 days of a written request by one of the parties. Where the complainant objects to the referral of the complaint and the President is satisfied that the matter cannot be resolved by conciliation, the complaint should lapse.

### **Recommendation 120**

**In relation to the resolution of complaints:**

**Where a complaint remains unresolved 12 months after the date of lodgement of the complaint, either party to the complaint should be able to make a request in writing to the President to refer the matter to the Tribunal.**



**The President should be required to refer the complaint to the Tribunal within 28 days of such a request unless the President believes the complaint can be conciliated.**

**Where the complainant objects to the referral of the complaint and the President is satisfied that the complaint cannot be conciliated, the complaint should lapse.**

#### Draft Anti-Discrimination Bill 1999: cl 116

#### **Death of a complainant or respondent**

8.147 Whether a complaint survives or abates on the death of a complainant or respondent is an important issue, particularly for people suffering from life threatening illnesses. Allowing the complaint to lapse on the death of a complainant will not curb the discriminatory conduct which is the subject of the complaint. It is argued that such a policy lets the perpetrators off "scot-free"<sup>116</sup> and may even encourage respondents to delay proceedings where the complainant is ailing. The ADB observed that:

Although it will rarely be appropriate for the estate to be awarded damages, the larger issues of principle which are involved should not die with the complainant. For example, policies or practices applied to the complainant may need to be changed so that discrimination does not occur in the future.<sup>117</sup>

8.148 A similar issue arose in relation to a complaint to the Human Rights and Equal Opportunity Commission made under the SDA. The complainant, who had been diagnosed as HIV positive, sought to participate in a clinical trial involving the use of a particular drug. She was excluded from the trial by a respondent hospital on the basis that she was still menstruating and therefore was subject to a risk of pregnancy. Her complaint was brought to test the lawfulness of the imposition on her of a condition that she be incapable of becoming pregnant in order to be eligible for the drug trial. However, she died before the complaint had come to a hearing and her estate sought to continue the proceedings on her behalf.<sup>118</sup> The Full Federal Court held that the complaint did not "abate" upon the death of the complainant. As noted by Justice Wilcox (with whose judgment Justices Jenkinson and Einfeld agreed):

The question arises because the drafter of the Act apparently overlooked the possibility of the death of a party during consideration of a complaint, and so neglected to make an express provision one way or another.<sup>119</sup>

8.149 A similar comment might have been made at that time in relation to the ADA. After considering the objects of the SDA, his Honour continued:

It is noteworthy that the objects are societal objects. Although the Act contains provisions that permit the recovery of compensation under some circumstances, this is not the primary purpose of the Act; it is directed towards the elimination of discrimination. An inquiry into a complaint may assist that purpose, notwithstanding the death of the complainant and whether or not it leads to a determination providing a personal remedy.<sup>120</sup>

8.150 Subsequent to this decision, an amendment was inserted in the ADA providing that a complaint under that Act could survive the death of the complainant.<sup>121</sup> The Commission supports the new provision.<sup>122</sup>

#### **REFERRAL**

#### **Preconditions for referral**

8.151 A complaint is not presently referred to the Tribunal without the consent of the complainant. Although there are many valid reasons to refer cases which raise issues of systemic discrimination and

those which reveal persistent breaches of the ADA by the same respondents directly to the Tribunal for a public inquiry, complaints are necessarily driven by complainants.<sup>123</sup> Some complainants may not wish to air their grievance publicly or may not be able to afford to proceed effectively before the Tribunal. Conciliation should remain an available option for all complainants.

#### **Direct referral to hearing for repeat respondents**

8.152 The Australian Law Reform Commission has recommended that the Sex Discrimination Commissioner be given the power to refer a matter directly to hearing when the complaint involves a respondent who has previously been the subject of a complaint.<sup>124</sup> The previous Sex Discrimination Commissioner actively supported this proposal.

8.153 By referring a complaint directly to hearing, the respondent is forced to defend the claim in a public forum rather than within the confidential process of conciliation. But while this may deter repeat respondents (who wish to avoid adverse publicity) it requires taking the complaint out of the control of the complainant.

8.154 The circumstances of referral to the Tribunal are interrelated with the proposals set out below which would provide alternative procedures for complaint handling. The matters considered here are intended to be consistent with those proposals. The first point to note is that the President presently has power to refer a complaint to the Tribunal at any time if satisfied that "the nature of a complaint is such that it should be referred".<sup>125</sup> It may be inferred from the structure of the current ADA that such a referral can be made without attempting conciliation. This inference should be made explicit and it should further be made clear that the President has power to refer whether or not an investigation into the complaint has been undertaken or completed.

8.155 Secondly, where referral has not been requested by a complainant, the President should be required to notify the complainant (and the respondent) of a proposal to refer the complaint and should give the parties an opportunity to comment on whether that course is appropriate at that stage. Unless there are exceptional circumstances, which should be provided to the parties in written form, the President should not refer a complaint over the objection of the complainant. The circumstances should generally be limited to cases where a complainant has failed for a specified period, or repetitively, to comply with reasonable requests of the President, but still wishes to pursue his or her complaint.

8.156 The Commission has also considered whether a respondent should in any circumstances be entitled to resist the referral of a complaint. It is clear that a respondent should be able to give reasons why a complaint should not be referred, which must be taken into account by the President. There is one circumstance, however, where there may be a legitimate reason for precluding the President from making a referral over the objection of the respondent, namely where the respondent asserts that the complaint has been settled by agreement between the parties, which the respondent remains able and willing to comply with. Such a condition may, of course, give rise to differences of opinion as to the facts, but those should properly be resolved to the satisfaction of the President.

#### **Recommendation 121**

##### **In relation to the referral of complaints by the President:**

- **The President should have the discretion to refer the complaint to the Tribunal at any stage, whether or not investigation and conciliation have taken place.**
- **The President should be required to notify both parties of an intention to refer the complaint and should not refer a complaint without the consent of the complainant except in exceptional circumstances.**

## **Review of decisions of the President**

8.157 At present, there is no mechanism to review any decision made by the President with respect to a complaint, otherwise than by invoking the power of the Supreme Court to grant relief by way of judicial review. This mechanism does not allow the merits of a decision to be revisited, but leaves the aggrieved party with the need to establish that the President has made some relevant legal error in reaching his or her decision.

8.158 The Commission does not think it necessary to divert the parties unduly from the merits of a complaint by encouraging review of presidential decisions, which do not preclude the consideration of the merits. Whilst a refusal by the President to refer a complaint in a timely fashion may delay consideration on the merits, it is most unlikely that the President would exercise such a power inappropriately and in a manner which would prevent one party obtaining effective relief. Given the greater flexibility in procedures which are recommended under the ADA, the Commission does not recommend any new scheme of merits review in relation to referral decisions.

## **Amendment of complaints before the President**

8.159 As will be noted below, the Commission recommends that an appropriate power of amendment be permitted in respect of a complaint before a Tribunal. However, amendment at that stage may result in a complaint, which should properly have been fully dealt with by the President, having been so dealt with only in part.

8.160 Often the investigation of a complaint by the President will result in the identification of different or additional issues to those originally raised by the complainant. Under the present ADA, such matters may be considered by the President, but can only be dealt with in accordance with the terms of the written complaint, and it is that complaint which may ultimately be referred for hearing by the Tribunal. In theory at least, whenever the issues are expanded in the course of investigation, a fresh complaint may be lodged.

8.161 These circumstances give rise to unnecessary inflexibility in the handling of complaints and place pressure on potential complainants to obtain legal advice before lodging a complaint with the President. So long as proper notice of matters which are the subject of complaint is given to a respondent, there is no reason why those matters should not be considered and, on the contrary, good reason why they should be considered. Each complaint should be dealt with in a manner which disposes of all aspects which may be in dispute in relation to particular conduct and in a manner which provides procedural fairness to all parties. The matters should also be dealt with in a timely fashion.

8.162 In the circumstances of the ADA, it would be unfortunate if a complaint became the subject of undue procedural formality. The preferred course is to enable the President, in carrying out functions of investigation and conciliation, to deal with such matters as arise from the complaint and such other matters as arise in the course of investigation and conciliation which may themselves constitute a contravention of the ADA. Where those functions take the President beyond the four walls of the complaint, that should be made clear to the parties in writing. Further, if it is necessary to refer the complaint to the Tribunal or a court, the President should be required to identify in the referral the extent to which the issues raised go beyond the terms of the written complaint.

8.163 In appropriate circumstances, the President should also have a power to require the complainant to reduce to written form any further matters that the complainant wishes to have investigated, and those matters will be dealt with as if they constituted part of the original complaint.

8.164 The ADA should also make clear that the President has power to investigate only some matters which are raised by the complaint and to deem other matters not to be part of the complaint. In similar vein, the President should be expressly authorised to deal with more than one complaint in a single investigation, where that course is appropriate.

## **Recommendation 122**

**The President should have the power to permit the amendment of the complaint at any stage.**

Draft Anti-Discrimination Bill 1999: cl 108(1)

**The President should notify both parties of any amendment in writing.**

Draft Anti-Discrimination Bill 1999: cl 108(3)

**Where an amendment is made to a complaint it should be identified in the President's referral.**

Draft Anti-Discrimination Bill 1999: cl 116(10)

**The President should be empowered to deal with more than one complaint in a single investigation.**

Draft Anti-Discrimination Bill 1999: cl 102

## **Report accompanying referral**

8.165 The ADA presently requires that a referral by the President be accompanied by "a report relating to any inquiries made by the President into the complaint".<sup>126</sup> Reports by the President vary significantly from complaint to complaint. In some cases, the report does little more than summarise the terms of the complaint, identify the steps which the President has taken in the course of investigation and annex copies of documents obtained by the President from one or both of the parties. In other cases, the President may undertake a reasonably comprehensive review of the issues raised by the complaint and the extent to which the investigation has clarified or refined the matters in dispute.

8.166 The issues raised by this statutory obligation are three-fold. First, the contents of a report may be the subject of dispute before the Tribunal. Some material may be thought by at least one party to be irrelevant or inadmissible. In some cases the report contains expressions of opinion on the part of the President.

8.167 Secondly, the ADA makes no provision for the report to be provided to the parties and often this does not occur until the contents have been considered by the presiding officer of the Tribunal. On occasion, the presiding member deals with the report at a directions hearing in the absence of other Tribunal members, noting that until the parties have had an opportunity to consider the report, other members of the Tribunal will not receive it. Although objection is rarely taken to the Tribunal reading the report, it is often suggested by the Tribunal that some matters dealt with in the report will be ignored by it or will be given very little weight. Practice varies as to whether the report becomes part of the evidence before the Tribunal, but usually it is received in evidence.

8.168 The lack of any clear indication as to the purpose of the report or its intended contents is unfortunate. Where documents have been obtained in the course of investigation, they will generally be tendered by the parties in any event. Whether it was originally intended that the history of the investigation or the opinions of the President should be taken into account by the Tribunal is not clear. Generally speaking, it will rarely be appropriate for the Tribunal to be concerned with such matters.

8.169 Thirdly, the requirement that a report be prepared may in some cases give rise to delay. Once the President is satisfied that a matter should be referred, it is unfortunate if referral is delayed in order to complete a bureaucratic process which may have little relevance to the next stage of the proceeding.

8.170 The purpose of a hearing before the Tribunal is to resolve a substantive issue in dispute between the parties. As the Tribunal is not required to review any decision made by the President, it is immaterial and possibly inappropriate for the Tribunal to be told what opinions the President has formed

or what decisions he or she has taken. Similarly, it is at least irrelevant, and possibly inappropriate, for the Tribunal to be advised of the detail of the investigation undertaken by the President. The referral itself should be largely a formal matter, albeit one which should properly be done by lodgment of a written document. To the extent that the President obtains documentary material, or reduces information to documentary form, that material should generally be available to the parties. It may be appropriate in some circumstances to make that material available as it is received, or in other circumstances, to make it available at the time of referral. What happens to that material before the Tribunal is a matter which should properly be left to the parties.

8.171 The real purpose of the referral is to inform the Tribunal of the fact of the complaint and that it remains unresolved. Accordingly, any written complaint which has been the subject of investigation, without resolution, should form part of the referral. Further, and to the extent that the President has refined or expanded the issues in the course of exercising his or her functions, that should also be included in the referral. Beyond that, the Commission does not see any need for the provision of a "report" to the Tribunal and accordingly recommends that the provision in the current ADA be amended to reflect the purposes identified above.

### **Recommendation 123**

**The referral should be limited to the written complaint, including any amendments and additional material identifying the issues in dispute.**

Draft Anti-Discrimination Bill 1999: cl 116(10)

## **ALTERNATIVE PROCEDURES**

### **Reasons for current regime**

8.172 The requirements that complaints be lodged with the President and that no relief be available for a contravention of the ADA, otherwise than through the statutory procedures,<sup>127</sup> reflected several policies and concerns. First, there was a concern to ensure that the provision of a new area of legal liability not give rise to abuse. The statutory procedures provided a mandatory screening process for all complaints. However, the fact that a complainant could in most circumstances require the President to refer a complaint to the Tribunal meant that the President had no power to prevent a hearing.

8.173 Secondly, the general (although not universal) requirement of conciliation, reflected a view that complaints of discrimination should often be capable of resolution by this means. Conciliation will frequently be appropriate where parties are in a continuing relationship, such as employment.

8.174 Thirdly, there was a concern that contraventions would often cause relatively minor losses and that cheap and informal dispute resolution procedures should be available.

8.175 Fourthly, the procedures were intended to protect privacy, as far as reasonably practicable. Rather than provide for anonymity and closed courts (techniques sometimes used in relation to family disputes), the ADA required complaints to proceed through the processes of the ADB and the President, without formal hearings at which the names of the parties and the fact of the complaint would be made public.

### **Need to reconsider**

8.176 Now that the policy of the ADA is no longer novel, and that similar legislation is found in all Australian jurisdictions, it is necessary to reconsider the appropriateness of the procedural limitations imposed on the availability of relief. The benefits of imposing a bureaucratic process on all complaints are by no means uniform and there are detriments of delay, loss of control and the consequences of treating the protections provided by the ADA as in some way different from other legal rights and obligations.

8.177 The Commission has, accordingly, reconsidered the factors which appear to underlie the present regime. First, there is the danger of abuse. All laws are open to abuse and courts and tribunals should, and generally do, have appropriate powers to prevent it. There is no reason to treat anti-discrimination laws as particularly susceptible to abuse, nor to suppose that the role of the President is a particularly effective means of preventing abuse.

8.178 Secondly, the appropriate use of conciliation is a desirable and legitimate goal. However, not all cases benefit from the availability of the process. The aim should be to ensure that it is available to, and can even be imposed on, the parties but only where appropriate.

8.179 Thirdly, the need for informal and inexpensive procedures should also be acknowledged. Many complaints involve the resolution of relatively straightforward factual disputes and the application of well-established legal principles. A combination of conciliation and referral, where necessary, to a specialist tribunal is entirely appropriate for such cases, as is the ability for the President to carry out an investigation into the facts. In other cases, however, the parties may seek their own legal representation in any event and will undertake more extensive investigations than those likely to be pursued by the President. In this category of cases, compulsory lodgement with the President may provide limited benefits to the parties and may cause delay and frustration.

8.180 Further, there are cases where a discrimination claim may arise in combination with other causes of action, or even by way of a defence to a cause of action pursued by the other party. If the complainant wishes to pursue more than one cause of action in relation to particular conduct which is said to be unlawful, he or she should not be forced unnecessarily into more than one set of proceedings. This occurs under the present regime, as the ADB and the Tribunal have no jurisdiction in relation to common law claims and the courts have no jurisdiction in relation to claims under the ADA. Similarly, where a defendant in a common law proceeding wishes to rely upon a breach of the ADA, he or she should not be precluded from raising that allegation by way of a defence. Accordingly, the Commission is concerned that, at least in some categories of cases, the present constraints militate against cheap and informal dispute resolution.

8.181 The fourth concern noted above was the protection of privacy. So far as the complainant is concerned, he or she should be entitled to accept or reject that benefit, rather than being forced through the present statutory procedures. So far as the respondent is concerned, the ADA may provide a benefit to some respondents. However, the protection of privacy is achieved at the expense of open justice.

8.182 Whilst the Commission acknowledges that questions of privacy give rise to legitimate concerns, it does not think that this matter should be given great weight in designing an appropriate procedure. The example usually raised of the need to protect privacy of a respondent involves a false claim of sexual harassment. This, it is said, could cause an employer great harm, although it might be totally unfounded.

8.183 Similar arguments have been raised in other contexts, including professional disciplinary proceedings. In the past, it was common for proceedings in relation to professional people to be held behind closed doors and in circumstances where the name of the respondent was not revealed, or only revealed after an adverse finding had been made and then only in a reputable professional journal.<sup>128</sup> However, such attitudes no longer hold sway. Such constraints on the principle of open justice are accepted only where it is "in the interests of the administration of justice" to do so.<sup>129</sup> and the cases indicate a growing reluctance to make exceptions, particularly in favour of professionals and others, simply on the basis of possible damage to reputation. As noted by President Kirby in *Raybos v Jones*:

I do not by any of these observations, wish to appear insensitive to the problem to which this motion calls attention. There is no doubt that great harm can be done to individuals by the widespread circulation of protected reports of their involvement in criminal or quasi criminal proceedings. Especially may this be so when such proceedings are commenced by private individuals, where the exercise of discretion and preliminary consideration may not have been given as may be expected in public prosecutions. Widespread publicity, through the modern media of communications, may do great harm. Sometimes quite

unjustifiable damage can be inflicted on individuals ... However, that may be, a price must be paid for the open administration, particularly of criminal justice. The alternative, of secret trials, where important public rights may be in competition and individual liberty may be at risk is so unacceptable that courts of our tradition will tend to avoid the consequence.<sup>130</sup>

8.184 Further, there is a serious argument that the policy of promoting privacy is not necessarily furthered by the present procedures. The fact that a complaint may so readily be lodged, without any attendant formality, and in the knowledge that the complainant may never need to justify the complaint publicly, can actually promote the lodgement of insubstantial or malicious complaints.

8.185 The Commission is not satisfied that the general rule requiring all complaints to be handled by the President and the ADB prior to any possibility of a judicial or quasi judicial hearing is supportable. Accordingly, s 123 of the ADA should be amended.

#### **Alternative forums**

8.186 The next question is to determine when and in what circumstances an alternative procedure should be available. First, the Commission is satisfied that no one should be precluded from relying upon a contravention of the ADA in circumstances where:

- (a) the claim is relied upon by way of a defence or set off to proceedings brought by another; or
- (b) the claim is associated with and should properly be brought together with a bona fide claim not based upon the ADA and which can only be brought in another court or tribunal.

8.187 In other circumstances, it is necessary to consider whether it should be open to a complainant to take a serious matter directly to the District or Supreme Court. In part, the justification for this opportunity would be that the Tribunal, because of its nature, has and should properly continue to have limits on its jurisdiction in relation to the relief available from it. Where other relief may appropriately be sought, a complainant should not be precluded from obtaining such relief. Accordingly, such cases should be capable of being commenced in another jurisdiction.

8.188 The justification for such a change must take account of the fact that most complaints can be resolved, in an appropriate manner, by the Tribunal. Nevertheless, there are more serious cases which the complainant may wish to pursue before a court.

8.189 Dealing with the more serious complaints, there is no reason in principle why such complaints may not benefit from conciliation and mediation services. Accordingly, one course would be to allow such complaints to be lodged with the President but to provide that, if referral for a hearing is necessary, they could be referred to the appropriate court or to the Tribunal. This would allow for referral to the District Court or even the Supreme Court in appropriate circumstances. It would also permit referral to the Tribunal if the complainant were willing to forego the jurisdictional benefits of a court.

8.190 There are, however, concerns which militate against the provision of such an option. First, to provide alternative jurisdictions, with differing rules in relation to procedure, admissibility of evidence and costs, should be avoided unless there are strong considerations in its favour. Secondly, the need for such an alternative can be significantly reduced if the cap on damages obtainable from the Tribunal were lifted or abolished and if the Tribunal were given the power to grant other remedies which may be needed in particular cases. Thirdly, the composition of the new ADT allows for its jurisdiction to be exercised in general, or in a particular class of case, by a District Court judge. Accordingly, it may be appropriate to allow the Tribunal to exercise jurisdiction and powers as extensive as those available in the District Court itself. Fourthly, as a practical matter, there is no case known to the Commission in which the appropriate relief would have exceeded the current jurisdiction of the District Court. Cases which have resulted in awards of damages in other jurisdictions, in the absence of a monetary cap, have all been well within the current monetary limit on awards under the *District Court Act*. As a result, the Commission is not satisfied that it is necessary to vest jurisdiction in a court and therefore concludes that referral of complaints should, as is the current practice, be to the ADT.

8.191 The Commission is aware that in some cases the standard of reasons given for decisions by the EOT has been less than optimal. It is not persuaded, however, that this is a matter of general concern, nor that it is a matter for providing an alternative to the jurisdiction of the new Tribunal. On the contrary, to confirm the important nature of decisions made by the Tribunal is likely to give impetus to more careful preparation of reasons and should also ensure that the Tribunal attracts appointments of high calibre.

#### **Recommendation 124**

**Amend s 123 to allow a party in proceedings in another jurisdiction to rely on a contravention of the Act where:**

**the claim is relied upon by way of defence or set off to proceedings brought by another; or**

**the claim is associated with a bona fide claim not based on the ADA and which can only be brought in another court or tribunal.**

**Draft Anti-Discrimination Bill 1999: cl 119(2),(3)**

#### **A NEW ENFORCEMENT ROLE FOR THE ADB**

##### **Public enforcement**

8.192 As stated above, currently the only mechanism by which the ADB is formally made aware of discriminatory conduct is if a complaint is made. It requires individuals or groups to identify isolated acts of discrimination and presumes that discrimination can be corrected by providing redress to those individuals.<sup>131</sup> This results in a reactive and piecemeal approach to achieving equal opportunity which neglects the need to deal with systemic discrimination.<sup>132</sup> Even the indirect discrimination provisions of the ADA, which were intended to address systemic discrimination, operate within the individualist framework of the ADA and have, as a result, been poorly utilised.<sup>133</sup> Depending on individuals who are often in positions of disadvantage to bring complaints also means that if such persons are unaware of their rights or are not willing to mobilise the process for fear of victimisation, lack of support or understanding of the process, no complaint is made. This effectively drives discrimination underground, further entrenching inequalities.<sup>134</sup>

8.193 Although significant, these criticisms do not suggest that the complaints model should be replaced. Rather, the issue is whether it alone is able to address the broader issue of systemic discrimination or whether it should be supplemented with a more comprehensive strategy of enforcement.

##### ***Approach adopted in other areas of law***

8.194 The private complaints model (and its inherent limitations) is not unique to anti-discrimination law. It underpins enforcement in many areas of our legal system. However, in a number of areas where the object is to regulate behaviour in certain spheres of public life, the complaints model is not the sole method of enforcement. In laws relating to the environment, trade practices, occupational health and safety and health care, the framework of enforcement allows complaints to be brought by aggrieved persons or by a public regulatory body. The Environmental Protection Authority, for example, has power to investigate and prosecute suspected breaches of environmental laws.<sup>135</sup> Similarly, an important function of the Australian Competition and Consumer Commission<sup>136</sup> is to investigate breaches of the *Trade Practices Act 1974* (Cth) and prosecute and seek civil remedies for those breaches where appropriate.<sup>137</sup>



### **Overseas equal opportunity agencies**

8.195 Specialist agencies have been established in a number of overseas jurisdictions with a common law legal tradition for the purpose of promoting equal opportunity and securing compliance with anti-discrimination laws. In the United Kingdom, the Commission for Racial Equality (CRE) and the Equal Opportunity Commission (EOC) act as advocates for victims of discrimination in tribunals and courts<sup>138</sup> and have broad powers to conduct investigations into persons or organisations suspected of breaching the legislation and to conduct general investigations where no unlawful conduct is suspected.<sup>139</sup> They may also issue non-discrimination notices requiring the person or organisation the subject of the investigation to stop or change its unlawful practices within a prescribed period (regardless of whether proceedings have been brought in relation to the conduct). Where a person or organisation has failed to comply with the non-discrimination notice, the CRE and EOC may prosecute offenders.<sup>140</sup> Significantly, the British equal opportunity agencies play no role in conciliating disputes.

8.196 The New Zealand Human Rights Commission is an umbrella organisation consisting of several divisions. The Complaints Division is responsible for receiving, investigating and conciliating complaints. It may also investigate of its own motion any practice which it considers may be discriminatory. Complaints or matters that it has itself initiated, and which cannot be settled at conciliation, are referred to the Proceedings Commissioner (also within the Human Rights Commission) who decides whether prosecutions should be commenced in the specialist Complaints Review Tribunal.<sup>141</sup> Private action by aggrieved persons or groups is also available.

8.197 The United States Equal Employment Opportunities Commission (EEOC) plays a similar proactive, public interest role in the enforcement of the *Civil Rights Act 1964* (US). It receives, investigates and conciliates complaints and, where appropriate, prosecutes offenders for alleged breaches of the *Civil Rights Act*.<sup>142</sup>

8.198 The active enforcement functions of such equal opportunity agencies, which allows them to initiate investigations on their own motion, and prosecute certain offences,<sup>143</sup> tends to signify a greater commitment to compliance by the state.<sup>144</sup> It is an acknowledgment, in particular, that systemic discrimination issues are unlikely to surface or be adequately addressed in private actions by individuals and that adherence to anti-discrimination principles is a matter of public interest.

### **Powers of other Australian agencies**

8.199 With the exception of Western Australia,<sup>145</sup> other Australian jurisdictions have, to varying extents, vested powers in their specialist agencies to investigate acts of discrimination that have come to the attention of the agency other than by the lodgement of a formal complaint.<sup>146</sup>

8.200 The Human Rights and Equal Opportunity Commission ("HREOC") has a broad general power to inquire into any act or practice that may be inconsistent with, or contrary to, any human right, and either attempt to conciliate the matter or, where conciliation is inappropriate or has been unsuccessful, to report to the Minister in relation to the inquiry.<sup>147</sup> Under the individual Federal statutes, instances of alleged discrimination which come to the attention of HREOC other than by the lodgement of a complaint can be referred for investigation to the relevant Commissioner.<sup>148</sup> The Commissioner must investigate such matters unless satisfied that the conduct is not unlawful or that the persons aggrieved by the conduct do not want the Commissioner to commence or continue the investigation. Similar provisions are found in State and Territory legislation.<sup>149</sup>

8.201 Some of the provisions, however, are ambiguous<sup>150</sup> or are constrained by the requirement that the Minister consent to the investigation and thus are rarely used. In both Queensland and Victoria, for example, a complaint can only be initiated by the Commissioner if the matter is serious or of public concern and the Minister consents to the action.<sup>151</sup> In Victoria, the matter must be serious in nature, a class or group of persons must be discriminated against and it would not be appropriate in the circumstances for an individual only to lodge a complaint in respect of it.

8.202 The South Australian provision is the most cumbersome and has never been used.<sup>152</sup> The Commissioner for Equal Opportunity may, with the Minister's approval, apply to the Tribunal in relation to a possible breach of the *Equal Opportunity Act 1984* (SA) ("EOA (SA)"). The alleged perpetrator must be notified of the application. If the Tribunal believes the person or organisation may have breached the EOA (SA), it may refer the matter to the Commissioner for investigation.<sup>153</sup> The Australian Capital Territory Commissioner, on the other hand, has a broad discretion to initiate inquiries into discriminatory conduct of which the Commissioner becomes aware but in respect of which no complaint has been lodged.<sup>154</sup>

### **Submissions**

8.203 In New South Wales, there is provision for public enforcement action only by the grant of a power to the Minister to refer a matter to the Tribunal for inquiry as a complaint under s 95 of the ADA. This provision was intended as a mechanism for bringing discrimination to the attention of the Tribunal when an individual complaint had not been lodged but the circumstances justified an inquiry into the issue.<sup>155</sup> It is not clear how the Minister was expected to identify appropriate matters. The power has never been used.

8.204 The majority of submissions expressed the view that the parameters of the legislation need to be broadened in order to address the more insidious forms of discrimination which have not been dealt with adequately under the present system of enforcement.<sup>156</sup>

8.205 A framework which makes concurrent provision for private and public enforcement action would preserve the existing rights of individuals to bring actions for redress and would overcome the shortfalls of the complaints-based approach in its dealings with broader systemic issues.<sup>157</sup> Instances of discrimination which might otherwise be overlooked because they are not the subject of a formal complaint could be investigated by a body which operates outside the individual complaints model. Enforcement action by a public body would relieve the onus currently borne by individual complainants to bring attention to instances of systemic discrimination. A public body whose mandate is to secure compliance with the ADA can more efficiently and effectively target certain practices or sectors where discrimination is suspected with a view to effecting change for the benefit of a larger group of people.

8.206 The Commission considers that these submissions are well founded. Accordingly, two further issues arise:

On what body should the power to initiate investigations and conduct prosecutions be conferred?

What powers would the body need in order to undertake its functions effectively?

### ***Should the President of the ADB have a power of inquiry?***

8.207 In the Commission's Discussion Paper the suggestion was framed in terms of giving the President the power to initiate complaints in those cases where discriminatory conduct was suspected but in respect of which no complaint had been lodged.<sup>158</sup> It drew considerable support in the submissions received by the Commission.<sup>159</sup> The ADB argued that, as the custodian of anti-discrimination legislation, the President is well-placed to detect, and capable of detecting, instances of discrimination, including practices which are not obviously discriminatory. The President has specialist expertise in anti-discrimination law<sup>160</sup> and patterns of discrimination or areas where discrimination is a major problem can be identified by monitoring inquiries and complaints made to the ADB.<sup>161</sup> The President, it is argued, is best placed to act in the public interest in cases of discrimination which affect a wide group of persons, such as a racially vilifying poster or a newspaper article.

8.208 The major criticism of giving the President such powers is that they may conflict with the President's non-partisan role in the investigation and conciliation of complaints and may, consequently, lead to perceptions that the ADB is biased in favour of persons bringing complaints of discrimination.

### ***The Commission's view***

8.209 The President and officers of the ADB have a clear role in policy development in relation to discrimination law and human rights matters under the ADA. Through the complaint-handling, education and research functions, the ADB performs an advisory role to Government and the community on discrimination issues.

8.210 The new pro-active powers of the President under the recently enacted *Industrial Relations Act 1996* (NSW) ("IRA"), designed to ensure compliance with anti-discrimination laws in industrial matters, are also significant. The President may now intervene in proceedings before the Industrial Relations Commission ("IRC") where the President can establish that issues of unlawful discrimination arise. The IRA also allows the President to bring an action in the IRC to amend or vary the provision of an award or agreement which is alleged to be inconsistent with the ADA.<sup>162</sup>

8.211 Giving the President a power of inquiry and complaint would utilise infrastructure which is already in place. Unlike a referral of a matter for public inquiry under s 95 by the Minister directly to the Tribunal, giving such powers to the President would continue to provide an opportunity to attempt conciliation, where appropriate.<sup>163</sup> It would also bring New South Wales anti-discrimination laws into line with Federal and other State legislation which already provide a facility for the initiation of complaints by the relevant Commissioner.

8.212 The Commission does not agree that giving the President the power to initiate an inquiry would compromise the President's conciliation functions. The Commission's research into the complaints-handling functions of the ADB found only limited adverse perceptions of bias.<sup>164</sup> Where they do exist, perceptions of bias appear to be related to parties' understanding of the functions and processes of the ADB and its officers' and parties' perception of the outcome of their complaint. Not surprisingly, the higher their level of understanding and the more satisfied they were with the outcome, the less likely parties were to feel the ADB was biased against them.<sup>165</sup> However one interprets these results, the Commission considers that it is vital to maintain the integrity of the President as an independent third party overseeing the complaint resolution process. Experience both in New South Wales and elsewhere does not suggest that the independence of the President is likely to be undermined by providing an independent power of investigation.

8.213 The changes proposed to the current terms of s 95 are relatively minor. First, the Commission recommends that the power of referral provided under the section should be to the President for investigation (and possible conciliation) rather than directly to the Tribunal. Secondly, the Commission recommends that express power be given to the President to seek such a referral.

8.214 In practice, it is most unlikely that the Minister would exercise a power under s 95 without consulting the President, but more importantly, the use of the power is likely to be increased if a specific provision for the formulation of a recommendation and determination of that recommendation be included in the ADA.

8.215 One alternative course would be to give the President an unfettered power to commence investigations in prescribed circumstances without reference to the Minister. On one view, that may be seen as a legitimate means of avoiding concerns about political interference. On the other hand, there is merit in the view that the exercise of such powers of investigation should be subject to a level of political accountability. Each of these factors deserves consideration, but the Commission's view is ultimately influenced by a practical consideration, namely the need to provide financial and other resources to permit such investigations to be undertaken. Whilst the President has on occasions devoted resources to enquiries into systemic discrimination in the past, there is understandable pressure on the President not to reduce the resources available to the investigation of individual complaints. Thus it may be expected that for financial reasons if none other, the President is likely to maintain consultation with the Minister in relation to investigations of any significance beyond the routine investigation of individual complaints.

8.216 As a subsidiary matter, the Commission considers that the power of the President to make a recommendation to the Minister should be subject to the consideration of identified criteria. Generally speaking, it is important to give administrative decision-makers some guidance as to the criteria which they should take into account in reaching decisions. The specification of criteria, even if they are general in their terms, will provide a useful constraint on the exercise of a broad-ranging discretion and will assist the decision-making process. It is also possible that the specification of a particular power, together with the identification of relevant criteria, will tend to focus the attention of both the President and the Minister and may increase the likelihood that the power will be used in appropriate circumstances.

#### ***How the proposed power would work***

8.217 Criteria to guide the exercise of the President's power may be similar to the criteria which assist prosecutorial authorities in deciding whether to pursue particular cases. The Commission anticipates that inquiries would only be justifiable, in terms of balancing the costs of an inquiry and the interests to be served by an inquiry, when a matter is of sufficient public interest. Although priority may be given to the identification, investigation and resolution of systemic discrimination issues, the matter need not be one that affects numerous persons. In some instances, an act which may affect few people may be highly important if it raises an issue which has not previously been tested. Public interest should be interpreted broadly. Factors which the President may consider when deciding whether to conduct an investigation or prosecution should include:

the seriousness of the unlawful discrimination;

the number of persons who may have been affected by the possible unlawful discrimination;

the period which elapsed since the conduct occurred;

the likelihood of a complaint being made in relation to the conduct;

if a complaint has been made, or were to be made, the ability of the actual or possible complainant to prosecute the matter efficiently and effectively; and

the public interest in the investigation of the conduct, the resolution of any question as to its lawfulness or otherwise and the remedies which may be available if the conduct were found to be unlawful.

8.218 The Commission proposes that the President have the power to investigate:

suspected discriminatory acts or conduct in respect of which no complaint has been lodged;

patterns of discriminatory conduct across an industry; and

persons or organisations who have persistently breached the ADA.

8.219 Where the President is satisfied that a complaint is justifiable, the President may cause the matter to be reduced to writing. The document so produced shall be deemed to be the complaint.

8.220 A complaint initiated in this manner may be the subject of conciliation between the party under the investigation and the President. Indeed, the primary aim of the process should be to investigate the subject matter with a view to reaching an agreement which is in accordance with the objects of the ADA.

#### ***Further issues***

8.221 The Commission acknowledges that the potential of powers of inquiry to investigate areas where discrimination is suspected and to effect appropriate change has not been fully exploited in those jurisdictions where it exists.<sup>166</sup> The power has been used rarely, if at all, in State jurisdictions. In the Federal sphere, the Race and Sex Discrimination Commissioners have conducted some investigations,

such as the joint investigation by the Sex Discrimination Commissioner and the ADB into pregnancy discrimination and the Race Discrimination Commissioner's investigation of the treatment of overseas-trained doctors. However, these were conducted under HREOC's general powers to conduct inquiries. Studies of other jurisdictions have revealed that where the agency has power to initiate actions, it very rarely does so.<sup>167</sup> In an environment of limited resources, agencies which are also responsible for receiving and conciliating complaints tend to allocate first priority to the resolution of individual complaints.

8.222 Effectively, this proposal does little more than give flesh to an existing function of the President, not dissimilar to the powers of intervention conferred on the President by the IRA. Despite the best intentions, these functions and powers will be ineffective without the allocation of commensurate resources to enable the President to take a more pro-active approach to enforcement of anti-discrimination laws. This option is far less costly than the establishment of a separate statutory body with a charter to monitor compliance with the ADA.

#### **Recommendation 125**

**Section 95 should be amended to provide that the Minister may refer a matter to the President for investigation.**

**The President should be given the power to make recommendations to the Minister that a particular matter be referred for investigation.**

Draft Anti-Discrimination Bill 1999: cl 97(1),(2)

#### **Recommendation 126**

**Factors which the President should be able to consider when deciding whether to initiate such an inquiry are:**

**the seriousness of the suspected discrimination;**

**the number of persons who may be affected;**

**whether the conduct is likely to be continuing and if not, the period which may have elapsed since the conduct occurred;**

**the likelihood of a complaint being made;**

**if a complaint has been made, the ability of the complainant to conduct the matter effectively; and**

**the public interest in the investigation of the matter.**

Draft Anti-Discrimination Bill 1999: cl 97(4)

#### **CODES OF PRACTICE**

8.223 A further issue raised in DP 30 was the desirability of the development of Guidelines and Codes of Practice to provide assistance for employers, service providers and other relevant groups in determining their obligations under the ADA and ensuring compliance with these obligations. A number of submissions argued that such forms of education are of paramount importance in dealing with discrimination in practice.<sup>168</sup>

8.224 The ADB has indicated its support for the development of Codes of Practice as an adjunct to the legislation. In a recent Paper released by the ADB, the Board recommended that the ADA should be amended to give the Board power to issue “topic related Codes of Practice”.<sup>169</sup> The Board argued that while compliance with the Code should not affect legal liability, evidence of compliance could be taken into account by the President in the investigation process and could be admissible as evidence in any proceedings before the Tribunal.<sup>170</sup> In addition to this, the ADB recommended that the Attorney General should be given the power to issue industry specific Codes of Practice, compliance with which would provide a complete defence to a complaint of discrimination.<sup>171</sup>

8.225 Although the ADB recommended that such Codes of Practice should be developed for all areas covered by the ADA, they argued that first priority should be given to the area of employment because the majority of complaints received by the ADB concern discrimination in employment.<sup>172</sup> Under the existing provisions of the ADA, the ADB already has a significant educational role, providing guidelines to various industries,<sup>173</sup> and has indicated that such assistance has been well received and has helped businesses to eliminate many discriminatory practices.<sup>174</sup>

8.226 The proposed contents of such Codes of Practice, suggested by the ADB, would include an explanation of direct and indirect discrimination, examples of situations in which such discrimination may arise and an explanation of the impact of the relationship between Federal and State discrimination laws.<sup>175</sup> In the area of employment, the ADB suggested that the Code could cover issues such as recruitment, harassment, terms and conditions of employment and termination of employment. Although the ADB would have the primary responsibility for the development of such Codes of Practice, they could be formulated in close consultation with employers, unions and other interested groups.

8.227 A precedent for the development of Guidelines and Codes of Practice has already been set at the Federal level. Under each of the *Racial Discrimination Act 1975* (Cth) (“RDA”), the SDA and the *Disability Discrimination Act 1992* (Cth) (“DDA”) the HREOC has the power to prepare and publish Guidelines for the avoidance of discrimination.<sup>176</sup> Under the DDA there is also a specific provision empowering the Minister to formulate Disability Standards in relation to employment, education, accommodation and provision of public transport services.<sup>177</sup> These Disability Standards must be passed by both houses of Parliament and contravention of the Standards is unlawful under the DDA.<sup>178</sup> In addition to this, the DDA also provides a mechanism whereby service providers may submit an “action plan” outlining policies and programs which they plan to implement which are designed to achieve the purposes of the Act.<sup>179</sup>

8.228 The HREOC has already formulated a number of Guidelines under the various provisions in the Federal legislation. Under the RDA, HREOC has recently released a *Draft Employment Code of Practice for the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity in Employment*.<sup>180</sup> This Code contains a comprehensive explanation of employers’ obligations under the RDA, including an explanation of the nature and extent of liability for conduct of employees, requirements in relation to prevention of discrimination and recommendations to employers regarding the formulation of company policy statements and complaints mechanisms. The Code also contains a suggested policy statement which may be adapted to suit different employment situations. Although the Code does not impose any legal obligations, it specifically provides that evidence of compliance with the Code is admissible in any proceedings under the RDA.<sup>181</sup>

8.229 In addition to the *Draft Employment Code of Practice* under the RDA, the HREOC has also formulated a Code of Practice in relation to sexual harassment in employment.<sup>182</sup> Like the *Draft Employment Code of Practice*, the Guidelines under the SDA are not legally binding. The introduction to the Code states that:

Employers are strongly encouraged to comply with this Code to minimise the risk of liability for unlawful sexual harassment.<sup>183</sup>

8.230 The Sexual Harassment Code of Practice is similar in form to the Race Discrimination Code and includes a plain English explanation of obligations arising under the SDA, a sexual harassment policy checklist and a specific section outlining principles and examples from the relevant case law.

8.231 In addition to the above Codes of Practice formulated by HREOC, in 1996 the Commonwealth Attorney General's Department (in conjunction with the Disability Discrimination Commissioner) released draft *Disability Standards* for the area of employment.<sup>184</sup> These standards specifically outline the obligations of employers under the DDA and explain terms such as "reasonable adjustment", "inherent requirements of the job" and "unjustifiable hardship", including examples of how such issues may arise in practice.<sup>185</sup> Once finalised and passed through Parliament, these Standards will have the force of law under the DDA.<sup>186</sup>

8.232 The Commission does not recommend the introduction of Guidelines or Codes of Practice which have the force of law. The ADA itself sets out a clear legislative statement of the obligations of employers, service providers and other relevant parties. However, the Commission does recommend that the ADB be given the power to formulate non-binding Codes of Practice across all areas covered by the ADA. Such Codes could be developed in conjunction with relevant industries and interested parties and would form an important educative function in relation to the ADA. In addition, such Codes would make the ADA more accessible to the lay person, a matter of great importance if the ADA is to achieve its stated objectives.

#### **Recommendation 127**

**The ADB should be given the power to formulate non-binding Codes of Practice across all areas covered by the ADA. Such Codes could be developed in conjunction with relevant industries and interested parties.**

**Draft Anti-Discrimination Bill 1999: cl 130**

## **Footnotes**

1. When the ADA was first enacted in 1977, the ADB's role was to conduct quasi-judicial inquiries into complaints of discrimination that could not be conciliated by the Counsellor for Equal Opportunity who was the counterpart to the current President of the ADB. The ADB was also responsible for conducting research and policy development in human rights law. In 1981, the ADB's quasi-judicial functions were transferred to the newly created EOT. The following year the ADB took over the conciliation functions of the Counsellor for Equal Opportunity.
2. The ADT is established under the ADT Act.
3. ADA s 86.
4. ADA s 119.
5. ADA s 94A.
6. See ADA Pt 9 Div 3.
7. DP 30. The relevant submissions included: Combined Community Legal Centre Group NSW, *Submission*; NSW Department of Health, *Submission*; Disability Council of NSW, *Submission*; Disability Discrimination Legal Centre, *Submission*; Eastern Sydney Area Health Service, *Submission*; Gay and Lesbian Rights Lobby, *Submission*; Legal Aid Commission of NSW,

*Submission*; J Lennane, *Submission*; K & M MacKenzie & Co, *Submission*; G MacDonald, *Submission*; NSW Independent Teachers' Association, *Submission*.

8. RR 8.
9. Such as a remedy through industrial relations, which does not include damages for non-economic loss. For example, in a sexual harassment claim a more equitable remedy is available under the ADA but when faced with a conciliation conference in 2 weeks or registration of complaint in 6 months, victims will often take their complaint to the industrial relations forum.
10. National Pay Equity Coalition, *Submission* at 4.
11. See below at para 8.192.
12. ADA s 88(1) and 88(3).
13. ADA s 88(1)(a). ADA s 88 provides that a complaint must be lodged by:
  - a person on the person's own behalf;
  - a person on the person's own behalf and on behalf of others; or
  - a "representative body" on behalf of a named person(s) provided the named person(s) has consented to the complaint and the body has a sufficient interest in the complaint.
14. ADA s 88(1)(b).
15. ADA s 88(1)(c) and 88(1)(d).
16. As to which see *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509 (FC).
17. See EOA (Vic) s 104(1)(a).
18. See s 80.
19. See s 123.
20. ADA s 88(1).
21. See generally, *Qantas Airways Ltd v Squires* [1984] EOC 92-102 (NSW CA).
22. ADA s 113(1)(b)(i).
23. See Chapter 10 at para 10.68.
24. See Chapter 9 with respect to proceedings before the Tribunal.
25. These issues are dealt with in Chapter 9.
26. See ADA s 102 and 103.
27. ADA s 103(2)(a)(i).
28. ADA s 88(1A)-(1C).
29. ADA s 88(1A).



30. See *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW) Sch 1(2) and (3).
31. See *Anti-Discrimination (Homosexual Vilification) Amendment Act 1993* (NSW) Sch 1(3).
32. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 4 May 1994 at 1831; See also New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 May 1994 at 2468.
33. (1987) 8 NSWLR 442 at 448-452; per Street CJ at 463-466; per Kirby P at 475; and per Samuels JA (agreeing with Street CJ).
34. See, for example, EOA (Vic) s 104(1)(b).
35. See, for example, EOA (Vic) s 106.
36. ADA s 88(1).
37. See DDA s 69(2); EOA (Vic) s 106; and SDA (Tas) s 34(2).
38. *Abrahams v Harwood Nominees Pty Ltd* (NSW, EOT, 68-100/96, 28 October 1996, unreported) at 9.
39. ADA s 88(3).
40. ADA s 88(4).
41. *Najdovska v Australian Iron and Steel Pty Ltd* [1985] EOC 92-140 at 76,385, followed in *Fares v Box Hill College of TAFE* [1992] EOC 92-391.
42. This position was supported by D Robertson, *Submission* at 18.
43. See South Australia, *Legislative Review of the Equal Opportunity Act 1984* (SA) (1994) (the "Martin Report") at 138. See also Anti-Discrimination Board, *Submission 1* at 194; S Cipriotti, *Submission* at 1; Combined Community Legal Centre Group NSW, *Submission* at 1; Disability Discrimination Legal Centre, *Submission* at 6. However, the NSW Department of Health, *Submission* at 7 argued that the 6 month time limit should not be altered.
44. It is estimated that approximately 10% of all complaints received by the ADB are lodged out of time requiring action to decide whether to accept or decline the complaint. Information supplied by Della Goswell, Senior Conciliator, ADB (9 August 1995).
45. See RDA s 24(2)(c); SDA s 52(2)(c); DDA s 71(2)(c); EOA (Vic) s 108(1)(c); DA (ACT) s 71(b); ADA (Qld) s 138(1); EOA (WA) s 83(4); see also *Human Rights Act 1993* (NZ) s 76(2).
46. [1996] EOC 92-800 per Levine J.
47. Anti-Discrimination Board, *Submission 1* at 194; Combined Community Legal Centre Group NSW, *Submission* at 2. A similar recommendation has been made to the South Australian Government by the SA Commissioner for Equal Opportunity: see Martin Report at 140.
48. In the case of an aggrieved person who is under 18 years of age or who has a disability, consent may be given by that person's parent or guardian: ADA s 88(2) and (2C).
49. ADA s 88(3). The President of the ADB may accept a late complaint if good cause is shown: ADA s 88(4).
50. ADA s 90(1).

51. ADA s 89.
52. New South Wales, Anti-Discrimination Board, *Conciliation Officer's Manual* (1994) at 7.
53. *Re NSW Corporal Punishment in Schools Case* [1986] EOC 92-160 at 76,584.
54. *Re NSW Corporal Punishment in Schools Case* at 76,585.
55. ADA s 94(1).
56. SDA s 54. See also RDA s 24B; DDA s 73; ADA (Qld) s 156; EOA (WA) s 86; ADA (ACT) s 85-86.
57. SDA s 54(1) and 54(2).
58. Anti-Discrimination Board, *Submission 1* at 191-192; Combined Community Legal Centre Group NSW, *Submission* at 3; Disability Discrimination Legal Centre, *Submission* at 6.
59. Anti-Discrimination Board, *Submission 1* at 192. This view was also supported by the Combined Community Legal Centre Group NSW, *Submission* at 3, and the Disability Discrimination Legal Centre, *Submission* at 6. However the NSW Department of Health, *Submission* at 6 argued that the President of the ADB should not be given the power to demand production of documents.
60. NSW Department of Health, *Submission* at 6.
61. Martin Report. The SA Equal Opportunity Commissioner had submitted that she be given extended powers to require persons to answer questions and furnish information to assist her in the investigation and conciliation of complaints. Currently, South Australian law gives the Commissioner power to require the respondent to produce "such books, papers or other documents ... as may be specified in a notice from the Commissioner". The respondent is not obliged to comply if the contents of a document may incriminate him/her of an offence: EOA (SA) s 94. Note that the Martin Report does recommend that the Commissioner's current powers (to order the respondent to produce documents and attend a conference) be extended to cover complainants as well.
62. Martin Report at 144.
63. ADA s 89.
64. ADA s 90. The National Pay Equity Coalition, *Submission* at 6 argued that the President's discretion to decline complaints should be "tied to specific criteria". Furthermore, the NSW Department of Health, *Submission* at 3 argued that the grounds upon which a complaint may be declined should be expanded.
65. ADA s 90A, inserted in 1994 by *Anti-Discrimination (Amendment) Act 1994* (NSW).
66. ADA s 90, 91 and 91(1A).
67. NSW, Anti-Discrimination Board, *Annual Report 1996/1997* at 19. This figure represents 192 out of 1,649 complaints received by the Board in the preceding year.
68. See ADA s 90(1) and 91(1).
69. See, for example, EOA (Vic) s 108; and DA (ACT) s 81.
70. See alternative procedures at para 8.172 below.
71. DA (ACT) s 79(3). See also ADA (NT) s 74-77 and ADA (Qld) s 155-157.

72. See EOA (Vic) Pt 7 Div 4.
73. See above at para 8.70.
74. See also DP 30 at para 6.14.
75. RR 8 at 43-45. Approximately 30% of the people surveyed reported that they were successful or that a compromise position had been reached (as against 19% of complainants overall). Over 70% said they clearly understood what was happening at the conference: RR 8 at 45.
76. SDA s 57.
77. *Bennett v Everitt* [1988] EOC 92-244 at 77,273.
78. Western Australia, Steering Committee into Processes under the Western Australian Equal Opportunity Act 1984, *Investigation and Conciliation: Report into Processes under the Western Australian Equal Opportunity Act 1984* (1994) ("WA Report") at 75.
79. M Thornton, "Equivocations of Conciliation: the Resolution of Discrimination Complaints" (1989) 52 *Modern Law Review* 733 at 741-742.
80. M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (OUP, Melbourne, 1990) at 150-153. See also H Astor and C M Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) at 112; O M Fiss, "Against Settlement" (1984) 100 *Yale Law Journal* 1073.
81. A number of the submissions also supported the view that matters arising during conciliation proceedings should be confidential: Disability Discrimination Legal Centre, *Submission* at 4; Gay and Lesbian Rights Lobby, *Submission* at 20; Law Society of NSW, *Submission* at 6; National Pay Equity Coalition, *Submission* at 4.
82. *Bennett v Everitt* [1988] EOC 92-244 at 77,273.
83. *Australian Iron and Steel Pty Ltd v Najdovska* [1985] EOC 92-120 at 76,202.
84. FOI Act Sch 1 cl 13 provides that a document is exempt if disclosure would found an action for breach of confidence or if it contains information which was obtained in confidence or which could prejudice the future supply of information to the Government or which would, on balance, be contrary to the public interest. See Anti-Discrimination Board, *Submission 1* at 188-189.
85. *Najdovska v Australian Iron and Steel Pty Ltd* [1985] EOC 92-120 at 76,202, per Barbour J.
86. For example, mediators in the Family Court mediation schemes are required to take an oath of secrecy, see *Family Law Act 1975* (Cth) s 19K. See also *National Health Act 1953* (Cth).
87. RDA s 27F; SDA (Cth) s 112; DDA s 127; ADA (Qld) s 220; EOA (Vic) s 192; EOA (WA) s 167; DA (ACT) s 122; and ADA (NT) s 108. The SDA (Tas) s 76 provides that anything said, done, or written in relation to proceedings under the Act is not admissible in any other proceedings.
88. See also Anti-Discrimination Board, *Submission 1* at 189.
89. J Scutt, "The Privatisation of Justice: Power Differentials, Inequality and the Palliative of Counselling and Mediation" in J Mugford (ed), *Alternative Dispute Resolution* (Australian Institute of Criminology, Seminar Proceedings No 15, 1986).
90. RR 8 at 49-52. See also K Mack, "Alternative Dispute Resolution and Access to Justice for Women" (1995) 17 *Adelaide Law Review* 123.

91. RR 8 found that 32% of those complainants who had withdrawn their complaint said it was because of delays and lack of support: at 32. Another survey showed half of the withdrawn complaints were related to either time or lack of support: see Distaff Associates, *A Better Balance: A Review of the Complaints Handling Processes under the Sex, Racial and Disability Discrimination Acts* (1994) at 40.
92. RR 8 at 46.
93. See Anti-Discrimination Board, *Submission 1* at 192; NSW Department of Health, *Submission* at 6-7; D Robertson, *Submission* at 17.
94. Anti-Discrimination Board, *Submission 1* at 192; NSW Department of Health, *Submission* at 6-7; D Robertson, *Submission* at 17.
95. "Submission of Women's Electoral Lobby to the WA Steering Committee into Processes Under the Western Australian Equal Opportunity Act 1984": WA Report at 54.
96. SDA (Tas) s 45(4) provides that where the Commissioner grants leave to one party to be represented, the other party must be notified at least five days before the conference and may also be represented.
97. Anti-Discrimination Board, *Submission 1* at 193; D Robertson, *Submission* at 17.
98. D Robertson, *Submission* at 17.
99. EOA (Vic) s 115(3). See also SDA (Tas) s 46(4).
100. See EOA (Vic) s 140.
101. ADA s 92.
102. ADA s 90A, inserted in the ADA in 1994. It enables the President of the ADB to withdraw a complaint where he or she is satisfied that the complainant no longer wishes to pursue the matter. Up to that time, inactive complaint files remained open indefinitely. See also discussion at para 8.79 above.
103. For the purposes of this section, the Commission will deal only with delays at the conciliation stage. Delays at the Tribunal are dealt with separately in Chapter 9 at para 9.23.
104. A Durbach, "Test Case Mediation: Privatising the Public Interest" (1995) 6 *Australian Dispute Resolution Journal* 233; R Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1992) at 264; M Thornton, "Equivocations of Conciliation: the Resolution of Discrimination Complaints" (1989) 52 *Modern Law Review* 733 at 741.
105. R Hunter and A Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases* (Centre for Employment and Labour Relations Law Working Paper No 8, 1995) at 109.
106. The Commission notes that the ADB's training program has been so successful that it has been able to self fund two positions for part-time educators.
107. ADA s 90A.
108. ADA s 90A, inserted by *Anti-Discrimination (Amendment) Act 1994* (NSW).
109. See s 90A(4) inserted by the *Anti-Discrimination Amendment Act 1997* (NSW).
110. ADA s 90A(2).

111. EOA (WA) s 83A(4).
112. ADA (Qld) s 141.
113. ADA (Qld) s 167. See also ADA (NT) s 84(1).
114. NSW Department of Health, *Submission* at 7.
115. Anti-Discrimination Board, *Submission 1* at 194 agrees with this and suggests that the period should be 12 months from the date of allocation to a conciliation officer. NSW Department of Health, *Submission* at 8 argues that complaints which remain unresolved after 12 months from the date of lodgement should be referred to the Tribunal, subject to limited exceptions to be defined in the ADA.
116. N Papadopolous, "Discrimination Ruling Outrages AIDS Groups" *Sydney Morning Herald* (16 December 1995).
117. Anti-Discrimination Board, *Submission 1* at 182.
118. *Stephenson v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 290.
119. *Stephenson v HREOC* at 290G.
120. *Stephenson v HREOC* at 297G.
121. *Anti-Discrimination Amendment Act 1997* (NSW), inserting a new s 88A.
122. See Draft *Anti-Discrimination Bill 1999* (NSW) cl 113 at Appendix A.
123. See Anti-Discrimination Board, *Submission 1* at 182.
124. Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (ALRC 69, Pt 1) para 3.97, recommendation 3.16.
125. ADA s 94(1)(c).
126. ADA s 94(1).
127. ADA s 123.
128. See, for example, *Law Society of the Australian Capital Territory v Giles* (1985) 81 FLR 176.
129. See, for example, *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47.
130. *Raybos v Jones* at 59G.
131. M Thornton, "Affirmative Action, Merit and the Liberal State" (1985) 2 *Australian Journal of Law and Society* 28 at 34.
132. The Government itself conceded, during the passage of the legislation, that private individual actions for personal remedies amount only to a "step-by-step mopping up" of isolated pockets of discrimination rather than an attack on the cause of discrimination. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 November 1976 at 3347. See also P Wilenski, *Review of EEO Practices in NSW Government Departments* (Sydney, 1976).
133. New South Wales, Anti-Discrimination Board, *Annual Report 1993-1994* at 36.

134. The number of formal complaints received by the ADB is only a small proportion of the inquiries it receives in which an incident of discrimination is allegedly occurring. For instance in 1996-1997, 71% of the approximately 18,000 inquiries received by the ADB related to a situation where discrimination was occurring. Formal complaints represented only 9% of total inquiries. This low figure may be partly due to the ADB's policy of assisting callers to attempt to solve their problem first before making a formal complaint, but the potential disincentives cannot be discounted. See New South Wales, Anti-Discrimination Board, *Annual Report 1996-1997* at 16. See also N Lacey, "From Individual to Group" in B Hepple and E Szyszczak (ed), *Discrimination: The Limits of Law* (Mansell, London, 1992) and M Thornton, "The Indirection of Sex Discrimination" (1993) 12 *University of Tasmania Law Review* 88.
135. *Protection of the Environment Administration Act 1991* (NSW) s 7(2).
136. Formerly known as the Trade Practices Commission.
137. *Trade Practices Act 1974* (Cth) s 80 and 163.
138. There is no specialist tribunal or court to determine discrimination disputes in the UK.
139. The House of Lords in *Commissioner for Racial Equality ("CRE") v Prestige Group PLC* [1984] 1 WLR 335 considered the powers of the CRE under the *Race Relations Act 1976* (UK). It held that there were two types of investigations under the legislation: a general inquiry which can be carried out after giving notice and where the agency need not hold a belief that the law has been breached; and an inquiry into named persons or organisations where the CRE must suspect unlawful acts. See B Hepple, "Have Twenty-five Years of the Race Relations Acts in Britain Been a Failure?" in B Hepple and E Szyszczak, (ed), *Discrimination: The Limits of the Law* (Mansell, London, 1992) and D Pannick, *Sex Discrimination Law* (Clarendon Press, Oxford, 1995).
140. The EOC has the power to bring proceedings against repeat offenders and proceedings for unlawful advertisements, instructions to discriminate or pressure to discriminate: *Sex Discrimination Act 1975* (UK) s 71 and 72.
141. *Human Rights Act 1993* (NZ) s 75.
142. *Civil Rights Act of 1964* (US) s 706 and 707.
143. For example, the EOC can prosecute repeat respondents in industrial tribunals, or respondents who fail to comply with non-discrimination notices. It alone can bring proceedings for unlawful advertisements, instructions to discriminate or pressure to discriminate: *Sex Discrimination Act 1975* (UK) s 71, 72 and 75.
144. Depending of course on how many resources are allocated to the agency to perform these functions. Lacey describes the UK laws as being ineffectual for this reason: see N Lacey, "From Individual to Group" in B Hepple and E Szyszczak (ed), *Discrimination: The Limits of Law* (Mansell, London, 1992). Evidence to the Lavarch Committee also suggested that a lack of resources was the main reason that the Sex Discrimination Commissioner had not made more use of her self-initiation powers: see Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (Canberra, 1992) ("Lavarch Report") at para 6.7.28
145. Cf EOA (WA) s 81.
146. DA (ACT) s 73(2); ADA (Qld) s 155(2); EOA (Vic) s 156(1); ADA (NT) s 74(2); and SDA (Tas) s 32(2).
147. HREOC Act s 11(1)(f).
148. SDA s 52(1)(b); RDA s 24 (1); and DDA s 67(1).

149. DA (ACT) s 73(2); ADA (Qld) s 155(2); EOA (Vic) s 156(1); and ADA (NT) s 74(2).
150. For example, SDA s 48(1)(b). The ALRC, in its report *Equality Before the Law*, recommended that the SDA be amended to reflect the wording of the DA (ACT): “that the Commissioner may, of her own motion, investigate conduct that appears to be unlawful under the Act”. It also recommends that the Commissioner does not need to obtain the consent of HREOC to conduct an investigation and should have the same powers of discovery that are available under the SDA to deal with a complaint. See Australian Law Reform Commission, *Equality Before the Law* (ALRC 69, 1994) Recommendation 3.3.
151. ADA (Qld) s 155(2); and EOA (Vic) s 156(2) and 157(1).
152. Information supplied by Margaret Heylen, Assistant Commissioner, Equal Opportunity Commission (SA) (June, 1995).
153. EOA (SA) s 93A and 94.
154. DA (ACT) s 73(2).
155. Anti-Discrimination Board, *Submission 1* at 178.
156. Anti-Discrimination Board, *Submission 1* at 176-177; Combined Community Legal Centre Group NSW, *Submission* at 13; NSW Department of Health, *Submission* at 11; Disability Council of NSW, *Submission* at 5; Disability Discrimination Legal Centre, *Submission* at 6; Gay and Lesbian Rights Lobby, *Submission* at 5; Law Society of NSW, *Submission* at 5; G MacDonald, at 1; NSW Ministry for the Status and Advancement of Women, *Submission* at 9; National Pay Equity Coalition, *Submission* at 6; NSW Women’s Advisory Council, *Submission* at 2.
157. Anti-Discrimination Board, *Submission 1* at 176-180. Supported by Office of the Director of Equal Opportunity in Public Employment, *Submission*; NSW Independent Teachers’ Association, *Submission*; and Gay and Lesbian Rights Lobby, *Submission*.
158. DP 30 at 174.
159. Anti-Discrimination Board, *Submission 1* at 208-209; Combined Community Legal Centre Group NSW, *Submission* at 13; Disability Council of NSW, *Submission* at 4; Gay and Lesbian Rights Lobby, *Submission* at 5; Law Society of NSW, *Submission* at 5; Legal Aid Commission of NSW, *Submission* at 2; J Lennane, *Submission* at 2; NSW Ministry for the Status and Advancement of Women, *Submission* at 9; National Children’s and Youth Law Centre, *Submission* at 4; National Pay Equity Coalition, *Submission* at 4; NSW Bar Association, *Submission* at 10; NSW Independent Teachers’ Association, *Submission* at 4; NSW Women’s Advisory Council, *Submission* at 3; Office of the Director of Equal Opportunity in Public Employment (NSW), *Submission* at 3; and People with Disabilities, *Submission* at 1. See also Public Interest Advocacy Centre, *Submission* at 1.
160. Aside from its complaint-handling functions, the ADB has a number of other functions which can be used to deal with systemic discrimination. Under ADA s 119, the ADB is empowered to:
  - carry out investigations, research and inquiries relating to discrimination;
  - disseminate information relating to the elimination of discrimination and the achievement of equal rights;
  - consult with government, industry and community groups in order to develop strategies to improve services and conditions affecting groups which may be discriminated against;
  - hold public inquiries; and

develop human rights programs and policies.

The ADB has conducted several inquiries and reviews pursuant to its general functions under the ADA and has prepared a number of reports to the Minister on, for example, its findings on the inquiries relating to pregnancy discrimination and HIV/AIDS discrimination. The ADB has also been especially active in the development and delivery of community education initiatives and training programs to promote awareness of, and compliance with the ADA.

161. Anti-Discrimination Board, *Submission 1* at 178-179.
162. IRA s 167 and 169(4).
163. Anti-Discrimination Board, *Submission 1* at 179-180.
164. The survey found that only 16% of complainants, and 31% of respondents felt that the ABD was biased in any way of its handling of the complaint: see RR 8 at 44.
165. RR 8 at 19 and 33.
166. R Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1990) at 258.
167. N Lacey, "From Individual to Group" in B Hepple and E Szyszczak (ed), *Discrimination: The Limits of Law* (Mansell, London, 1992) at 101.
168. Disability Council of NSW, *Submission* at 6; Eastern Sydney Area Health Service, *Submission* at 1; Gay and Lesbian Rights Lobby, *Submission* at 18; Law Society of NSW, *Submission* at 6; J McEvoy, *Submission* at 1; NSW Ministry for the Status and Advancement of Women, *Submission* at 29; National Children's and Youth Law Centre, *Submission* at 6; National Pay Equity Coalition, *Submission* at 6; NSW Independent Teachers' Association, *Submission* at 5; NSW Women's Advisory Council, *Submission* at 7.
169. NSW Anti-Discrimination Board, *Improved Guidance for Employers about Complying with the Anti-Discrimination Act 1977 (NSW)* (Sydney, 1996).
170. Anti-Discrimination Board, *Improved Guidance for Employers* at 18.
171. Anti-Discrimination Board, *Improved Guidance for Employers* at 18.
172. Anti-Discrimination Board, *Improved Guidance for Employers* at 7.
173. ADA s 119 provides the ADB with extensive powers of research, investigation and dissemination of information. Under this power the ADB has already issued a number of Guidelines, including: *Guidelines for Employers, Managers, Supervisors and EEO Personnel* (ADB, Sydney, 1995); *Guidelines for Real Estate Agents* (ADB, Sydney, 1995); *Guidelines for Club Directors, Managers and Supervisors* (ADB, Sydney, 1992); *Guidelines for the Media* (ADB, Sydney, 1994); *Anti-Discrimination Guidelines for Advertisers* (ADB, Sydney, 1994); *Anti-Discrimination Guidelines for Elected Members and Managers of Local Councils* (ADB, Sydney, 1995); and *Anti-Discrimination Guidelines for Employers and Unions* (ADB, Sydney, 1994).
174. Anti-Discrimination Board, *Submission 1* at 227.
175. Anti-Discrimination Board, *Improved Guidance for Employers* at 10.
176. RDA s 20(1)(d); SDA s 48(1)(ga); and DDA s 67(1)(k).
177. DDA s 31.



178. DDA s 32. However, compliance with the Disability Standards is a complete defence to a complaint of disability discrimination: DDA s 34.
179. DDA Pt 3. Once an Action Plan is submitted, the Commission is required to sell copies of the Plan to the public for a prescribed fee: DDA s 65.
180. Australia, Human Rights and Equal Opportunity Commission, *Draft Employment Code of Practice for the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity in Employment* (Sydney, 1996).
181. HREOC, *Draft Employment Code of Practice* at 7-8.
182. Australia, Human Rights and Equal Opportunity Commission, *Sexual Harassment: A Code of Practice* (Sydney, 1996).
183. HREOC, *Sexual Harassment: A Code of Practice* at 9.
184. These standards were revised in November 1997 and were open for public comment until March 1998. See Australia, Attorney General's Department and Australia, Human Rights and Equal Opportunity Commission, *Disability Discrimination Act Disability Standards: Employment (Revised Draft)* (Sydney, 1997).
185. Human Rights and Equal Opportunity Commission, *Disability Standards: Employment (Revised Draft)* at para 6-9.
186. See DDA s 31, 32 and 34.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 9. Tribunal Proceedings

#### INTRODUCTION

9.1 In 1981 the *Anti-Discrimination Act 1977* (NSW) ("ADA") was amended to create the Equal Opportunity Tribunal ("EOT").<sup>1</sup> Prior to this time the judicial functions under the ADA had been administered by the Anti-Discrimination Board ("ADB") and the conciliation and investigation of complaints had been undertaken by the Counsellor for Equal Opportunity.<sup>2</sup> In July 1997, the *Administrative Decisions Tribunal Act 1997* (NSW) ("ADT Act") was passed.<sup>3</sup> The ADT Act establishes the Administrative Decisions Tribunal ("ADT"), which takes over the functions of the EOT<sup>4</sup> and a number of other tribunals in New South Wales.<sup>5</sup> The following discussion will refer to the EOT and the ADT as "the Tribunal" unless specific reference to one or the other is necessary.

9.2 The ADT Act is the first step in a government program to rationalise and consolidate tribunals across New South Wales and to introduce a mechanism for merits review of administrative decisions.<sup>6</sup> A number of different reasons have been given for the need to merge existing tribunals, including independence, efficient allocation of resources, procedural fairness and consistency in decision making. In the Second Reading Speech introducing the Bill to Parliament, the Attorney General, Hon J W Shaw, stated that:

The growth of tribunals has fragmented responsibility for determining legal rights, leading to a lack of consistency and in some cases arbitrary decision making. It may also lead to poor resource allocation in relation to decision making.<sup>7</sup>

9.3 As a result, the intention is to merge as many tribunals as possible into the ADT.<sup>8</sup>

9.4 Although the ADT Act aims to provide a centralised administrative body, the ADT itself will operate through a number of separate divisions, each of which will have its own distinctive character and procedural rules.<sup>9</sup> The effect of the ADT Act (relevant for present purposes) is primarily, therefore, to transfer the functions of the existing EOT to an equivalent Equal Opportunity Division of the ADT ("EO Division"). As a result, many of the problems and issues faced by the EOT will be directly relevant to the EO Division. In the process of transferring jurisdiction from the existing EOT to the EO Division, however, a number of procedural changes have been made and inconsistencies have arisen between the operation of the provisions governing the EOT and the EO Division. These are outlined and their implications discussed below.<sup>10</sup>

9.5 In this chapter, the Commission suggests reforms to increase the accessibility of the EO Division and to increase the effectiveness and efficient conduct of matters in the Tribunal. Although the merging of the EOT into the ADT may result in unforeseen changes to the structure, operation and resources of the Tribunal, it is assumed that the EO Division will operate in a manner substantially similar to that of the existing EOT.

9.6 In general, the Commission accepts the legislative regime of the ADT Act and the importance of maintaining procedural consistency between various divisions of the ADT. As a result, the Commission only makes recommendations in two circumstances. First, where procedural inconsistencies have arisen between the ADA and the ADT Act, and no explanation has been given for the change in procedure, recommendations seek to resolve the inconsistency. Changes are suggested only where there is a sound theoretical or practical basis for having different procedural provisions in the EO Division to those which operate for the General Division of the ADT. Secondly, recommendations are made where the experience of the EOT has indicated that there are problems with existing procedural provisions under the ADA. In this situation, recommendations to alter the existing provisions are only made where the experience of the EOT will be directly relevant to the operation of the new EO Division.

## **MAIN FEATURES OF THE ADT**

9.7 When originally established, the EOT was designed to operate as informally as possible in recognition of the difficulties faced by women and minority groups in obtaining legal redress for civil wrongs through the formal court system. The ADT Act continues this focus on informality and flexibility.<sup>11</sup> Similarly, the adjudication of complaints at the ADT will continue to be in a public forum,<sup>12</sup> thereby setting enforceable standards, providing clarification of ambiguous or unclear provisions of the ADA and promoting compliance with the objects of anti-discrimination law.<sup>13</sup>

### **Structure of the Tribunal**

9.8 The ADT has two distinct areas of jurisdiction. The first is to review the merits of decisions made by government officials and public bodies and the second is to make original decisions in the areas in which jurisdiction of existing tribunals has been transferred to the ADT.<sup>14</sup> In both cases, jurisdiction must be conferred by another piece of legislation.<sup>15</sup>

9.9 In relation to original jurisdiction, the ADT is divided into a general division and a number of separate specialist divisions, including the EO Division.<sup>16</sup> Each division has the power to formulate its own procedural rules, appropriate to its jurisdiction,<sup>17</sup> and it is intended that each division will operate in a discrete and autonomous manner.<sup>18</sup>

9.10 In the Commission's view, there are sound reasons for maintaining a specialist EO Division and ensuring that its integrity and functions are maintained.<sup>19</sup> The EOT has traditionally been constituted by members who are selected on account of their experience and understanding of the special needs of the people the legislation was designed to serve.<sup>20</sup> It has developed a specialist jurisprudence of anti-discrimination law which should be continued by the EO Division.

### **Composition of the Tribunal**

9.11 The ADT is constituted by a President, deputy Presidents, non-presidential judicial members and non-judicial members.<sup>21</sup> The President must be a judge of the District Court.<sup>22</sup>

9.12 The EO Division is comprised of a Divisional Head<sup>23</sup> and a number of other members as assigned by the President.<sup>24</sup> The President is appointed on a full-time basis, however all other members may be appointed on a full-time or part-time basis.<sup>25</sup> All members are appointed for a three year term and the ADT Act specifically provides for the reappointment of members of the existing EOT, to equivalent status in the EO Division, for the balance of their term of office.<sup>26</sup> Suggestions relating to the appointment of full-time members to the EO Division are made below.<sup>27</sup>

9.13 One judicial member and at least two non-judicial members sit on each inquiry in the EO Division.<sup>28</sup> Non-judicial members are subject to a general requirement of having "special knowledge or skill in relation to any class of matters in respect of which the Tribunal has jurisdiction".<sup>29</sup> The above provisions substantially mirror the constitution of the EOT under the ADA.<sup>30</sup>

### **Referral of matters to the Tribunal**

9.14 A party may not file a matter in the Tribunal directly. The Tribunal can only inquire into matters that have been referred to it by the President of the ADB or by the Minister.<sup>31</sup> The ADB may only refer complaints to the Tribunal where they remain unsettled after conciliation or where conciliation is considered inappropriate.<sup>32</sup> However, a complaint must be referred where the complainant requests a referral under s 91 of the ADA. When referring a complaint, the President of the ADB must submit a report to the Tribunal which contains details of the ADB's investigation into the matter but cannot contain anything said or done during the course of conciliation proceedings.<sup>33</sup>

## **The powers of the Tribunal**

9.15 The Tribunal has broad powers to conduct matters in whatever manner it thinks fit and is not bound by the rules of evidence.<sup>34</sup> It has the power to determine its own procedure<sup>35</sup> and has a duty to act “with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms”.<sup>36</sup> The Tribunal also has the power to conduct preliminary conferences<sup>37</sup> and to refer complaints to conciliation or mediation at any stage with the consent of the parties.<sup>38</sup>

9.16 However, unlike the provisions establishing the EOT, the ADT Act places an express obligation on the ADT to take such steps as are reasonably practicable to ensure that the parties understand the legal implications of the assertions made in the proceedings, explain any aspect of the procedure if requested, and to ensure that the parties have the fullest opportunity to have their submissions heard.<sup>39</sup> The ADT also has an obligation to act as quickly as possible and to ensure that all relevant material is presented before it.<sup>40</sup> In addition to these obligations to assist those before it, the ADT also has the power to call, examine and cross-examine witnesses of its own motion.<sup>41</sup>

9.17 Although the EOT and many other tribunals have had the power to perform such functions, it has been suggested that the introduction of these mandatory obligations will mean that the ADT will be more inquisitorial than previous tribunals and that this will reduce delays and assist unrepresented litigants.<sup>42</sup>

## **Duplication and inconsistency between the ADA and the ADT Act**

9.18 The above provisions are all contained within the ADT Act and have no equivalent in the ADA. However, in the process of amending the ADA, to transfer jurisdiction from the EOT to the EO Division, a number of duplications and inconsistencies have arisen between the two pieces of legislation. These duplications and inconsistencies fall into three categories:

those provisions which have been left in the ADA which have no equivalent in the ADT Act;

those provisions which have been left within the ADA but for which there are equivalent, or substantially similar, provisions in the ADT Act; and

those provisions which have been removed from the ADA which have no equivalent provisions in the ADT Act.

9.19 In the Commission’s view, having provisions relating to the powers and procedures of the Tribunal in two separate pieces of legislation is unduly confusing to complainants. It also involves unnecessary duplication and can give rise to inconsistency. The Commission, therefore, recommends that all provisions relating to the powers and procedures of the EO Division be relocated in a Schedule to the ADT Act.<sup>43</sup> Recommendations relating to specific provisions are made below.

### **Recommendation 128**

**All procedural provisions in the ADA should be transferred to the ADT Act.**

## **Accessibility**

9.20 Although the ADT has only recently been established, a number of problems which have been identified in relation to the existing EOT will have direct relevance to the EO Division.

9.21 The two principal concerns which have been expressed about the operation of the EOT under the ADA are that it has not been sufficiently accessible to parties and that parties experience considerable delays.<sup>44</sup> This lack of accessibility is largely because of the cost required to bring matters

in the EOT<sup>45</sup> and the disadvantages of proceeding without legal representation. The inadequate provisions for representative proceedings have also placed a burden on the individual complainant.<sup>46</sup> Furthermore, power imbalances between the parties, which are evident at the conciliation stage, are more pronounced at the tribunal stage. Some of these matters may be resolved to some extent with the creation of the new ADT, which is intended to streamline tribunal proceedings across jurisdictions. However, the costs of, and the barriers to obtaining legal representation are unlikely to improve as a result of the administrative changes.

9.22 Other disincentives to bringing proceedings in the EOT include the inadequacy and ineffectiveness of the range of remedies available where a complaint is substantiated<sup>47</sup> and the exacting task of proving discrimination, particularly indirect discrimination.<sup>48</sup> Some research in this area has found that few complainants think that bringing an unconciliated complaint to the EOT is worth the time, stress and cost.<sup>49</sup> If, because of perceived obstacles, complainants fail to take unsettled matters to the Tribunal, the conciliation process is weakened as respondents may be less inclined to settle a complaint where the threat of a contested hearing is a hollow one.<sup>50</sup> Similarly, a complainant who feels unable to proceed further, will more readily abandon a meritorious complaint.

### **Delays**

9.23 Delays in the EOT have generally occurred at the three stages of the resolution process:

obtaining dates for hearing;

the conduct of proceedings at the hearing, including pre-hearing procedures; and

delays in the handing down of decisions.

9.24 The New South Wales Bar Association submitted that:

[t]he operation of the EOT currently means that the credibility of the jurisdiction and its decisions are being undermined by the serious delays which can be detrimental to all parties. Important issues of rights and remedies need to be determined, and yet it is difficult to obtain a decision even after the hearing is completed often after many months and in some cases, years.<sup>51</sup>

9.25 **Delays in listing matters for final hearing.** In the past, it was not uncommon for matters to be set down for hearing some 12 to 18 months after they were referred to the EOT.<sup>52</sup> Following a review of the operations of the EOT, additional judicial and lay members were appointed and a full-time registrar and additional administrative staff were recruited. Together with reforms to pre-hearing procedures, these improvements have substantially redressed the delays in listing matters for hearing.<sup>53</sup> However, the workload of the EOT has increased considerably over the years of its operation<sup>54</sup> and it is likely that this trend will continue in the EO Division of the ADT.

9.26 One innovative feature of the ADT Act is a provision which allows a decision to be made without holding a formal hearing.<sup>55</sup> This provision may reduce the level of delay at the ADT. Although this provision has been criticised as failing to provide sufficient safeguards to protect the interests of the applicant,<sup>56</sup> the ADT Act does provide a complementary obligation, namely that the Tribunal ensure that the parties have the “fullest opportunity practicable to be heard or otherwise have their submissions considered in the proceedings”.<sup>57</sup>

9.27 **Delays in the conduct of matters at the hearing.** In addition to delays in listing matters, it is often the parties’ own conduct, such as failure to attend conferences, file documents, or generally not being prepared, which has caused delays in resolving disputes.<sup>58</sup> Hearings may also be protracted where one of the parties to an inquiry is unrepresented.<sup>59</sup>

9.28 The time it takes to resolve a matter in the EO Division will be materially linked to how inquiries are conducted by it and whether parties have access to legal assistance or representation. A number of submissions to the Commission suggested that rules should allow the Tribunal to take a more active role in:

defining the relevant issues prior to hearing;

encouraging agreed statements of facts and law;

calling on independent expert advice where there is a conflict of expert evidence;

requiring evidence to be submitted in affidavit form; and

imposing, and strictly enforcing, timetables for the production and filing of submissions.<sup>60</sup>

9.29 In relation to the existing procedures, submissions received in response to the Commission's *Review of the Anti-Discrimination Act 1977 (NSW)* (Discussion Paper 30, 1997) ("DP 30") called for the imposition of strict time-lines and penalties for non-compliance with directions of the Tribunal in order to minimise delays and costs.<sup>61</sup> The power to impose time-lines and make directions are unlikely to be effective without some penalty for non-compliance. The EO Division could be given an express power to impose time-lines on parties and to make costs awards in cases of non-compliance with directions of the Tribunal.<sup>62</sup>

9.30 ***Delays in handing down judgments.*** A final source of delay at the EOT has been in handing down judgments. It has been reported that many months, and sometimes years, have elapsed between the completion of submissions by the parties to an inquiry and the handing down of the EOT's decision.<sup>63</sup>

9.31 These delays have been due partly to the structure of the EOT which has only provided for the appointment of part-time members.<sup>64</sup> However, this structural problem, which is by no means unique to the EOT, is not the sole cause of delay. Anecdotal evidence suggests that some judicial members (the initial preparation of written reasons is usually the responsibility of the presiding member) are more efficient, or at least more expeditious, than others. However, there has been no formal study of the causes of this problem and, in any event, it is likely that the causes have varied from time to time. In addition, the practice of holding a hearing for the handing down of a decision may have contributed to delays.<sup>65</sup>

9.32 Under the ADT Act, the ADT is required to give reasons for a reserved decision within six months<sup>66</sup> and the decision may be delivered by a single member of the Tribunal or by the Registrar.<sup>67</sup> While the ADT Act provides that members may be appointed on a full-time or part-time basis,<sup>68</sup> there is no mandatory provision requiring the appointment of a full-time member to any Division of the ADT. The fact that the President will be a full-time member at the EO Division should assist in resolving some of the administrative problems. Although the provisions of the ADT Act are likely to reduce the level of delay at the ADT, it has been suggested that the case load in the EO Division will mean that it is necessary to have at least one full-time member in the Division.<sup>69</sup> A full-time member would provide a degree of continuity to the case-management in the EO Division. While this is an administrative matter, the Commission recommends that careful consideration be given to whether the Head of the EO Division should be appointed on a full-time basis.

## **INITIATION OF PROCEEDINGS**

9.33 The ADT Act provides that a person may apply to the Tribunal for "an original decision" if "the application is made by or on behalf of an interested person".<sup>70</sup> The term "interested person" is defined to mean a person "who is entitled under an enactment to make an application to the Tribunal for an original decision".<sup>71</sup>

9.34 As already discussed, the scheme of the ADA provides that complaints are lodged with the President of the ADB and, if conciliation fails or is inappropriate, are referred to the Tribunal by the President.<sup>72</sup> The ADT Act amends the ADA to substitute the ADT for the EOT.<sup>73</sup> There is no provision currently in the ADA for any person to make an application to the Tribunal; there is a provision in the ADT Act for the Tribunal to deal with a complaint referred to it,<sup>74</sup> but only by an extension of the definition of “application”. As consequential provisions relating to parties to proceedings depend upon there being a person who has made an application to the Tribunal,<sup>75</sup> this approach is inadequate.

9.35 The ADT Act makes provision generally for “proceedings before the Tribunal”. The ADA provides that the Tribunal “shall hold an inquiry” into each complaint or matter referred to it.<sup>76</sup> These provisions adopt different terminology and should not both be retained. Consistently with the view that matters relating to the powers and functions of the Tribunal should be in the ADT Act, s 96 of the ADA should be repealed.

9.36 The Registrar of the Tribunal is required to serve notice of an application “on any party (other than the applicant)”.<sup>77</sup> That provision will only have effect if the respondent to a complaint is a “party” to the proceedings before the Tribunal. Parties are defined as: the applicant; any other person who seeks to become a party; and “any person specified by or under any enactment as a party to the proceedings”.<sup>78</sup> The purpose of service is to give notice to a party of the proceedings. If a respondent to a complaint is not automatically a party, he or she must make application to become a party: accordingly, unless the respondent to a complaint is “specified” as a party to the proceedings under an enactment, he or she will not be a party and will not be entitled to notice of the commencement of the proceeding. For the purposes of the ADT Act, the person must be made a party by some other Act.<sup>79</sup> Consistently with this framework, an amendment is needed to the ADA to require the identification of the respondent to a complaint as a party to the proceedings before the Tribunal, upon referral to the Tribunal. Whilst this amendment may be appropriate, there is a question as to whether it should be in the ADA or in the ADT Act. If it is to be in the ADT Act, which appears to be the more appropriate location, s 5 of the ADT Act will also need amendment.

#### **Recommendation 129**

**Section 96 of the ADA, regarding inquiries into complaints by the Tribunal, should be repealed.**

#### **Recommendation 130**

**The ADT Act should specify that, upon referral to the Tribunal, the complainant and respondent to the complaint are parties to the proceedings.**

### **PRE-HEARING PROCEDURES**

9.37 The question of representative complaints is dealt with separately in this chapter.<sup>80</sup> Presently, the relevant provisions appear in the ADA and require amendment. To the extent that representative proceedings are available in the Tribunal, relevant provision should be included in the ADT Act.

9.38 The general powers of the Tribunal in relation to procedural matters are set out in the ADT Act, Pt 2 ch 6.

#### **Procedural rules**

9.39 Subject to the comments set out below, the ADT Act makes provision in relation to most of the matters currently covered by the ADA in relation to the functions of the Tribunal. The ADT Act specifies the powers and functions of the ADT generally in a manner which maximises the flexibility of the

Tribunal to determine its own procedure. This is a beneficial approach: however, in some circumstances, parties to proceedings may benefit from more specific guidance as to particular steps. The ADT Act recognises this and provides that the ADT may make rules and may prescribe different rules for each of the divisions.<sup>81</sup> Although the EOT has from time to time issued practice directions which have given the parties guidance as to the procedures to be followed, the EOT has not used its power to determine its own procedure to formulate rules. It is hoped that the ADT will make appropriate rules with respect to the EO Division.

### **Conciliation**

9.40 The ADA provides that the Tribunal may endeavour to resolve a complaint by conciliation and obliges the Tribunal to take “all such steps as to it seem reasonable” to effect an amicable settlement of a complaint.<sup>82</sup> This provision is not one of those to be repealed upon the commencement of the ADT Act. On the other hand, the ADT Act itself contains extensive provisions in respect of alternative dispute resolution.<sup>83</sup> However, these provisions provide for referral to mediation and require the consent of the parties to the referral.<sup>84</sup>

9.41 In practice, the power of the Tribunal to encourage settlement and engage in conciliation has rarely been used. In part, this reluctance is soundly based upon a concern that, were the Tribunal itself to become involved in conciliation, it would not be able to proceed with a hearing of the complaint should conciliation fail. That would necessitate the reformation of the Tribunal, with different members, for the purpose of the hearing. Further, the power given to the Tribunal to embark on conciliation seems unnecessary, given that the complaint has only come to the Tribunal because an independent statutory officer, namely the President of the ADB, has been unable to reach a settlement by conciliation or has thought conciliation no longer appropriate. In relation to the obligation to take unspecified steps to effect an amicable settlement, it is again not clear to the Commission that the provision has had any practical effect. Given the more detailed provision permitting mediation contained in the ADT Act, the Commission recommends that s 106 of the ADA be repealed.

### **Recommendation 131**

**Section 106 of the ADA, regarding the Tribunal’s resolution of a complaint by conciliation, should be repealed.**

### **Confidentiality orders**

9.42 The ADA empowers the Tribunal to give directions prohibiting or restricting the publication of various aspects of an inquiry, or the disclosure of information which may lead to the identification of a party or witness before the Tribunal.<sup>85</sup> That power is largely replicated in the ADT Act.<sup>86</sup> It is inappropriate to have similar provisions appearing in both Acts especially in the present case where there is a significant level of inconsistency between them. Further, there appears to be inconsistency between two different sections in the ADT Act dealing with the same topic.

9.43 The appropriate place for such provisions is in the ADT Act. However, at least in relation to proceedings under the ADA, the Commission is satisfied that the substance of the provisions appearing in the ADA are appropriate and that any inconsistency should be resolved in favour of the party or witness. This appears to have been the intention of the ADT Act,<sup>87</sup> although that intention is by no means beyond doubt.

9.44 The principal inconsistency is that one provision in the ADT Act provides a ban on the publication or broadcasting of the name of any person who is a witness before the Tribunal, or who is a person to whom any proceedings relate, or is “mentioned” or otherwise involved in any proceedings before the Tribunal, except with the consent of the Tribunal.<sup>88</sup> Publishing the name of a person is defined to include publication of any information, picture, or other material that identifies, or is likely to lead to the identification of, the person. The name or identifying material can be published if it appears in “an official



report of the proceedings”, presumably because the inclusion of the material in the report indicates the implied consent of the Tribunal.

9.45 The open administration of justice is a fundamental principle of the common law, based on the assumption that public scrutiny of the judicial system, accompanied by the right publicly to impart information and ideas and comment on them, is central to the healthy operation of a democratic society. As noted by Justice Kirby, when President of the Court of Appeal:

The principles which support and justify the open doors of our courts likewise require that what passes in court should be capable of being reported. The entitlement to report to the public at large what is seen and heard in open court is a corollary of the access to the court of those members of the public who chose to attend ...

Statute apart, it is doubtful on the authorities that Courts have the power to make an order, operating outside the court, which suppresses the publication of anything said in open court.<sup>89</sup>

9.46 Even where the courts do have power to suppress the publication of names or other information, they will only exercise that power where such publication “will defeat the very purpose to which the public conduct of a court’s business is ordinarily deemed essential”.<sup>90</sup>

9.47 As the ADA recognises, there is nothing about the jurisdiction granted to the Tribunal under it which requires the imposition of a blanket of secrecy. Where the particular circumstances of a case require that a non-publication order be made, it is appropriate that the Tribunal have power, upon the application of a party, to make such an order. The Commission is satisfied that such a power should be available in relation to proceedings concerning discrimination complaints. However, it is quite inappropriate that non-publication should be the rule, subject to release by the Tribunal from the statutory constraint.

9.48 Whether s 126 of the ADT Act is appropriate in other circumstances is not a matter which the Commission is asked to consider: its application in relation to the jurisdiction of the Tribunal under the ADA, however, is inappropriate. The ADT Act should contain a provision similar to s 110A of the ADA in relation to this aspect of its jurisdiction.

9.49 Indeed, the intended operation of s 126 of the ADT Act is unclear: it appears to be inconsistent with s 75 of the same Act, which more closely reflects the provisions of s 110A of the ADA.

### **Recommendation 132**

**The ADT Act should contain a provision similar to s 110A of the ADA in relation to matters brought under the ADA and s 126 of the ADT Act should not apply.**

### **Representation**

9.50 The ADA currently makes the following provision in relation to representation at an inquiry before the Tribunal:

101(1) A party to an inquiry –

- (a) is entitled to appear personally or where the party is a body corporate, by a director, the secretary or an agent of the body corporate; and
- (b) may by the leave of the Tribunal, be represented by a solicitor, by counsel or by an agent.

101(2) No person, other than a solicitor or counsel is entitled to demand or receive any fee or reward for representing a party to an inquiry.

9.51 This provision is not covered by the repeals which take effect on commencement of the ADT Act. The ADT Act, however, makes separate provision for representation of parties to proceedings.<sup>91</sup> The provision in the ADT Act differs in two respects. First, it permits the Tribunal to appoint a person to represent an incapacitated person. In this context, an incapacitated person is a minor or any person who is totally or partially incapable of representing himself or herself in the proceedings.<sup>92</sup> Secondly, there is representation as of right by an agent,<sup>93</sup> although the Tribunal may prohibit representation by “an agent of a particular class”, but only in relation to “the presentation of oral submissions”.<sup>94</sup>

9.52 The provisions in relation to incapacitated persons are intended to be beneficial: nevertheless, there should be a restraint on the Tribunal appointing a representative for such a person without the consent of the person, if the person is capable of giving or withholding consent.

9.53 Although the ADA requires parties to seek leave to be legally represented before the Tribunal, in practice, it appears that the EOT has rarely denied such an application, as indicated by the relatively few unrepresented cases.<sup>95</sup> The submission of the New South Wales Bar Association argued that, due to the complexity of discrimination law, there should be an unrestricted right to legal representation.<sup>96</sup>

9.54 Whilst some discrimination cases involve legal or factual complexities, many do not. If a party, even in a relatively simple case, is entitled to representation, the other party will usually feel disadvantaged if he or she cannot find or afford representation. The Tribunal should retain the power to control this aspect of its proceedings, as at present. However, the Commission recommends that the ADT Act prescribe the relevant criteria to be considered in the exercise of the discretion.

9.55 The relevant criteria to be addressed by the Tribunal in the exercise of its discretion should be as follows:

- (a) Where one party applies for representation, the Tribunal should take into account the intention of the other party, and should be less willing to grant leave to one party where the other party expresses an intention not to seek representation or believes that representation will not be available.
- (b) The complexity and importance of the proceedings to each party and in the public interest are factors favouring representation.
- (c) The likelihood that a case will be short and turn on issues of fact works against the grant of leave, even in circumstances where there may be serious issues of credibility.
- (d) The Tribunal should take into account the likely cost of representation as compared with the financial benefit of the relief sought.
- (e) Where the Tribunal is inclined not to grant leave, it may consider and take into account the possible consequences of appointing an officer to assist the Tribunal.

### **Recommendation 133**

**The ADT Act should provide that, in the EO Division, the Tribunal has a discretion whether to allow representation by an agent.**

**In exercising this discretion the Tribunal should consider:**

**whether both parties intend, or are able, to obtain legal representation;**

**the complexity and importance of the proceedings to each party and in the public interest;**

**the likelihood that a case will be short and turn on issues of fact;**

**the likely cost of legal representation as compared with the financial benefit of the relief sought; and**

**where the Tribunal is inclined not to grant leave, the possible consequences of appointing an “officer assisting the Tribunal”.**

### **Access to legal representation**

9.56 Although there may be a right to legal representation in the Tribunal, this right will have little value for parties who cannot afford to be legally represented. Although it is intended that the ADT will be characterised by greater informality and procedural flexibility than previous tribunals,<sup>97</sup> the difficulty and complexity of proving discrimination in some cases will still leave the unrepresented litigant at a disadvantage.<sup>98</sup> Complainants who cannot afford legal services and who cannot access publicly funded legal aid are likely to be deterred from proceeding to the Tribunal.<sup>99</sup>

9.57 Apart from legal aid, which is rarely granted,<sup>100</sup> there has been no formal support for complainants who have been unrepresented at the EOT. It is assumed that this situation will continue in the ADT. This fact is a major concern in the area of discrimination law, given the difficulty of proving discrimination and the fact that the majority of complainants are from disadvantaged groups. The lack of support for unrepresented parties also contributes to delays and, according to the New South Wales Bar Association, can be unfair to the represented party whose legal representative is sometimes expected to assist the unrepresented party.<sup>101</sup>

9.58 In relation to representation by an agent, the Commission is troubled by the proposition that representation is provided as of right under the ADT Act, subject to a contrary order by the Tribunal, in circumstances where a restriction can only be imposed in relation to oral submissions. If it is proposed that there be no requirement to obtain leave, then the power of the Tribunal to restrict representation should apply to all aspects of the proceedings before it. At present, it seems as if the Tribunal could prevent a defendant being represented by lawyers in relation to oral submissions, but could not prevent a defendant engaging senior counsel to cross-examine the complainant.

9.59 On balance, the Commission understands that the Government intended, by not repealing the provision in the ADA, that that regime should continue to operate in the EO Division. The Commission accepts that that approach is appropriate, but recommends that the section be removed from the ADA and incorporated into the ADT Act.<sup>102</sup>

9.60 If that is done, there are two further minor amendments which the Commission would recommend. First, it is desirable that the ADA provision be amended to make it clear that an agent who is employed to assist others should not be precluded from representing a party before the Tribunal because he or she receives a salary for work which includes such representation, but rather that the prohibition in s 101(2) should relate only to a fee or reward provided by or on behalf of a party for the purpose of representing that party.

9.61 Secondly, the Commission is satisfied that the power of the Tribunal to appoint a representative for an incapacitated person is a desirable power, but one which should be limited to an appointment with the consent of the party where the party is capable of giving or withholding that consent.

### **Recommendation 134**

**The prohibition in s 101(2) of the ADA should be transferred to the ADT Act and should only apply to a fee provided on behalf of a party for the purpose of representing that party.**

### **Recommendation 135**

**The ADT Act should provide that where the Tribunal appoints an agent to represent an incapacitated person, the consent of that person is required (where that person is capable of giving consent).**

#### **Summary dismissal of complaints**

9.62 The ADA and the ADT Act contain similar provisions which allow the Tribunal to dismiss a complaint which is “frivolous, vexatious, misconceived or lacking in substance”, or where the complainant does not wish to proceed with the complaint.<sup>103</sup> The only significant difference between the ADA provisions and those in the ADT Act are that the provisions in the ADA specifically provide that the Tribunal may award costs where a complaint is dismissed on either of these bases.<sup>104</sup>

9.63 The provisions in the ADA were amended in 1994 to make specific provision for the removal of a complainant who did not wish to proceed. These specific provisions are, in the view of the Commission, worth retaining.<sup>105</sup> The power to dismiss complaints is, however, clearly one which should be contained in the same legislation as the general powers relating to the Tribunal. Given the general consistency between the two provisions, the Commission recommends that s 111 be removed from the ADA but that s 73 in the ADT Act be amended to include provisions equivalent to the 1994 amendments to the ADA. The Commission does not see any necessity to deal with costs of such an order in this section, especially as s 73 of the ADT Act deals generally with the powers of the Tribunal. A specific power in relation to costs should, however, make specific reference to proceedings which have been dismissed as frivolous and vexatious.

### **Recommendation 136**

**The ADT Act should provide that the Tribunal may dismiss a complaint, or remove the name of a particular complainant, if satisfied that the complainant does not wish to proceed with the matter.**

#### **POWERS TO OBTAIN EVIDENCE**

9.64 Under the ADA, the EOT had power to require the attendance of witnesses to give evidence or produce documents, by a somewhat cumbersome mechanism of vesting in it certain powers conferred under the *Royal Commissions Act 1923* (NSW).<sup>106</sup> This provision has been repealed. The ADT Act makes specific provision for the Tribunal to call witnesses to attend and give evidence or produce documents and also empowers the Tribunal to compel witnesses to answer questions.<sup>107</sup>

9.65 The power of the Tribunal to compel a witness to answer a question is subject to a “reasonable excuse” exception for refusing to answer.<sup>108</sup> In earlier legislation, the phrase “reasonable excuse” had been used, but was defined.<sup>109</sup> More recently, a similar phrase has been used in the *Crime Commission Act 1985* (NSW) and given a partial definition by reference to factors which might constitute reasonable excuses.<sup>110</sup> In the ADT Act, the phrase appears undefined.

9.66 Even where significant guidance was given as to what might constitute a reasonable excuse, the Court of Appeal declined to provide an exhaustive definition, or to substitute some different judicial formula for the phrase used in the legislation.<sup>111</sup> As a result, the phrase imports an undesirable level of uncertainty into legislation which should, so far as possible, be clear and precise.

9.67 The EOT, operating under the *Royal Commissions Act*, may not compel an answer to a question, or compel the production of a document if the witness has a “reasonable excuse” for refusing, but that term is defined in s 4 as follows:

“Reasonable excuse” in relation to any act or omission by a witness or a person summoned as a witness before a commission means an excuse which would excuse an act or omission of a similar nature by a witness or a person summoned as a witness before a court of law.

9.68 The terminology adopted may be more precisely defined in the modern context by reference to the *Evidence Act 1995* (NSW).

9.69 Accordingly, the provision would be more satisfactory if it read as follows:

Nothing in subsection (1) enables the Tribunal to compel a witness to answer a question or produce a document if the witness –

- (a) would not be a compellable witness under the provisions of the *Evidence Act 1995*;  
or
- (b) would be entitled to the benefit of a privilege under the provisions of Part 3.10 of the *Evidence Act 1995*.

9.70 This approach is picked up in part in relation to documents by s 125 which is contained in the miscellaneous provisions in ch 8 of the ADT Act. However, there is no cross-referral between the relevant provisions.

#### **Recommendation 137**

**The ADT Act should provide that nothing in the Act enables the Tribunal to compel a witness to answer a question or produce a document if the witness:**

**would not be compellable under the provisions of the *Evidence Act 1995* (NSW); or**

**would be entitled to claim privilege under Part 3.10 of the *Evidence Act 1995* (NSW).**

#### **POWERS IN RELATION TO RELIEF**

##### **Interim orders**

9.71 The ADA provides that the Tribunal may make interim orders, either on the application of a party to an inquiry before it, or on the application of the President of the ADB, where a complaint is still before him or her for investigation or conciliation.<sup>112</sup> The purpose of the power is to maintain the status quo between the parties to the complaint or to preserve the rights of the parties pending the termination of the subject of the complaint. These provisions ceased to exist when the ADT Act commenced,<sup>113</sup> but there is no similar provision contained in the ADT Act.

9.72 The Commission is of the view that the power to make interim orders, although not commonly used, is a valuable one and that a provision in similar terms to s 112 of the ADA should be contained in the ADT Act. Similarly, the role of the President of the ADB in seeking interim orders in circumstances where the complaint has not been declined, nor referred to the Tribunal, is valuable and should be incorporated in the ADT Act.

#### **Recommendation 138**

**The ADT Act should provide that the EO Division has the power to make interim orders to preserve the rights of the parties, on the application of either the President of the ADB or a party to an inquiry.**

#### **Final orders**

9.73 The orders available from the Tribunal are presently contained in s 113 of the ADA. The extent and appropriateness of the provisions in this section are discussed separately in Chapter Ten of this report. Questions of enforcement are also dealt with in that chapter.

#### **Reasons for decision**

9.74 The ADA did not require the EOT to state reasons for its decisions, but allowed a party to seek reasons by notice served on the EOT within seven days of the decision or order. The EOT was then required to give reasons within 14 days of receiving the notice.<sup>114</sup> This provision has been replaced with the commencement of the ADT Act. The ADT Act provides that the Tribunal “may give reasons either orally or in writing” for its decision and allows a party to seek reasons, where they are not given, within 28 days of receiving a copy of the decision.<sup>115</sup> The Tribunal is then allowed 28 days to provide a statement of reasons. The provision expressly requires that the reasons must set out findings on material questions of fact with reference to the evidence or other material on which the findings are based, the Tribunal’s understanding of the applicable law, and the reasoning process which led the Tribunal to its conclusions.

9.75 In addition, there is a further provision which appears to require the Tribunal to give reasons if it reserves its decision and does not deliver it at the completion of the hearing.<sup>116</sup> The provision is worded in terms of an obligation to give reasons for a decision within six months of reserving the decision, which presumably means that the decision itself must be given within six months. This provision does not fit well with the specific requirements of s 89. However, the Commission supports the principle that the decision of the Tribunal should be required within six months of completing a hearing. The Commission is also of the view that, where a decision is not reserved, there should be a positive obligation on the Tribunal to give reasons, either at the time of the handing down of the decision or within 28 days. Alternatively, if reasons are not given when the decision is handed down, it should be sufficient that a party present when the decision is handed down make an oral request for reasons.

#### **Recommendation 139**

**The ADT Act should provide that the Tribunal must give reasons for its decision, within 28 days of handing down the decision.**

#### **CLASS ACTIONS**

9.76 The availability of representative or class actions<sup>117</sup> has in the past been a controversial issue in Australia. Representative actions are a recognised tool for improving access to the legal system because they allow one person from a group of persons with a common interest to lodge an action which, if the group were required to act as individuals, might not be feasible or as effective. They can also significantly redress power imbalances between individuals and well financed respondents.<sup>118</sup> Representative actions, in varying forms, have been incorporated in the rules of all superior Australian courts.<sup>119</sup> Although the ADT Act makes no provision for it, the representative action procedure in the ADA has been retained. In keeping with the recommendations made above, the representative action procedure should be removed from the ADA and transferred to the ADT Act. However, the Commission also recommends that the current provisions be amended as set out below.

#### **Representative action provisions under the ADA**

9.77 A representative complaint is defined in s 87 of the ADA as:

a complaint lodged under s 88 by a person on behalf of himself or herself and other persons, or two or more persons on behalf of themselves and other persons, and which is treated by the Tribunal as a representative complaint.

9.78 Under s 103 of the ADA, the Tribunal may only hear a complaint as a representative complaint if “it is satisfied that the complaint is made bona fide and in good faith as a representative complaint”.<sup>120</sup> In deciding whether a complaint is so made, the Tribunal must be satisfied that specified criteria are met. Section 103 of the ADA provides that:

In considering whether a complaint is made bona fide and in good faith as a representative complaint, the Tribunal shall satisfy itself:

- (a) that:
  - (i) the complainant is a member of the class of persons, the members of which class have been affected, or may reasonably be likely to be affected, by the conduct of the respondent;
  - (ii) the complainant has in fact been affected by the conduct of the respondent;
  - (iii) the class is so numerous that joinder of all its members is impracticable;
  - (iv) there are questions of law or fact common to all the members of the class;
  - (v) the claims of the complainant are typical of the claims of the class;
  - (vi) multiple complaints would be likely to produce varying determinations which could have incompatible or inconsistent results for the individual members of the class; and
  - (vii) the respondent has acted on grounds apparently applying to the class as a whole, thereby making relief appropriate for the class as a whole; or
- (b) that notwithstanding that the requirements of paragraph (a) have not been satisfied, the justice of the case demands that the matter be dealt with and a remedy provided by means of a representative complaint.<sup>121</sup>

### **Criticisms of the current model for class actions**

9.79 These criteria are modelled largely on Rule 23 of the *United States Rules of Civil Procedure*, although the requirement that a court or tribunal be satisfied that the representative complainant will fairly and adequately represent the interests of the class is not included in the ADA.<sup>122</sup> Judge Mathews has suggested that criterion (vi) is meaningless, given the nature of discrimination cases and the quasi-judicial nature of the EOT.<sup>123</sup>

9.80 More importantly, this provision makes cumulative a number of requirements which, in the United States rules, are not cumulative but depend upon the nature of the case and the relief sought. Further, the United States rules are specifically designed to allow for class actions where damages are sought, although the ADA excludes a representative proceeding in relation to a damages claim.<sup>124</sup>

9.81 In practice, the EOT has not dealt with representative complaints by applying the terms of paragraph (a), but rather by application of the alternative provision in paragraph (b).

9.82 While the EOT has exercised its power to hear a complaint as a class complaint when “the justice of the case demands”,<sup>125</sup> these certification requirements, and the limited remedies available in representative actions, may have discouraged the use of the representative complaint provisions in the ADA.<sup>126</sup> Additional disincentives include the absence of machinery provisions for the proper

management of representative complaints, such as procedures to amend the class, substitute for the representative party, opt out of the class, strike a settlement and discontinue the action.

9.83 The Commission is firmly of the view that the United States rules should no longer serve as a model for an appropriate representative procedure. This model was rejected by the Australian Law Reform Commission ("ALRC") in its 1988 report.<sup>127</sup> Although the ALRC as a whole recommended a novel and somewhat complex approach, the Federal Government adopted a more straight forward approach which involved the liberalisation of the common law rules which appeared in the Federal Court Rules and, in virtually identical form, in other superior court rules in Australia and the United Kingdom. This model should form the basis of a revised representative procedure in the Tribunal.<sup>128</sup>

9.84 The statutory approach has received judicial support from the High Court in *Carnie v Esanda Finance*,<sup>129</sup> which paved the way for increased use of representative actions under the common law rules.<sup>130</sup> In that case, the High Court gave a wide interpretation to the requirement imposed by the criterion that members of the class have the "same interest" in the proceedings.<sup>131</sup> This approach should allow claims for damages arising out of separate contracts in appropriate cases. The reasoning of the High Court has important ramifications in discrimination law in light of the fact that many decisions taken today, especially in employment situations, involve not "so much a denial of individual human rights but a process which systematically operates to exclude a certain class from the enjoyment of some benefit".<sup>132</sup>

#### **Representative actions in Federal equal opportunity laws**

9.85 The representative action provisions of Federal anti-discrimination legislation were amended in 1992, largely to mirror the new representative action provisions of the Federal Court.<sup>133</sup> Most importantly, these new representative procedures, unlike the representative complaints provisions contained in the ADA, do not restrict the remedies or ancillary orders that may be awarded. They are available for damages claims and for claims arising out of separate contracts between the applicants and the respondent.<sup>134</sup> Under Federal equal opportunity laws, a complaint may be heard as a representative complaint if three criteria are satisfied:

- the class members have complaints against the same person;
- the complaints arise out of the same, similar or related circumstances; and
- the complaints give rise to a substantial common issue of law or fact.<sup>135</sup>

9.86 The complainant need not name the persons comprising the class, nor obtain their consent, but the complaint must describe or identify them. It must also specify the nature of the complaint, the relief sought and the common questions of law or fact.<sup>136</sup> Federal anti-discrimination laws borrow from the comprehensive legislative framework of Federal Court representative action procedures,<sup>137</sup> making provision for opting out, replacement of the representative complainant, amendment of the complaint (for example, to alter the description of the class or the relief sought) and notice requirements. Group members are precluded from lodging an individual complaint in respect of the same matter.<sup>138</sup>

9.87 Federal equal opportunity laws do not, however, reflect all of the procedural and machinery provisions contained in Part IVA of the *Federal Court Act*. For example, they do not suspend the limitation period for an action by an individual member of the class<sup>139</sup> nor do they contain provisions for the quantification and allocation of damages awards.<sup>140</sup>

#### **Criticisms of the Federal Court model**

9.88 Although Part IVA of the *Federal Court Act 1976* (Cth) delivers a legislative benchmark for the effective administration of representative complaints in Australia, the model has been criticised on two specific points. First, it is criticised for allowing residual damages to revert to the respondent.<sup>141</sup> Secondly, it is criticised for permitting the respondent to have the matter struck out if the court agrees



that the cost of identifying and distributing any damages award to class members is likely to exceed the amount to which each member is entitled.<sup>142</sup> It is argued that, together, these provisions effectively allow the respondent to “unlawfully obtain relatively small amounts of money from a large number of people” (which may amount to a sizeable aggregate) and “retain the profits of its misdeeds”.<sup>143</sup>

#### **Adopting an expanded representative procedure**

9.89 The majority of submissions received by the Commission called for the incorporation of representative procedure provisions similar to those adopted in Federal equal opportunity laws and, where relevant, Part IVA of the *Federal Court Act*.<sup>144</sup>

9.90 The drafters of the ADA provisions demonstrated commendable foresight in accepting a principle which is now reflected in similar legislation around the country. However, the mechanism for representative actions has since been reconsidered and more appropriate models are available. Accordingly, the principle should be retained, but in a form which reflects the Federal Court provisions.

9.91 In addition, the Commission considers that the Tribunal should have a power to make cy-pres orders in relation to amounts which the respondent has been ordered to disgorge for repayment to class members, in circumstances where the amount is not fully distributed, or where the costs of distribution should properly be borne by the fund and would reduce the amount available for distribution below a reasonable level. The principle of disgorgement should apply in relation to amounts which the respondent has made or retained as a result of its unlawful conduct, and should not apply in circumstances where the award is assessed purely as compensation for loss suffered by individuals. Further, the Commission does not consider that the Tribunal should have an unfettered power as to the beneficiary of a cy-pres order. The preferred course is to require that the funds be paid to the ADB which should be empowered to disburse them to community organisations (including community legal centres and the Legal Aid Commission) for the funding of activities, including proceedings relating to public education or efforts to enforce the ADA. A precedent for this approach may be found in the provisions of the former *Credit Act 1984* (NSW) with respect to payments ordered for breach of consumer protection provisions.<sup>145</sup>

9.92 As Chief Justice Gleeson commented in the *Carnie* decision, it is important for the fair and efficient conduct of representative actions that expanding their availability “be done with the backing of appropriate legislation or rules of court, adequate to the complexity of the problem and appropriate to the requirement of justice”.<sup>146</sup> Accordingly, the Commission proposes that the machinery provisions of the Federal Court procedures be adopted.

#### **Recommendation 140**

**The ADT Act should provide for representative complaints (in accordance with the Federal Court model) where:**

**the complaints of all group members are against the same person;**

**the complaints arise out of the same, similar or related circumstances; and**

**the complaints give rise to a substantial common issue of law or fact.**

#### **Recommendation 141**

**The ADT Act should adopt a comprehensive set of procedural and machinery provisions to deal with the conduct of representative complaints (similar to the Federal Court model) including provisions in relation to:**

**notice requirements;**

**settlement by a representative complaint;**

**substitution of the representative complaint;**

**discontinuance of the action;**

**amendment of the class; and**

**the assessment and distribution of damages to class members.**

#### **Recommendation 142**

**The Tribunal should have the power to make cy-pres orders in relation to representative actions, in accordance with the following principles:**

**An order may only be made where the amount is not fully distributed or the cost of distribution would reduce the amount below a reasonable level for each member of the class.**

**The payment must be made to the ADB for distribution to organisations for the purpose of public education and enforcement of the ADA.**

#### **TRIBUNAL RULES**

9.93 The ADT Act itself contains few procedural provisions as it is intended that each division of the Tribunal will have a broad discretion to adapt its procedures to the circumstances of the case before it and to formulate its own procedural rules.<sup>147</sup> By requiring the ADT to proceed “according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms”, the ADT Act allows the Tribunal to move away from traditional adversarial procedures towards a more informal model.<sup>148</sup> However, in the Second Reading Speech introducing the Bill to Parliament, the Attorney General stated that:

I have taken account of the criticism which has been levelled at the Commonwealth and Victorian tribunals that despite legislative prescription for informality and flexibility, the actual hearings have become formal and adversarial.<sup>149</sup>

9.94 To overcome this problem, the ADT Act provides for the establishment of a Rules Committee, including community representatives, and a community review process, “to ensure that the procedures do not become stultified”.<sup>150</sup>

9.95 The Rules Committee is composed of the President of the ADT, each Divisional Head and a number of other Tribunal members and other persons as appointed by the Minister.<sup>151</sup> The Committee is required to make rules which are “as flexible and informal as possible”.<sup>152</sup> Matters which may be covered by the rules include: the commencement of proceedings; the practice and procedure of the Tribunal; and the mediation of matters.<sup>153</sup> The ADT Act also provides that different rules may be formulated for each of the divisions and for different classes of matters.<sup>154</sup>

9.96 In addition to the general Rules Committee, the ADT Act also establishes a Rules Subcommittee for each division. Rules for each of the divisions may only be made on the recommendation of Divisional Subcommittees.<sup>155</sup> Draft Rules must be subject to public exhibition for at least two months before approval and any written submissions must be considered by the Divisional Subcommittees.<sup>156</sup>

9.97 Although the ADA also provided the EOT with the power to determine its own procedure,<sup>157</sup> it was not until April 1995 that the EOT issued its first written Practice Guidelines and Directions.<sup>158</sup> In response to DP 30, the submission of the New South Wales Bar Association noted that the EOT's failure to develop its own alternative procedural rules resulted in the adoption, by default, of traditional court procedures.<sup>159</sup> In general, the submissions received by the Commission, including the EOT's submission, extensively supported the development of procedural rules.<sup>160</sup> These problems may be resolved in the ADT Act by the mandatory provision for the establishment of Rules Committees.<sup>161</sup>

9.98 In the Commission's view, an expanded set of procedural rules is an appropriate and effective method of setting out the practice and procedure of the EO Division.

#### **What should the rules contain?**

9.99 The Commission does not propose to prescribe what the rules should contain. That is ultimately a question for the EO Division Rules Subcommittee. However, it is important that problems with the procedure of the existing EOT be considered in the formulation of rules for the EO Division.

9.100 Rules of the EO Division should be designed to make the Tribunal more accessible, minimise delays and costs and to ensure that the principles of procedural fairness are followed.<sup>162</sup>

9.101 By way of guidance, the EO Division Rules Subcommittee may have regard to the rules governing procedure in other Australian equal opportunity tribunals which make provision for a range of procedures, including:

notice requirements and procedure for preliminary conferences and hearings;

filing, service and production of documents;

discovery and inspection of documents;

particulars of statements of complaint and defence;

standard forms for subpoenas, summons and notices to produce;

applications for interim orders; and

calculation of costs.<sup>163</sup>

In addition, it would be of great value to have a procedure expressly providing for the making of offers of settlement.

9.102 Both the *Anti-Discrimination Tribunal Rules 1993* (Qld) and the *Equal Opportunity Regulations 1986* (WA) specifically provide that where a party fails to comply with an order or direction of the tribunal, the tribunal may make appropriate orders including an order dismissing the complaint or statement of defence.<sup>164</sup>

#### **COSTS**

9.103 Both the ADA and the ADT Act contain provisions relating to the power of the Tribunal to award costs.<sup>165</sup> The provisions in the ADA differ from the general provisions under the ADT Act. The ADA provides that each party to an inquiry "shall pay his or her own costs" unless the Tribunal is satisfied that the circumstances of the particular case "justify" an award of costs.<sup>166</sup> However, under the general provisions of the ADT Act, the Tribunal may only award costs where there are "special circumstances" warranting such an award.<sup>167</sup> The ADT Act also provides that the Tribunal must not award costs unless the power to do so is conferred by the Principal Act.<sup>168</sup>

9.104 The fact that the power to award costs must be conferred by the Principal Act means that separate provision must be made to allow the EO Division to award costs. As the Commission is recommending the transfer of all procedural provisions relating to the Tribunal to the ADT Act, the costs provision should also be transferred.

9.105 It would be feasible to maintain a provision in the ADA noting that the Tribunal can award costs, in accordance with the appropriate provision of the ADT Act. However, this gives rise to a level of duplication which seems unnecessary and which could lead to confusion, especially if it were thought that the provision in the ADA gave some indication as to the circumstances in which costs might be awarded, possibly inconsistently with the specific provision in the ADT Act. It would be preferable if the ADT Act were amended so that, in relation to the EO Division, the source of the power to award costs need not be found in the ADA.

9.106 The primary issue which needs to be considered in relation to costs is whether the existing provision, that the parties pay their own costs unless the circumstances of the case “justify” a costs order, is the most appropriate.

### **The general rule**

9.107 The statutory rule, that each party pay its own costs, replaces the traditional rule entrenched in most Australian courts that costs follow the event; that is, the costs of the successful litigant are paid by the unsuccessful party.<sup>169</sup> The costs indemnity rule has been displaced in a number of jurisdictions, including the Family Court, because it is considered to act as a deterrent to bringing or defending an action in court.<sup>170</sup> Just paying one’s own costs is seen as a sufficient barrier to the inappropriate use of the justice system.<sup>171</sup>

9.108 By precluding the recovery of costs to a successful complainant in the Tribunal, the statutory rule may actually compound the effects of the low damages ceiling, as few complainants receive any real compensation over and above their legal expenses.<sup>172</sup> Complainants are therefore discouraged from pursuing their complaint to the Tribunal on two fronts: without legal representation, they stand a limited chance of success; with legal representation, they are likely to remain out-of-pocket even if they are successful, rendering their victory a pyrrhic one.<sup>173</sup>

9.109 One alternative to the statutory rule is that of “one-way costs shifting”.<sup>174</sup> “One-way costs shifting” aims to encourage public interest litigation by private individuals and groups through compensating them when they are successful, but not awarding costs against them when they fail.<sup>175</sup> This option was canvassed by the ALRC in their report *Costs Shifting – Who Pays for Litigation*.<sup>176</sup> However, the ALRC rejected the proposal on the basis that it was seen as “inequitable to have a general rule providing for one party to be deprived of an entitlement to claim costs while remaining liable to pay costs if the other party succeeds”.<sup>177</sup>

9.110 The preferred approach of the ALRC was that the court or tribunal should retain a discretion with respect to costs, and that, in areas of public interest litigation, the court or tribunal should make a “public interest costs order” where this is justified in the particular circumstances of the case.<sup>178</sup> The ALRC also recommended that, rather than courts and tribunals having an absolute discretion to determine costs, the power to award costs should be exercised in accordance with “cost allocation rules”.<sup>179</sup> These rules can be used to remove some of the uncertainty and inconsistency surrounding an unstructured discretion.

9.111 Many of the submissions received in response to DP 30 supported the development of criteria to guide the Tribunal when considering whether, and on what terms, to make costs orders.<sup>180</sup> A number of cases before the EOT have also set out criteria relevant to the making of a costs order. Relevant factors which have been identified are:

*Public policy considerations.* That a matter may raise important public policy considerations, extending beyond the parameters of the individual complaint has been considered a relevant

consideration, tending in favour of an award of costs in favour of a successful complainant.<sup>181</sup> Some submissions, however, have argued against the use of such a test.<sup>182</sup>

*The conduct of the parties during the inquiry process.* A number of submissions have suggested that costs orders should be used to discipline parties for failing to comply with orders and directions of the Tribunal, such as notices to file documents, answer questions, produce documents and comply with agreed timetables.<sup>183</sup> Precedents have already been set by the EOT for an award of costs in cases where respondents have unduly delayed or obstructed proceedings<sup>184</sup> or where they have maintained insupportable positions.<sup>185</sup> It has been pointed out, however, that caution must be exercised so that a party's right to present a case in support or defence of a claim is not unduly constrained.<sup>186</sup>

*Frivolous and vexatious complaints.* Under the existing provisions of the ADA, the Tribunal may also make costs orders against complainants whose complaints are dismissed on the grounds that they are found to be frivolous or vexatious.<sup>187</sup> The EOT has made costs orders against complainants whose complaints are found unsubstantiated, where persuaded there is mischief on the complainant's part.<sup>188</sup>

*Proceedings necessitated by the failure of a party to comply with previous orders.* It has been suggested that a party forced to initiate fresh proceedings because of the failure of the other party to comply with a previous order of the Tribunal should not have to bear the costs of the new proceedings, unless there are extenuating circumstances to explain the default.<sup>189</sup>

*The filing of written offers of settlement.* The ADB has suggested the introduction of an informal system of offers of settlement.<sup>190</sup> These offers could be used to support submissions on costs but would be considered by the Tribunal as only one of a number of factors in any costs application.<sup>191</sup>

### **The Commission's view**

9.112 The basic principle applying in the Tribunal, namely that each party should bear its own costs, is supportable on two grounds. First, it reflects a policy that complainants should not be dissuaded from pursuing their complaints before the Tribunal for fear of an order that, if unsuccessful, they will be required to pay the costs of the respondent. Secondly, the fact that costs generally cannot be recovered is intended to be an encouragement to the parties to limit the legal costs incurred.

9.113 Against this, respondents tend to argue that there is no incentive for a complainant to settle because there is no financial risk in running a case and losing. This argument has limited practical application. Where a complainant lacks resources, it will often be difficult in practice to recover any costs ordered in any event. On the other hand, in most contested cases, a complainant will not have a reasonable chance of success unless he or she has legal representation. If the lawyer is being paid for by the client, there will be a significant incentive not to pursue claims where the costs (even of success) may well outweigh the return. Where the case is legally aided, or taken on a speculative basis, there will generally have been an assessment of the merits of the case which, accordingly, is not likely to be pursued unless there are reasonable prospects of success.

9.114 Some complainants also oppose the present system on the basis that it is difficult to succeed before the Tribunal without legal representation, but in many circumstances the likely damages award will hardly cover the cost of representation.

9.115 One course is to provide for an award to a successful complainant where the respondent appears to have acted unreasonably. Respondents might object to this proposal on the basis that it will require them to justify their conduct, if unsuccessful. This in turn may require them to reveal privileged legal advice.

9.116 While this argument raises a legitimate concern, it carries less weight than may at first appear. A respondent would only be at risk of a costs order if he or she were not only unsuccessful, but where it

appeared positively to the Tribunal that the conduct had been unreasonable. The practical onus may then be on the respondent to prove reasonableness by revealing its legal advice. However, it may not wish to do so where, for example, it is considering an appeal and thinks that its position might in some way be prejudiced if it took that step. However, where the policy of the legislation is to encourage reasonable conciliated settlements, that consideration carries limited force.

9.117 A second and balancing proposal to the first, is that it should be easier for a respondent to recover costs against an unsuccessful complainant. There is a danger that this will tip the balance between dissuading unmeritorious complaints and not unduly discouraging meritorious complaints too far in favour of respondents. However, the Commission is not satisfied that this need occur. Experience over twenty years of operation of the ADA has confirmed that complaints are often difficult to prove and that there is a large scope for perceptions of conduct to differ. Views as to the propriety or impropriety of particular aspects of conduct may be poles apart and firmly held. It is inevitable that such cases go before the Tribunal and it is not unreasonable to expect the parties, in some circumstances, to refuse to reach a conciliated settlement. In such circumstances, cost orders should not be made against the unsuccessful complainant (or respondent).

9.118 Thirdly, there is little doubt that the use of disciplinary costs orders would encourage parties to comply with orders and directions of the Tribunal and would have the incidental effect of reducing delays. The Commission also considers costs orders to be appropriate, in principle, against parties whose breach of interim orders has eliminated or diminished the possibility of effecting a conciliated settlement and resulted in an action in the Tribunal.

9.119 Fourthly, the Commission recommends that provision should be made for the filing of offers of settlement in relation to proceedings in the EO Division, in the Registry of the ADT. These offers may then be used by the parties in support of their submissions on costs. In order to encourage parties to participate in the scheme, offers of settlement are to be considered as persuasive, not conclusive, factors. The costs should only be recoverable from the time a reasonable period has elapsed for considering the offer. This will provide an added incentive to settle early.<sup>192</sup>

9.120 Many of the factors referred to above already influence the Tribunal in cases where it has to consider costs awards.<sup>193</sup> The Commission is satisfied that the following approach, which is largely reflected in decisions of the Tribunal, should be adopted:

- (a) There should be no general principle that an unsuccessful complainant must pay the costs of the successful respondent, as that would be likely to deter complaints which are reasonably and genuinely pursued.
- (b) Where a complainant has pursued a case successfully and there was an element of public interest, beyond the private interests of the complainant involved, the Tribunal should be able to award costs to the complainant on that basis.
- (c) Where a complaint has been pursued successfully, but purely in the interests of the complainant, the complainant should be able to obtain an award of costs, but only where the Tribunal is satisfied that the conduct of the respondent was unreasonable. In assessing unreasonableness, weight should be given to the policy of settlement by conciliation.
- (d) Where the complaint was not made, or was not pursued, in a genuine and reasonable belief that it had merit, the Tribunal should be able to award costs against the unsuccessful complainant.

9.121 These principles will tend to result in an increase in the number of cost awards made by the Tribunal. However, to some extent the principles reflect current practice and, accordingly, will make more transparent the approach currently adopted.

## **Costs in other courts**

9.122 When a matter goes on appeal from the Tribunal to the Supreme Court, the general cost rules applicable in the Supreme Court, namely that costs follow the event, will apply.<sup>194</sup> It is apparent to the Commission that this rule has on occasion dissuaded the parties (usually unsuccessful complainants) from taking appeals to the Supreme Court. If the recommendations of the Commission with respect to representation by the President of the ADB or the ADB are accepted,<sup>195</sup> this concern will be mitigated. Where legal aid is granted for the purposes of an appeal, the legally assisted person will be protected from an adverse costs order, a limited liability being incurred by the Legal Aid Commission.<sup>196</sup>

9.123 There is, however, a particular concern which arises from the discussion in Chapter Eight that the issues raised by a complainant could, in appropriate cases, be taken directly to a court, rather than the Tribunal.<sup>197</sup> The question raised by that proposal is whether the general rules of court should apply or whether there should be a special costs rule in relation to matters brought under the ADA.

9.124 The difficulty with prescribing a special rule in such cases is that the contraventions of the ADA will only arise as part of a proceeding to which the normal court costs rules will apply. It is not practical to apply differing cost rules in such circumstances.

9.125 The only other consideration which arises in this context is one of consistency with the rules applicable in the Federal Court, where most claims under Commonwealth discrimination laws will be determined. At present, no special rule applies in the Federal Court in relation to such proceedings.

9.126 There may well be merit in giving a party the power to seek an order from the court limiting the overall liability for costs in particular proceedings. Such a power is available in the Federal Court of Australia.<sup>198</sup> A party may apply to that Court to exercise its discretion in relation to the maximum costs which may be permitted, but should do so at the beginning of the hearing, rather than the end so that the parties will know their respective liabilities if unsuccessful. In considering such applications, the Federal Court has taken into account the financial position of applicants, the public interest in the determination of the claims, the legal importance of the issues involved and the scheme of the legislation under which the claims were brought.<sup>199</sup> Federal Court Rules provide that such an order will not apply where one party has acted in a way which has unjustifiably increased costs of the other.<sup>200</sup> The rules also permit the Court to vary the specification of maximum recoverable costs at any time if there are special reasons to do so and it is in the interests of justice.<sup>201</sup>

9.127 The Commission considers that this a useful provision which allows parties without unlimited resources to control their exposure to costs. The control vested in the Federal Court is ample to prevent abuse of the mechanism and in the five and a half years during which the rule has operated, it has provided a useful safety net in a number of cases, without there being any evidence of misuse. There is obviously a case for making such a rule generally applicable in the Supreme Court. However, such a general change is beyond the scope of the current reference.

### **Recommendation 143**

**The ADT Act should provide that in the EO Division each party shall pay his or her own costs, unless the Tribunal is of the opinion that the circumstances of the case justify the making of a costs order.**

**In determining whether the circumstances of the case justify the making of a costs order, the EO Division should consider:**

**whether the proceedings determine or clarify an important question of law;**

**whether any important public policy considerations were raised;**

**the behaviour of the parties during the inquiry process;**

**whether the complaint was pursued in a genuine belief that it had merit;**

**whether the matter was dismissed on the basis that it was frivolous or vexatious;**

**whether the matter is brought to enforce a previous order of the Tribunal; and**

**the filing of any written offers of settlement.**

#### **Recommendation 144**

**Where a contravention of the ADA is litigated in a court or other tribunal the costs rules generally applicable in that court or tribunal will apply.**

#### **APPEALS FROM DECISIONS OF THE TRIBUNAL**

9.128 The ADT has a two-tier structure whereby appeals from primary decisions of the Tribunal may be made to an Appeal Panel constituted by at least three members of the Tribunal.<sup>202</sup> Appeals to the Appeal Panel are available on questions of law, but may extend to a review of the merits with leave of the ADT.<sup>203</sup> Appeals from the Appeal Panel are available to the Supreme Court on questions of law alone.<sup>204</sup> These provisions create an extra step in the appeals process than that which existed under the ADA. Under the ADA appeals from decisions of the EOT on questions of law could be made directly to the Supreme Court.<sup>205</sup>

9.129 A number of submissions received by the Commission dealt with the question of rights of appeal from decisions of the Tribunal. One submission suggested that there should be a full right of appeal on the merits to the Supreme Court, as was the position prior to 1982.<sup>206</sup> Other submissions supported the view that appeals to the Supreme Court should be allowed, but only on questions of law.<sup>207</sup> However, all of the submissions predated the ADT Act and none proposed an internal appeal procedure.

9.130 Chapter 7 of the ADT Act provides an internal appeal right in certain cases. The question is whether such a right should be available in relation to decisions of the EO Division. Generally speaking, the multiplication of rights of appeal is undesirable. However, in the next chapter, the Commission recommends that the jurisdictional limit of the Tribunal should be \$150,000 in circumstances where the panel hearing a particular case does not include a District Court judge. Given the increase in the powers of the Tribunal following from that recommendation, it is necessary to consider whether there should be one level of appeal available in relation to findings of fact, and whether that should take place within the Tribunal. Secondly, it is necessary to consider whether review on findings of fact should be allowed in any circumstances in the Supreme Court. The question of external review is put to one side at this stage.

9.131 Although it is recommended that the monetary limit on orders the Tribunal may make should be increased significantly, it is likely that most orders will in fact fall within, or close to, the jurisdiction of the Tribunal. In such cases, there is no good reason to impose a second level of review of factual issues in all cases. However, it is still arguable that in relatively serious cases, such as those in which an amount in excess of \$100,000 is claimed or awarded, there should be a right of appeal on the facts to an appeal panel chaired by a District Court judge. The Commission considers that this suggestion has merit in that it would only arise in those cases in which an award had been made which approached the level of compensation which could only be made by a Tribunal having a District Court judge amongst its members. Further, it is likely that any claim which appeared as possibly giving rise to an award in excess of \$100,000 would be taken in the first instance before a panel comprising a District Court judge.



Thus, the internal right of appeal on the facts would, for the most part, only arise in cases where the extent of the possible damages had not been anticipated at the outset.

9.132 Otherwise, the Commission is satisfied that the structure for appeals provided by the ADA should be maintained. The jurisdiction under the ADA is not one of administrative review of a government decision, but rather, a private right of action which may arise simply between two private parties. The possibility of two hearings within the Tribunal will merely increase expense and delay in circumstances where that is not justified. The right of appeal from the EOT to the Supreme Court was limited to an appeal on a question of law. This is a common position in relation to specialist tribunals and leaves the final determination of facts to that tribunal. That principle should be maintained. Where an important question of law does arise in a particular case, the avenues of appeal, which will include the Supreme Court, the Court of Appeal and, where special leave is granted, the High Court of Australia, remain open.

9.133 Before leaving the question of appeals, it is necessary to consider whether a right of internal appeal should be available generally on a question of law and whether rights of external appeal should be so limited.

9.134 In relation to the first matter, the Commission would only be minded to recommend such an internal right of appeal in relation to decisions which had not been made in the first instance by a panel including a District Court judge. Further, the right should not be considered except in circumstances where an appeal to the Supreme Court on a question of law was not as of right, but required leave.

9.135 In relation to external appeals, past practice in the EOT was that appeals from a panel of the EOT not including a District Court judge went to a single judge of the Supreme Court.<sup>208</sup> It is desirable that, this practice be reflected in the legislation applicable to appeals from the ADT. However, there is an increasing tendency for leave to be required in relation to proceedings in the Court of Appeal. If that principle were to be applied in relation to the ADT, there would be no unqualified right of appeal from all decisions of the ADT to the Supreme Court.

9.136 The *Supreme Court Act 1970* presently provides that an appeal shall not lie to the Court of Appeal except by leave of that Court from a final judgment of a single judge where the amount at issue does not exceed \$100,000.<sup>209</sup>

9.137 Although it may be said, in principle, that there should be a right of appeal to the Supreme Court in all matters on questions of law, it must be recognised that significant costs are usually involved. However, so long as the Supreme Court retains its powers of judicial review at common law, there seems to be little point in preventing appeals going as of right on questions of law. Accordingly, the Commission recommends that the right of external appeal to the Supreme Court be retained, but limited to questions of law. In those circumstances no internal right of appeal on questions of law is appropriate. Internal appeals should be limited to the circumstances noted above.<sup>210</sup>

#### **Recommendation 145**

**Appeals from decisions of the EO Division should be made directly to the Supreme Court but should only be available on questions of law.**

#### **MISCELLANEOUS**

##### **Officer of the ADB assisting the Tribunal**

9.138 Under the ADA, the EOT has had the power to appoint an officer of the ADB to assist it in relation to any inquiry.<sup>211</sup> However, in the process of amending the ADA, to transfer jurisdiction to the ADT, this power has been removed.<sup>212</sup> There is no equivalent provision in the ADT Act.

9.139 The provision allowing the EOT to appoint an officer of the ADB to assist it was introduced with the creation of the EOT in 1981. In the Second Reading Speech to the Bill which originally introduced this provision, it was stated that:

Specific statutory provision has been made for an officer of the Anti-Discrimination Board to appear in inquiries conducted by the tribunal and to assist it as requested. It is envisaged, for example, that this officer would be able to assist the tribunal by providing relevant information not generally available to the parties and in opening up lines of argument that may facilitate the resolution of the complaint.<sup>213</sup>

9.140 Although the provision is not commonly used, it has been availed of in a number of significant cases, including at least one case where the complainant, a quadriplegic, indicated her intention to abandon her complaint because she did not feel able to pursue the case herself. The presiding member of the EOT noted that the case involved significant issues of a broad public interest and made arrangements for an officer of the ADB to assist it pursuant to this provision.<sup>214</sup> In that case, the officer assisting the EOT briefed counsel to appear. The same procedure has been adopted in a number of other cases before the EOT.

9.141 These circumstances highlight the practical difficulties which may not be resolved by allowing complainants to be legally represented, especially if they are without the resources to conduct a case themselves and are unable to obtain legal aid, not for want of merit, but because legal aid funds are limited. Although the current provision allowing the Tribunal to appoint an officer to assist it provides one form of solution, it is not an entirely satisfactory one. First, the officer is not a representative of the complainant, although in appropriate circumstances, where the respondent is properly represented, his or her task may be to ensure that the complainant's case is properly put. Secondly, administrative difficulties can arise where one authority is permitted to appoint an officer of another authority to assist the former authority. One may expect that there will be informal cooperation between the Tribunal and the ADB in order to ensure that orders are not made where resources are unavailable. Nevertheless, there should be a sound reason for allowing one body to have access to the resources of another. Such a situation is unlikely to work satisfactorily because of difficulties in budgeting for resources which are in the control of another organisation.

9.142 This issue raises the question of the role, or possible role, of the President of the ADB before the Tribunal. On occasion, the President himself or herself has been joined as a party to the proceedings before the Tribunal, although usually in circumstances where a specific issue arises as to the application or interpretation of the ADA. Whilst it is appropriate that the President of the ADB be given an express power, similar to that provided to the Human Rights and Equal Opportunity Commission,<sup>215</sup> it is not appropriate generally for the President to intervene on behalf of a particular party unless given that role specifically by the legislation.

9.143 A number of submissions to the Commission argued that the President of the ADB should be required to act as advocate for those who would otherwise be unrepresented complainants.<sup>216</sup> Such a power has been successfully used in other jurisdictions.<sup>217</sup>

9.144 One objection to the President of the ADB having an advocacy role is that such partisanship at the hearing stage does not follow comfortably from the need to adopt an impartial role at the conciliation stage.

9.145 The Commission is of the view that the investigation and conciliation functions of the President of the ADB should be separated.<sup>218</sup> There is less inconsistency between the investigative functions and an advocacy role: indeed, as long as the legislation makes express provision for each, so that there can be no misunderstanding about the respective functions of the President, the Commission sees no difficulty in providing that the President have a role as advocate for complainants before the Tribunal.

9.146 The difficulty at the present stage is that conferring such a role on the President of the ADB and on the ADB would require that appropriate resources be made available, either in addition to the current resources of the ADB or by re-allocation of current resources, or more probably by a combination of

these approaches. Whilst the Commission considers that such a role should be conferred on the President of the ADB, it makes that recommendation in the knowledge that further consultations and administrative arrangements will need to be undertaken before such a change can be effected.

#### **Recommendation 146**

**The Tribunal should have the power to grant the President of the ADB leave to intervene on behalf of a complainant, where considered appropriate, in proceedings before the Tribunal.**

#### **Burden of proof**

9.147 In addition to the provision relating to an “officer assisting the Tribunal”, a specific provision relating to the burden of proof of exceptions has also been removed from the ADA by the recent amendments, and there is no equivalent provision in the ADT Act.<sup>219</sup> Under s 109 of the ADA, once a complainant has established discrimination on a certain ground, the burden then shifts to the respondent to prove any exception upon which he or she relies to avoid liability. The provision relating to proof of exceptions is consistent with general principles, but it is more useful if it is expressly stated, as it is in other jurisdictions.<sup>220</sup> The Commission therefore recommends that an equivalent provision be inserted in the ADT Act.

#### **Recommendation 147**

**The ADT Act should make provision that where any conduct is proved to be unlawful under the ADA, the burden of proving a relevant exception lies upon the respondent.**

### **Footnotes**

1. *Anti-Discrimination (Amendment) Act 1981* (NSW) inserting Pt 7A into the ADA. For a brief historical account see DP 30 at para 6.1.
2. In 1982 the office of the Counsellor for Equal Opportunity was abolished and the functions of this office were taken over by the President of the ADB: *Anti-Discrimination (Amendment) Act 1982* (NSW).
3. The ADT Act was assented to on 10 July 1997. Schedule 1 as it relates to the Community Services Division and Part 1 of Schedule 2 commenced on 6 October 1998. The remainder of the Act commenced on 1 January 1999.
4. The functions of the EOT are carried out by the Equal Opportunity Division (“EO Division”) of the ADT. For further discussion see para 9.4.
5. These include the Community Services Appeals Tribunal, the Legal Services Tribunal, the Boxing Appeals Tribunal, the Schools Appeals Tribunal and the Veterinary Surgeons Disciplinary Tribunal. See ADT Act Sch 5 Pt 2 and *Administrative Decisions Legislation Amendment Act 1997* (NSW).
6. The creation of the ADT is the culmination of a number of reports and recommendations over the last 20 years, beginning in 1973 with the New South Wales Law Reform Commission, *Appeals in Administration* (Report 16, 1972) suggesting the development of a centralised system of tribunals and administrative appeals: New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11278.

See also L Katz, "ADT-ABC: An Introduction to the New South Wales Administrative Decisions Tribunal", paper presented at the *Government Lawyers CLE Convention* (Sydney, 31 July 1997) at 1.

7. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, Hon J W Shaw, Attorney General, Second Reading Speech at 11281.
8. In the Second Reading Speech it was stated that consideration is currently being given to the integration of a further 21 tribunals into the ADT: New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11281.
9. ADT Act s 19, 20 and Sch 2. See also New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11281.
10. See para 9.18.
11. In the Second Reading Speech introducing the Bill, the Attorney General stated that: "The range of matters which may arise before the ADT, both in substance and degree of difficulty, requires that the Tribunal have considerable flexibility in its composition and procedures." See New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280.
12. ADT Act s 75. Compare ADA s 101B, repealed by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
13. For a discussion of the influence of tribunal proceedings on the remedies gained at conciliation, see R Hunter and A Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases* (University of Melbourne, Faculty of Law, Centre for Employment and Labour Relations Law, Working Paper No 8, 1995).
14. ADT Act ch 3 s 36. See also ADT Act ch 4 and 5.
15. ADT Act s 4, 42 and 55. In the case of discrimination matters, the *Administrative Decisions Legislation Amendment Act 1997* (NSW) also amends the ADA to provide for the referral of matters to the ADT, rather than the EOT: ADA s 91, 94 and 95.
16. ADT Act s 19 and Sch 1 and 2.
17. ADT Act ch 6 Pt 3 s 91-93 and 97.
18. In the Second Reading Speech introducing the Bill to Parliament, the Attorney General, stated:

"the Tribunal will operate in different divisions and it will be possible for the divisions to operate relatively autonomously, with different rules and procedures which are appropriate to the functions exercised by each division. Even within divisions, the rules and procedures may vary depending on the nature of the particular matter before the Tribunal."
19. The Commission notes a Report which recommended that the South Australian Equal Opportunity Tribunal be abolished and jurisdiction given to the District Court: see South Australia, *Legislative Review of the Equal Opportunity Act 1984* (SA) (1994) ("Martin Report") at 235-240. However, the Commission also notes that both the Human Rights and Equal Opportunity Commission and the Victorian Equal Opportunity Tribunal continue to operate separately from

their respective administrative review bodies. See also J Anderson, "Something Old, Something New, Something Borrowed ... The New South Wales Administrative Decisions Tribunal" (1998) 5 *Australian Journal of Administrative Law* 97 at 112.

20. N Hasluck, "Human Rights and Equal Opportunity in Western Australia" [1995] *Australian and New Zealand Equal Opportunity Law and Practice Reporter* (CCH Australia) 91-706 at 76,075.
21. ADT Act s 12. Note that a Registrar, Deputy Registrars and other staff are to be appointed to assist the President in managing the affairs of the Tribunal: ADT Act s 27 and 28.
22. ADT Act s 17(1).
23. ADT Act s 17(2). The Divisional Head must be a judicial officer or a legal practitioner of at least 7 years standing.
24. ADT Act Sch 2 Pt 2 Div 1. Note that members of the Tribunal may be assigned by the President to one or more divisions and this assignment may be varied at any time: ADT Act s 21(3).
25. ADT Act s 13(4). Compare the position at the EOT, where all members have been appointed on a part-time basis: ADA s 69C(1) repealed by *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
26. ADT Act Sch 5 Pt 2 Div 2(5). The EOT currently consists of 26 part-time members comprising 11 judicial members and 15 non-judicial (or lay) members. The senior judicial member is currently a judge of the District Court.
27. See below at para 9.23 (in relation to delays).
28. ADT Act Sch 2 Pt 2 Div 3.
29. ADT Act s 17(3).
30. See ADA Pt 7A repealed by *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
31. ADT Act s 4 and 42 and ADA s 4, 91, 94 and 95 as amended by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) (the *Administrative Decisions Legislation Amendment Act 1997* (NSW) amends the definition of "Tribunal" in s 4 of the ADA to mean the "Administrative Decisions Tribunal": Sch 2.1). However, note that under the *Administrative Decisions Tribunal Legislation Amendment Act 1998* (NSW) an amendment has been made to s 90 of the ADA which allows a complainant to apply directly to the Tribunal for review of a decision by the President to decline to entertain a complaint (except where the reason given is that the complaint is "vexatious, misconceived or lacking in substance"): *Administrative Decisions Tribunal Legislation Amendment Act 1998* (NSW) Sch 2.1. An amendment to s 126A of the ADA has also been made, which allows a person who is in charge of a special needs program or activity to apply directly to the Tribunal for review of a decision by the Minister concerning the certification of the program or activity: *Administrative Decisions Tribunal Legislation Amendment Act 1998* (NSW) Sch 2.1.
32. ADA s 94(1).
33. ADA s 91(2) and 94(1) as amended by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
34. ADT Act s 73(2). The Tribunal is, however, subject to the rules of "natural justice": s 73(2). See also ADA s 108(1)(a) repealed by *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.

35. ADT Act s 73(1). See also ADA s 108(1)(c) repealed by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1. It should be noted that the ADT has extensive powers to make rules for each division and for different classes of matters: ADT Act s 90, 91 and 93.
36. ADT Act s 73(3). See also ADA s 108(1)(b) repealed by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
37. ADT Act s 74.
38. ADT Act s 102 and 103. These provisions are similar to s 106 of the ADA (repealed by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1) which places an obligation on the EOT to conciliate complaints where possible.
39. ADT Act s 73(4). These obligations apply throughout the proceedings, not simply at the hearing.
40. ADT Act s 74(5)(a) and 74(5)(b).
41. ADT Act s 83 and 84.
42. F Cameron, "NSW ADT: Scope for Inquisitorial Procedures in the New Administrative Decisions Tribunal" (1997) 35(7) *Law Society Journal* 41 at 43-44 and J Anderson, "Something Old, Something New, Something Borrowed ... The New South Wales Administrative Decisions Tribunal" (1998) 5 *Australian Journal of Administrative Law* 97 at 103.
43. Such provisions could easily be included in Sch 2 Pt 2 of the ADT Act which relates specifically to the EO Division.
44. Although delays in listing matters for hearing were substantially reduced by the EOT in the two year period to August 1995, recent research indicates that delays have been an ongoing source of dissatisfaction with matters in the EOT. In a recent survey prepared for the Commission, 49% of complainants and 54% of respondents surveyed agreed that the EOT took too long to deal with their matters. See RR 8 Table 5.2 and Table 6.2 respectively. See also New South Wales, Equal Opportunity Tribunal, *Biennial Report 1993-1995* at 7.
45. See below at para 9.107.
46. See Chapter 8 at para 8.21.
47. For a further discussion of remedies available under the ADA see Chapter 10.
48. For a further discussion of "direct" and "indirect" discrimination see Chapter 3.
49. Few complaints have proceeded to a final hearing, and fewer have been judicially determined. On average, only 6% of complaints received by the ADB are referred to the EOT annually, and less than half of these are actually determined by the EOT. In 1993-1994, 96 of the 272 cases before the EOT were resolved: 12 were determined by the EOT and 84 were settled prior to determination: New South Wales, Equal Opportunity Tribunal, *Biennial Report 1993-1995* at 8; New South Wales, Anti-Discrimination Board, *Annual Report 1994-1995*. See also L Thornthwaite, "The Operations of Anti-Discrimination Legislation in New South Wales in Relation to Employment Complaints" (1993) 6 *Australian Journal of Labour Law* 31 at 42; K O'Donovan and E Szyzszak, *Equality and Sex Discrimination Law* (Blackwell, Oxford, 1988) at 214-216 and RR 8 at Table 5.2.
50. P Pentony, *Conciliation under the Racial Discrimination Act 1975: A Study in Theory and Practice* (Australia, Human Rights Commission, Occasional Paper No 15, 1986) at 91; see also Chapter 10 para 10.37 (on raising the ceiling for damages).
51. NSW Bar Association, *Submission* at 17.

52. New South Wales, Equal Opportunity Tribunal, *Annual Report 1992-1993*. The structure of the EOT, which has provided for part-time members only and which has made limited provision for administrative support, has been said to restrict severely the capacity of the EOT to meet demand for its services. See New South Wales, Office of Public Management, *Review of the Operations and Structure of the Equal Opportunity Tribunal* (1993) ("OPM Review"). See also NSW Bar Association, *Submission* at Annexure A.
53. Data collected by the EOT shows that the average period between date of referral to hearing has fallen by over 50% notwithstanding an increase in the EOT's workload. The wait has fallen from 12-18 months in 1992-1993 to 10 months in 1993-1994 and 7 months in 1994-1995: OPM Review at 8.
54. In 1994-1995, 125 new matters were referred to the EOT compared to 78 matters in 1993-1994 and 54 in 1992-1993. A further 36% increase is anticipated as a result of recent amendments to the ADA. See New South Wales, Equal Opportunity Tribunal, *Biennial Report 1993-1995* at 7. Note the 1992-1993 figures count the 42 and 72 individual complaints against Australian Iron and Steel and Qantas as one complaint against each respondent.
55. ADT Act s 76 provides that the ADT is empowered to make a decision without a formal hearing, where "it appears to the Tribunal that the issues for determination can be adequately determined in the absence of the parties".
56. J Anderson, "Something Old, Something New, Something Borrowed ... The New South Wales Administrative Decisions Tribunal" (1998) 5 *Australian Journal of Administrative Law* 97 at 104.
57. ADT Act s 73(4)(c).
58. RR 8 at Table 5.2 and Table 6.2.
59. In order to ensure the unrepresented party is given a fair hearing, the Tribunal may admit evidence which is not strictly relevant or probative. Or it may accede to requests for adjournments which it would not ordinarily grant, at least not without the imposition of a costs order against the party who has caused the unnecessary delay.
60. NSW Bar Association, *Submission* at 15-16; Legal Aid Commission of NSW, *Submission* at 2.
61. It was submitted that an automatic timetable could be triggered without the need for a directions hearing as occurs in the Equity Division of the Supreme Court: see NSW Bar Association, *Submission* at 15; Legal Aid Commission of NSW, *Submission* at 4; Gay and Lesbian Rights Lobby, *Submission*. It should be noted that the ADT Act currently contains a provision which allows the Tribunal to place time limits on the presentation of submissions, however, this provision only applies at the hearing stage and does not carry a penalty for non-compliance: ADT Act s 73(5)(d).
62. See below at para 9.107 (in relation to costs).
63. NSW Department of Health, *Submission* at 10-11; NSW Bar Association, *Submission* at 22-26. The EOT now monitors delays between submissions and final decision, and this has made a difference to delays – see Equal Opportunity Tribunal, *Correspondence* (8 May 1996). The submission of the NSW Bar Association specifically suggested that legislative time limits should be imposed on the Tribunal for the handing down of decisions of the Tribunal: NSW Bar Association, *Submission* at 20.
64. ADA s 69C(1) repealed by *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1. Delays in handing down judgments have also been compounded by the fact that, until recently, part-time members were paid only for sitting fees, not for the preparation or writing up of judgments: OPM Review at 18. This was rectified shortly after the OPM Review in 1993. Members are now remunerated for hearing inquiries and for preparing and writing decisions.

Judicial members are paid \$557 per day or \$275 per half day for sitting fees, preparation of decisions and for administrative duties. Non-judicial members are paid \$310 per day or \$155 per half day for sitting fees and for the preparation of decisions: J Hannaford, *Letter to the Senior Judicial Member from the Attorney General* (14 October 1993). The adequacy of these fees requires regular review.

65. Most submissions argued that there was no need for a formal hearing for the handing down of a decision or for the dismissal of a complaint, unless the issue of costs needs to be resolved at the same time: NSW Bar Association, *Submission* at 19; Legal Aid Commission of NSW, *Submission* at 4; NSW Ministry for the Status and Advancement of Women, *Submission*; Gay and Lesbian Rights Lobby, *Submission*. See also OPM Review at 19.
66. The reasons may be given orally or in writing and the rules may specify a lesser time limit for different classes of matters: ADT Act s 80(1) and (3).
67. ADT Act s 80(2).
68. ADT Act s 13(4). However, only the President is *required* to be appointed on a full-time basis. See discussion above at para 9.12.
69. Information supplied by Mary Reiby, Duty Solicitor at the EOT (2 April 1998).
70. ADT Act s 42.
71. ADT Act s 4(1).
72. See above at para 9.14.
73. *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.
74. ADT Act s 142: the heading to the section is misleading.
75. ADT Act s 67.
76. ADA s 96.
77. ADT Act s 72.
78. ADT Act s 67(1).
79. ADT Act s 67(1)(d) and 5(b).
80. See below at para 9.77.
81. ADT Act s 90.
82. ADA s 106.
83. ADT Act s 54.
84. ADT Act s 102.
85. ADA s 110A.
86. ADT Act s 75 and 126.
87. See ADT Act s 40.



88. ADT Act s 126.
89. *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 55E-55F.
90. *Raybos Australia* at 61B-61C, per Samuels JA.
91. ADT Act s 71.
92. ADT Act s 71(1), 71(4) and 71(7).
93. ADT Act s 71(1)(b).
94. ADT Act s 71(2).
95. In 1992-1993 there were only 13 cases presented at the EOT where a party was without legal assistance. In 1993-1994 and 1994-1995 this increased to 31 and 33 matters respectively (approx 11% of all cases) where at least one party was unrepresented: New South Wales, Equal Opportunity Tribunal, *Biennial Report 1993-1995* at 9-11. RR 8 found that 56% of the complainants and 86% of the respondents surveyed who had appeared at the EOT had been represented by a lawyer: at para 5.4.1 and 6.3.1.
96. NSW Bar Association, *Submission* at 5. However, other submissions have argued that there should be strict guidelines which would effectively deny legal representation to one party where the other is unrepresented: Gay and Lesbian Rights Lobby, *Submission*; NSW Ministry for the Status and Advancement of Women, *Submission*. However, the submission of the ADB rejected this suggestion on the basis that it would be unfair to the parties and would also deprive the Tribunal of the benefit of legal argument: Anti-Discrimination Board, *Submission 1* at 201.
97. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280. See also F Cameron, "NSW ADT: Scope for Inquisitorial Procedures in the New Administrative Decisions Tribunal" (1997) 35(7) *Law Society Journal* 41 at 43-44; and J Anderson, "Something Old, Something New, Something Borrowed ... The New South Wales Administrative Decisions Tribunal" (1998) 5 *Australian Journal of Administrative Law* 97 at 103.
98. It is well established that the provision of effective legal services is fundamental to achieving access to justice. See Australia, Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, (AGPS, Canberra, 1994) Pt 2.
99. Research has indicated that success rates are lowest among those who are self-represented: see Distaff Associates, *A Better Balance: A Review of the Complaints Handling Processes under the Sex, Racial and Disability Discrimination Acts* (1994) and L Thornthwaite, "The Operation of Anti-Discrimination Legislation in New South Wales in Relation to Employment Complaints" (1993) 6 *Australian Journal of Labour Law* 31.
100. In 1992-1993, only 7 applications were made for legal aid, 3 of which were granted. In 1993-1994, 16 applications were made of which 6 were granted, 5 denied and the result is unknown in the remaining 5 applications. In 1994-1995, 9 out of 31 applications were successful. The result was unknown in 17 applications. See New South Wales, Equal Opportunity Tribunal, *Biennial Report 1993 -1995* at 11-12.
101. NSW Bar Association, *Submission* at 5. See also para 9.23 (in relation to delays).
102. See above at para 9.18 and Recommendation 128.
103. ADA s 111. See also ADT Act s 73(5)(g) and 75(5)(h) which provide the ADT with power to dismiss a complaint at the request of the applicant or which is "frivolous or vexatious".

104. ADA s 111(2).
105. See ADA s 111(1A) and (1B).
106. ADA s 110.
107. ADT Act s 83 and 84.
108. ADT Act s 83(3).
109. See *Royal Commissions Act 1923* (NSW) s 4 and *Special Commissions of Inquiry Act 1983* (NSW) s 3(1).
110. *Crime Commission Act 1985* (NSW) s 18.
111. See *Ganin v NSW Crime Commission* (1993) 32 NSWLR 423.
112. ADA s 89A and 112.
113. See *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
114. ADA s 117 repealed by *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
115. ADT Act s 89(2) and 89(3).
116. ADT Act s 80(3).
117. The representative action derived from the English Courts of Chancery. In Canada and America, it has evolved into the "class action". Though known by different names, the class and representative action essentially seek the same objective: to determine, in a single action, the similar claims of a group of persons against the same respondent or defendant.
118. Australia, Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (AGPS, Canberra, 1994) at para 2.104. See also Coalition for Class Actions, *Representative Proceedings in NSW: A Review of the Law and a Proposal for Reform* (Public Interest Advocacy Centre, Sydney, 1995).
119. See, for example, *Supreme Court Rules* (1970) NSW, Pt 8 r 13.
120. ADA s 103(1).
121. ADA s 103(2).
122. In *Pearce v Glebe Administration Board* [1985] EOC 92-131 at 76,313, Barbour DCJ found that even though there is no specific requirement in the ADA that the representative be able to represent fairly and adequately the interest of the class and hence protect the interests of absent class members, it is nonetheless a factor to be considered in the exercise of the Tribunal's discretion under s 103(2)(b).
123. *Leves v Haines* [1986] EOC 92-167 at 76,637 per Mathews J. See also *Pearce v Glebe Administration Board* [1985] EOC 92-131 at 76,313. For a commentary, see R Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1990) at 253.
124. ADA s 113(b)(1).
125. ADA s 103(2)(b).

126. See *Squires v Qantas Airways Ltd* [1985] EOC 92-135.
127. Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (ALRC 46, 1988).
128. See *Federal Court of Australia Act 1976* (Cth) Pt 4A.
129. *Carnie v Esanda Finance* (1995) 182 CLR 398. The Carnies had entered into a loan variation agreement with Esanda Finance and alleged that Esanda had overstated the loan and therefore charged interest on the wrong amount. The High Court ruled that many persons who had also signed variation agreements with the creditor had the same interest in knowing how Esanda calculated the amount owing on the loan and if the calculation method was wrong. They had a common interest in being released from their liabilities to repay moneys they did not owe.
130. N Francey, "High Court Clears the Way for Class Actions" (1995) 30 *Australian Lawyer* 27.
131. This was a reversal of the restrictive approach of the English decision in *Markt & Co Pty Ltd v Knight Steamship Pty Ltd* [1910] 2 KB 1021, on which the majority in the Court of Appeal had relied: *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382.
132. R Hunter, *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1990) at 250-251.
133. *Federal Court of Australia Act 1976* (Cth) s 33C(1).
134. See RDA s 25Y and 25Z; SDA s 80 and 81; DDA s 102 and 103; see also *Federal Court of Australia Act 1976* (Cth) s 33C(2).
135. See RDA s 25L; SDA s 69; DDA s 89; as inserted by *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth).
136. For example, DDA s 89(2).
137. *Federal Court of Australia Act 1976* (Cth) s 33C-33ZB.
138. SDA s 72.
139. *Federal Court of Australia Act 1976* (Cth) s 33ZE.
140. Public Interest Advocacy Centre, *Submission* at 1. See *Federal Court of Australia Act 1976* (Cth) s 33H-33ZJ.
141. *Federal Court of Australia Act 1976* (Cth) s 33Z(5).
142. *Federal Court of Australia Act 1976* (Cth) s 33M.
143. Public Interest Advocacy Centre, *Submission* at 2.
144. Anti-Discrimination Board, *Submission 1* at 208-209; Combined Community Legal Centre Group NSW, *Submission* at 13; Disability Council of NSW, *Submission* at 4; Gay and Lesbian Rights Lobby, *Submission* at 5; Law Society of NSW, *Submission* at 5; Legal Aid Commission of NSW, *Submission* at 2; J Lennane, *Submission* at 2; NSW Ministry for the Status and Advancement of Women, *Submission* at 9; National Children's and Youth Law Centre, *Submission* at 4; National Pay Equity Coalition, *Submission* at 4; NSW Bar Association, *Submission* at 10; Independent Teachers' Association, *Submission* at 4; NSW Women's Advisory Council, *Submission* at 3; Office of the Director of Equal Opportunity in Public Employment, *Submission* at 3; People with Disabilities, *Submission* at 1. See also Public Interest Advocacy Centre, *Submission* at 1.
145. *Credit Act 1984* (NSW) s 86B.

146. *Carnie v Esanda Finance* (1995) 182 CLR 398 at 414.
147. ADT Act s 73. See also New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280.
148. ADT Act s 73(3). A similar provision also applied to the EOT under the ADA: ADA s 108(1)(b).
149. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280.
150. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280. See ADT Act ch 6 Pt 3 Div 1.
151. ADT Act s 94(1).
152. ADT Act s 93(1).
153. ADT Act s 90(2).
154. ADT Act s 90(3).
155. ADT Act s 93(2) and 97. These Subcommittees are composed of the Divisional Head, one judicial and one non-judicial member of the Division and three community members who represent relevant special interests in the area of the Division's jurisdiction: ADT Act s 97(2).
156. ADT Act s 98(1). The Rules Committee need not comply with this provision if the President certifies that it is necessary for the rule to be made "expeditiously": ADT Act s 98(2).
157. The EOT has not been bound by the rules of evidence and has had the power to give procedural directions to "enable costs or delay to be reduced": ADA s 108 repealed by *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
158. New South Wales, Equal Opportunity Tribunal, *Practice Guidelines and Directions* (1995).
159. NSW Bar Association, *Submission* at 2.
160. NSW Bar Association, *Submission* at 15; Legal Aid Commission of NSW, *Submission* at 3; Anti-Discrimination Board, *Submission 1* at 216. See also Equal Opportunity Tribunal, *Consultation* (25 February 1994). The advantages of having a comprehensive set of procedural rules is that they would assist parties in conducting their cases, encourage procedural fairness in decision making and enhance public confidence in the decision making process.
161. ADT Act s 90 and 97.
162. The ADT Act specifically provides that the Tribunal is subject to the rules of "natural justice": ADT Act s 73(2). Procedural fairness may, for example, require the grant of an adjournment where one party has failed to comply with procedural requirements or directions: see *Shadforth's Ltd v Human Rights and Equal Opportunity Commission* [1992] EOC 92-400.
163. *Equal Opportunity (Anti-Discrimination Tribunal) Regulations 1995* (Vic); *Anti-Discrimination Tribunal Rule 1993* (Qld); *Equal Opportunity Tribunal Rules 1988* (SA); and *Equal Opportunity Regulations 1986* (WA).
164. *Anti-Discrimination Tribunal Rule 1993* (Qld) s 11 and *Equal Opportunity Regulations 1986* (WA) reg 31.
165. ADA s 114 and ADT Act s 88.

166. ADA s 114.
167. ADT Act s 88(1).
168. ADT Act s 88(3).
169. The rationale for this general “costs indemnity” rule is that success at litigation vindicates the winning party who should not then have to pay his or her legal costs in successfully asserting a valid legal claim or defending an unjust claim. Usually, the party may only recover those legal costs reasonably incurred in preparing and presenting the action in court. These are generally referred to as “party and party costs”. Special circumstances must exist to justify an award for full recovery of all expenses reasonably incurred, known as an award for “indemnity costs”. See generally, Australian Law Reform Commission, *Who Should Pay? A Review of the Litigation Costs Rules* (Issues Paper 13, 1994) and Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation* (ALRC 75, 1995).
170. For example, the *Family Court of Australia Act 1976* (Cth). But note that the new *Equal Opportunity Act 1995* (Vic) s 138 allows the recovery of costs.
171. See Australian Law Reform Commission, *Who Should Pay? A Review of the Litigation Costs Rules* (Issues Paper 13, 1994); Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation* (ALRC 75, 1995); Australia, Access to Justice Advisory Committee *Access to Justice – An Action Plan* (AGPS, Canberra, 1994).
172. Note that the Commission is recommending that the ceiling on damages in discrimination cases be raised: see Chapter 10 at para 10.37.
173. One reason for dissatisfaction with the outcomes of the complaint among complainants who proceeded to the EOT was that the “out-of-pocket expenses and wage loss were twenty times the amount awarded”. See RR 8 at para 5.3.3.
174. See ALRC 75 at para 4.26-4.29.
175. One-way costs shifting allows successful plaintiffs to recover costs but not successful defendants. In America, one-way costs shifting has been implemented to encourage public interest litigation in environmental and civil rights matters. See Australian Law Reform Commission, *Who Should Pay? A Review of the Litigation Costs Rules* (Issues Paper 13, 1994) at para 2.9.
176. ALRC 75 at para 4.26-4.29.
177. ALRC 75 at para 4.27. Numerous submissions to the ALRC Report, including those of the Law Society of NSW and the NSW Bar Association, opposed the use of such a general rule.
178. ALRC 75 at para 13.16-13.19. In their report, the ALRC advocated the greater use of discretionary costs orders to achieve specific purposes.
179. ALRC 75 at para 2.14-2.17.
180. NSW Department of Health, *Submission* at 11; Gay and Lesbian Rights Lobby, *Submission*; Legal Aid Commission of NSW, *Submission* at 3; NSW Bar Association, *Submission* at 10.
181. For example, *Squires v Qantas Airways Ltd* [1985] EOC 92-135; *Holdaway v Qantas Airways Ltd* [1992] EOC 92-430 and *Duggan v Shore Inn Pty Limited* [1993] EOC 92-483. It has also been suggested that where a respondent appeals a decision because it is considered a test case, the appeal should only be granted if the respondent agrees to indemnify the complainant for costs, regardless of whether the respondent wins or loses: Legal Aid Commission of NSW, *Submission* at 3. In *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, the High Court allowed

the respondent leave to appeal on condition that the respondent indemnify the complainant for costs regardless of the outcome of the appeal. See also *Oshlack v Richmond River Council* (1998) 72 ALJR 578; *Richmond River Council v Oshlack* (1996) 39 NSWLR 662.

182. NSW Bar Association, *Submission* at 11; NSW Department of Health, *Submission* at 11.
183. Anti-Discrimination Board, *Submission 1* at 213-215; Legal Aid Commission of NSW, *Submission* at 2 and NSW Bar Association, *Submission* at 10-11. It has also been suggested that the EOT make orders for indemnity costs in cases where there is evidence that a party has deliberately and unreasonably delayed the proceedings by reason of misconduct: Legal Aid Commission of NSW, *Submission* at 2. The existing NSW Equal Opportunity Tribunal, *Practice Guidelines* (1995) No 4 actually provide for the possibility of adverse costs orders in such circumstances.
184. The EOT has awarded costs for those parts of the matter where a party has unduly prolonged the hearing and added to the costs of the other party by, for example, not agreeing on facts not genuinely in dispute: *Hill v Water Resources Commission* [1985] EOC 92-127 at 76,292. In some cases, costs have been factored into the remedies given for economic loss: see Chapter 10 at para 10.39 (damages and economic loss). In addition, costs have also been awarded for failing to comply with pre-hearing directions and for conduct which made more difficult clarification of complex issues raised: *Holdaway v Qantas Airways Ltd* [1992] EOC 92-430.
185. *Duggan v Shore Inn Pty Limited* [1993] EOC 92-483 at 79,492. Contrast *Nowland v TNT Skypak* [1994] EOC 92-560.
186. Anti-Discrimination Board, *Submission 1* at 212-213. The delays invariably caused by a self-represented litigant with little knowledge of Tribunal procedures surely merit different treatment to the misconduct of another party who has lodged numerous baseless claims. Preserving a discretionary approach is an appropriate means of ensuring a just result.
187. ADA s 111(2). A similar provision is also found in the legislation of South Australia, Western Australia and the ACT: EOA (SA) s 26; EOA (WA) s 125(2); and DA (ACT) s 102(4). The Commission does not agree with a Submission of the NSW Bar Association that an automatic costs order be made against a complainant whose complaint is found to be vexatious or frivolous: NSW Bar Association, *Submission* at 10-11.
188. *Absolon v Department of Technical and Further Education* [1995] EOC 92-693 at 78,223; *Hill v University of New England* [1990] EOC 92-291 at 77,951.
189. Anti-Discrimination Board, *Submission 1* at 213-215 and Legal Aid Commission of NSW, *Submission* at 2-3. Under the current provisions of the ADT Act, a successful complainant who has been awarded damages may enforce the order as a judgment debt in a court of relevant jurisdiction: ADT Act s 82. Compare ADA s 115 repealed by *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
190. Anti-Discrimination Board, *Submission 1* at 213-215. An “offer of compromise system” is also one of the alternative models supported by the ALRC in its report on the reform of litigation costs rules: Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation* (ALRC 75, 1995). A number of submissions specifically recommended the implementation of a formal, statutory offer of compromise system, similar to that used in the District Court: Legal Aid Commission of NSW, *Submission* at 3; NSW Bar Association, *Submission* at 14. However, the submission of the ADB opposed the consequences of an adverse costs order in favour of a respondent on the basis that this would detrimentally affect complainants, who tend to be averse to risks. In addition, it was argued that such a system may have limited effect as the redress sought by complainants is not always financial compensation: Anti-Discrimination Board, *Submission 1* at 215; D Robertson, *Submission* at 20.
191. An “offer of compromise system” provides that, if the amount of a settlement offer made (and possibly filed with the court or tribunal) by a complainant is either met or exceeded by the amount

subsequently recovered at judgment, the complainant is entitled to a costs order. Conversely, if the respondent offered to settle for a specified amount and the complainant recovers less than that amount at the hearing, costs may be awarded to the respondent, or at least the complainant may not recover his or her costs incurred after the offer is made.

192. See Australian Law Reform Commission, *Who Should Pay? A Review of the Litigation Costs Rules* (Issues Paper 13, 1994) at 58.
193. See, for example, *Squires v Qantas Airways Ltd* [1985] EOC 92-135 at 76,341; *Willis v State Rail Authority of NSW (No 3)* [1992] EOC 92-456 at 79,283. Factors which have been held to be relevant are: whether the complaint raises important issues of public policy and whether the complainant has received financial assistance from any other source, such as legal aid or union assistance: *Squires v Qantas Airways Ltd* [1985] EOC 92-135 at 76, 341. However, compare *Holdaway v Qantas Airways Ltd* [1992] EOC 92-430 where the EOT decided to award costs to the complainant despite the fact that the complainant's union had agreed to pay his costs.
194. See *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497 (CA).
195. See para 9.146, 9.147
196. *Legal Aid Commission Act 1979* (NSW) s 47.
197. See Chapter 8 at para 8.187.
198. See *Federal Court Rules* O 62A.
199. See *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139.
200. O 62A r 2; *Hanisch v Strive Pty Ltd* (1997) 74 FCR 384.
201. O 62A r 4.
202. ADT Act s 24 and 113. Note that s 118 of the ADA has been amended to expressly provide that appeals from the EO Division may be made to an Appeal Panel of the ADT.
203. ADT Act s 113. An appeal must be made within 28 days after the Tribunal provides the party with written reasons for the decision or within such further time as the Appeal Panel may allow: ADT Act s 113(3).
204. ADT Act s 119. The Supreme Court retains its original jurisdiction to review decisions of the ADT (ADT Act s 122) but it may decline to exercise that jurisdiction if satisfied that an alternative mechanism, such as the statutory right of appeal, is adequate: ADT Act s 123.
205. ADA s 118 (amended by *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1). Under the ADA an appeal to the Supreme Court was able to be made, but only within 21 days after the EOT provided the party with written reasons for the decision: s 118(1).
206. NSW Department of Health, *Submission* at 11.
207. Anti-Discrimination Board, *Submission 1* at 217; NSW Bar Association, *Submission* at 16; Legal Aid Commission of NSW, *Submission* at 3.
208. This practice depended upon a particular interpretation of s 48 of the *Supreme Court Act 1970* (NSW), namely that one looked to the panel which heard the case rather than the membership of the EOT as a whole in determining whether the Tribunal included a District Court judge.
209. *Supreme Court Act 1970* (NSW) s 101(2)(r).

210. See para 9.131.
211. ADA s 101A.
212. See *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
213. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 25 November 1980, the Hon N K Wran, Premier, Second Reading Speech at 3412.
214. *Woods v Wollongong City Council* [1992] EOC 92-393 and 92-394. The decision of the Tribunal is reported at [1993] EOC 92-486 and 92-511.
215. See HREOC Act s 11(1)(o).
216. Legal Aid Commission of NSW, *Submission* at 2; NSW Department of Health, *Submission* at 10; and Gay and Lesbian Rights Lobby, *Submission*.
217. In South Australia and Western Australia the Equal Opportunity Commissioner must, either personally or by counsel, assist the complainant, if requested, in the presentation of the complainant's case: EOA (SA) s 95(9); and EOA (WA) s 93(2). Note the South Australian provision is currently under review: Martin Report ch 5-6. Similarly, if a matter proceeds to a tribunal in Canada or in the United States, the proceedings are brought by the State equal opportunity agency. See also *Human Rights Act 1993* (NZ) s 83(1).
218. See Chapter 8 at para 8.96.
219. ADA s 109 repealed by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
220. This provision appears in the legislation of a number of other jurisdictions: ADA (Qld) s 206; EOA (WA) s 123; and ADA (NT) s 91(2). Note that the ADB actually recommended extending the provision to provide that the burden of proof of "reasonableness" in indirect discrimination cases should also lie on the respondent: Anti-Discrimination Board, *Submission 1* at 200. The Commission supports this recommendation: see Chapter 3 at para 3.103.



## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### 10. Remedies

#### INTRODUCTION

10.1 The *Anti-Discrimination Act 1977* (NSW) ("ADA") renders various forms of conduct unlawful. These, as discussed in the previous chapters, may be grouped as follows:

discrimination, harassment and victimisation;

vilification;

advertising; and

procedural obstruction.

10.2 The first category covers the major prohibitions contained in the ADA: discrimination, harassment and victimisation are rendered unlawful and the Act provides civil remedies to complainants who have suffered or may suffer damage as a result of such conduct.

10.3 In relation to the second category, namely vilification, special civil remedies are provided.<sup>1</sup> Other offences are created in relation to advertising which contravenes the ADA and in relation to failure to comply with orders made by the Anti-Discrimination Board ("ADB") or the Administrative Decisions Tribunal ("ADT").<sup>2</sup>

10.4 The availability of the remedies in particular cases may depend upon the person or body taking the proceedings. In relation to discrimination, harassment and victimisation, a complaint may be taken by an individual on his or her own behalf, or by a person as representative of a group. Currently, the remedies available vary according to the capacity in which the complaint is pursued. It is possible that the availability of remedies may depend on the interest of the complainant in the proceedings.<sup>3</sup>

10.5 The first question raised by these matters is whether the ADA currently makes the appropriate distinction between civil remedies and criminal penalties. Subject to some minor changes suggested below, the Commission is satisfied that the distinction is appropriately drawn. In other words, it is appropriate that the various forms of discrimination should be the subject of civil remedies allowing for persons injured to obtain compensation. The Commission sees no purpose in imposing penalties for such conduct. On the other hand, it is appropriate to impose a penalty in respect of breaches of orders given by the President of the ADB or the Tribunal.

10.6 The second general issue which arises in this context is the monopoly given to the Tribunal in relation to complaints of discrimination, harassment and victimisation.<sup>4</sup> The Commission gives separate consideration to the appropriateness of maintaining the exclusivity of the Tribunal's jurisdiction.

10.7 In Chapter Eight the Commission has recommended giving the President of the ADB a new role in pursuing complaints before the Tribunal.<sup>5</sup> This recommendation requires that consideration be given to the remedies which should be available in relation to matters pursued by the President.

10.8 At present the ADA also distinguishes between the relief available to an individual complainant and a representative complainant. Comment will be made below in relation to particular remedies as to whether they should be available at the request of an individual, a representative or the President of the ADB, or in all cases regardless of the identity or capacity of the complainant. Finally, it will be necessary to give specific consideration to the enforcement of orders made by the Tribunal. These matters have been touched on in Chapter Nine, as has the power of the Tribunal to make orders as to costs.<sup>6</sup>

10.9 The ADA does not punish those who contravene its prohibitions on unlawful discrimination and harassment, but provides redress for injury or loss suffered. Subject to this overriding purpose, the ADA

confers a broad discretion on the new Equal Opportunity Division of the Administrative Decisions Tribunal ("EO Division") as it did on the EOT,<sup>7</sup> taking into account all material facts before it, to decide what remedy is appropriate in any case.<sup>8</sup> The following discussion will refer to the EOT and the Equal Opportunity Division of the ADT as the "Tribunal" unless specific reference to one or the other is necessary.

10.10 Under the current provisions of the ADA, the Tribunal is not bound to make any orders even if it finds the complaint substantiated.<sup>9</sup> However, it is unusual for the Tribunal not to make some sort of order for redress, given that a finding of discrimination alone is not seen to offer sufficient vindication to complainants.<sup>10</sup>

10.11 Where the Tribunal finds an individual complaint substantiated, it may make one or more of the following orders:

an award of damages, not exceeding \$40,000;

an injunction to stop the respondent from continuing or repeating the unlawful act;

an order requiring the respondent to "perform any reasonable act or course of conduct" to redress any loss or damage suffered by the complainant; and/or

a declaration that a contract or agreement, either in whole or in part, is void.<sup>11</sup>

10.12 Orders for damages and orders requiring the respondent to perform a reasonable act to redress any loss or damage suffered by the complainant as a result of the unlawful act are expressly made unavailable in a representative proceeding.<sup>12</sup>

10.13 If substantiated, the Tribunal has specific power, in vilification complaints, to order the respondent to:

publish a public apology or a retraction; and/or

develop and implement a program or policy aimed at eliminating unlawful discrimination.<sup>13</sup>

10.14 Unlike the main remedies for discrimination, the orders the Tribunal may make in relation to vilification complaints indicate a legislative acknowledgment that vilification complaints affect the whole group, even if the action is brought by an individual complainant.

10.15 The major criticisms of the judicial remedies available under the ADA are that:

the statutory ceiling for awards of damages is too low;<sup>14</sup>

the extent of the Tribunal's powers to order the respondent to take remedial action is uncertain;

orders for damages and orders requiring the respondent to take remedial action are not available in group actions: once liability is determined, aggrieved persons must bring separate actions in order to seek such orders; and

there is no provision for declaratory relief.<sup>15</sup>

## **DISCRIMINATION, HARASSMENT AND VICTIMISATION**

### **General principles**

10.16 The ADA presently provides that various remedies are available in relation to a complaint which the Tribunal finds has been "substantiated".<sup>16</sup> The form of the provision reflects the two-stage process which is uniformly adopted by the Tribunal in practice. First, the Tribunal considers whether or not there

has been a contravention of the Act and only when so satisfied continues to consider the remedy or remedies which may appropriately be provided. The ADA also provides that a finding of discrimination may be made but no further step need be taken.<sup>17</sup> However, it is generally appropriate to take a further step of granting specific relief, unless the Tribunal is satisfied that no loss or damage has been suffered, or no compensation is sought and that there is no threat of a continuation or repetition of the unlawful conduct. However, if there has been compensable loss suffered, the Full Federal Court has held, under similar provisions in the *Sex Discrimination Act 1984* (Cth) ("SDA"), that order for payment of compensation should generally follow.<sup>18</sup> That is because the purpose of the SDA is not merely to provide an educational or deterrent effect by making a finding of unlawful conduct but it is to provide for loss or damage suffered. In short, a complainant who can establish loss or damage from unlawful conduct generally speaking has a right to an award of compensation.

10.17 The nature of the available relief has led to the rights provided under the ADA being described as a category of "statutory torts".<sup>19</sup> However, that is not to say that the relief provided should necessarily be identical with that available in respect of a common law tort, nor that, in an otherwise appropriate case, the relief should be the same as that provided for a breach of contract. Rather, the ADA confers a broad discretion on the Tribunal to take into account all material facts in determining what remedy is appropriate in a particular case.<sup>20</sup> These considerations will continue to apply in relation to the new Tribunal.<sup>21</sup>

### **Compensation: availability**

10.18 Although many complainants claim not to be motivated by the availability of pecuniary compensation, damages for losses suffered are the most common form of relief sought and the kind most commonly granted.<sup>22</sup>

10.19 While the ADA gives effect to the policy of providing compensation for loss caused by interference with important human rights and fundamental freedoms, it also imposes a constraint in some cases on the completeness of the compensation which may be recovered. This is achieved by imposing a cap on the damages recoverable in the Tribunal<sup>23</sup> together with a provision precluding the bringing of proceedings in any other jurisdiction for a contravention of the Act.<sup>24</sup>

10.20 While the provision of a cap on the jurisdiction of the Tribunal may be justifiable, it is difficult to justify, in policy terms, a result which may prevent some complainants receiving full and appropriate compensation for loss or damage suffered. This limitation has been criticised both as unfair and as providing a deterrent or disincentive to complainants who might otherwise pursue complaints to the Tribunal.<sup>25</sup>

### ***Should there be a ceiling?***

10.21 In 1977 when the ADA was first passed, the ceiling was set at \$20,000 in line with the District Court jurisdictional limit. It was increased in 1982 to \$40,000 to keep pace with the ceiling in the District Court.<sup>26</sup> It has not been reviewed since, despite movements in the Consumer Price Index and the fact that the limit of the District Court has been increased many times since, the current limit being \$750,000. In the Commission's *Review of the Anti-Discrimination Act 1977 (NSW)* (Discussion Paper 30, 1997) ("DP 30"), submissions were sought on whether there should be a ceiling at all and if so, whether and how it should be increased.

10.22 Some submissions argued that there is no need to cap damages in any way. It is argued that the fundamental principles which underscore the assessment of damages already contain a built-in safeguard,<sup>27</sup> and that awards will compensate the injured person only for that loss or damage which is shown to be causally related to the unlawful conduct.<sup>28</sup> With the exception of Western Australia and the Northern Territory (where the prescribed limits are \$40,000 and \$60,000 respectively),<sup>29</sup> Australian equal opportunity jurisdictions operate without statutory limits on recovery of damages. In these jurisdictions, damages have not been excessive.<sup>30</sup> Removing the ceiling would also promote uniformity with Federal legislation.<sup>31</sup>

10.23 A small number of submissions argued that the current statutory limit provides adequate redress and opposed any increase on the grounds that it would:

open the floodgates to litigation at the Tribunal;

run against the recent tide of reducing and capping compensation pay outs;<sup>32</sup> and

increase the risk of a “pot of gold syndrome” developing among victims of discrimination and their lawyers, thus undermining the aims of conciliation and workplace reform.<sup>33</sup>

10.24 It is also argued that imposing an upper limit on the amount of damages that the Tribunal may award may not in itself be evidence of a failure to provide an effective remedy provided the limit is pitched high enough so that the remedy is effective and so adequately compensates for the damage suffered.

10.25 However, the vast majority of submissions received by the Commission agreed that the ceiling of \$40,000 is inadequate and counter-productive, and supported increasing the ceiling to the jurisdictional limit of the District Court.<sup>34</sup>

10.26 Arguments in favour of increasing the ceiling included:

a higher ceiling would represent a more realistic and equitable remedy for victims of discrimination, as the Tribunal would be empowered to make orders for damages commensurate with the harm suffered by the complainant due to the respondent’s unlawful actions;

it would reduce the tendency of complainants to plead several complaints in order to maximise their chances of proper compensation, thus streamlining the proceedings;

it would remove a potential disincentive to complainants to pursue a complaint in the Tribunal when it remains unsettled after conciliation;

it will increase the in-built deterrent element present in compensatory damages.<sup>35</sup> Higher damages pay outs are said to have been a powerful stimulus for change in other countries;<sup>36</sup>

removing or increasing the ceiling on damages awards may have a spin-off effect on conciliation proceedings, as it would encourage both sides to work towards an amicable settlement and avoid proceeding to the Tribunal.

### ***The Commission’s view***

10.27 The Commission believes that the current statutory ceiling is inadequate. The current low limit discredits the significance of anti-discrimination laws, and has the potential to frustrate the provision of adequate remedies under the ADA. The Commission has therefore considered the issue of either increasing the limit to the District Court limit,<sup>37</sup> as was suggested in some submissions, or increasing it to some other amount which may reflect current community expectations.

10.28 The argument that removing the ceiling would lead to a flood of matters in the Tribunal is unsubstantiated.<sup>38</sup> The level of claims and the quantum of awards in other jurisdictions which lack a ceiling tells against this argument. Research undertaken in Australia and overseas suggests that complainants are rarely motivated by money when they decide to lodge complaints.<sup>39</sup> Rather, most want to take the discriminator to task and ensure that the discriminatory conduct is stopped.<sup>40</sup>

10.29 If the appropriate course in principle is to remove the statutory ceiling, the next question is whether the nature of the Tribunal suggests there should nevertheless be a cap on the amount which can be awarded.

10.30 The panel of the EO Division constituted to hear a particular case will not necessarily be headed by a District Court judge or member of the Worker's Compensation Court. There are other differences between the Tribunal and the District Court which prevent equating one with the other. Unlike a court, the Tribunal is not bound by adversarial procedures or rules of evidence and has considerable discretion to conduct matters however it sees fit. Appeals on the merits of the case are not available to the Supreme Court.

10.31 Even under the ADA, the EOT has not always had a judge as its senior judicial member, and, even when it did, the judge did not sit on the panels in all cases. Accordingly, there is justification for limiting the amount or value of the relief which may be awarded.

10.32 Further, it was suggested to the Commission that if the cap on damages were removed, a more expansive right of appeal should be available to the parties. The Commission sees some merit in this proposal, as one reason for restricting rights of appeal is to ensure that claims for relatively minor amounts do not generate unduly complex legal proceedings and disproportionate legal costs.

### **Conclusions**

10.33 Consistently with the principle that full compensation should be available for a contravention of the ADA, there should not be a limit on the amount recoverable. However, given the constitution of the Tribunal, there should be a statutory ceiling on the amount that it can award by way of damages.

10.34 The appropriate resolution of this difficulty is to provide a cap on the damages recoverable in the Tribunal, depending on the constitution of the particular panel hearing the matter. The President of the ADT or the Head of a Division has the power to constitute panels for the purposes of particular cases.<sup>41</sup> In circumstances where a claim is made in excess of the proposed limit, the President may be required to constitute a Tribunal presided over by a District Court judge.

10.35 In other cases the power of the Tribunal should generally be limited to the powers of a District Court judge sitting as such. Whilst the Tribunal has a level of procedural flexibility, as a practical matter it is clear that amounts awarded in this jurisdiction are unlikely to come anywhere near the limits of the District Court's jurisdiction. Experience under similar legislation in other jurisdictions in Australia suggests that there will be a relatively small number of cases in which an award of damages in excess of \$150,000 could reasonably be anticipated. It may well be that no further cap on the limit of the Tribunal is needed: certainly experience in other jurisdictions suggests that caps are unnecessary and one would not expect a Tribunal presided over by a District Court judge to act otherwise than responsibly. In any event, an irresponsible award of damages could be corrected on appeal.

10.36 Issues in relation to appeals from decisions of the Tribunal are dealt with in Chapter Nine.<sup>42</sup>

10.37 These conclusions require an answer to a further question, namely the appropriate monetary limit of the Tribunal (constituted by non-judicial members only). In the view of the Commission, a statutory ceiling of between \$100,000 and \$200,000 is appropriate. The identification of a precise figure is necessary, but to a degree arbitrary. The Commission considers that at the present time, an appropriate limit would be \$150,000.

### **Recommendation 148**

**The statutory limit on damages in the Tribunal should be increased to \$150,000, except in cases where the panel has a District Court judge as its presidential member where the limit should reflect the jurisdiction of the District Court;**

**otherwise, the powers of the Tribunal with respect to orders should be those available under the *District Court Act 1973 (NSW)*.**

## **Nature of compensation**

### ***Assessment of damages***

10.38 Generally, it has been considered that assessment of damages under the ADA should be treated as analogous to an action in tort, thus permitting a wider claim to damages being made than if an action under the ADA were treated as an action in contract.<sup>43</sup> While in most cases the measure of damages in tort would be a sensible and sound test, a court is not bound to principles of tort, and should be open to the possibility of taking a different approach to the assessment of damages where a case may require it.<sup>44</sup>

10.39 Damages which have regularly been recovered include amounts to cover disbursements (such as medical expenses) incurred as a result of the unlawful conduct and loss of wages to the date of the hearing, or some other appropriate time in the past. Amounts may also be recoverable for future loss of earnings in appropriate cases, although, given the lapse of time which inevitably accompanies the making of a complaint, its investigation, conciliation and referral to the Tribunal for hearing, the period of unemployment which may properly be attributed to the unlawful conduct will usually have terminated before the determination is made. In addition, general damages are commonly awarded for pain and suffering, although more usually, they are relatively small amounts for embarrassment, humiliation and injury to feelings. As these are intangible harms, damages for non-economic loss are more difficult to quantify and are often mistakenly perceived as a penalty on the discriminator.<sup>45</sup> They tend to be low<sup>46</sup> despite the warning of the English Court of Appeal that damages for non-economic loss should “not be minimal, because this would tend to trivialise or diminish respect for public policy”.<sup>47</sup> Reported awards for damages for non-economic loss in New South Wales have varied between \$50<sup>48</sup> and \$27,500.<sup>49</sup>

10.40 Damages for non-economic loss can be made regardless of whether damages are claimed or awarded for economic loss. It is not uncommon, in fact, for the Tribunal to award damages for injury to feelings alone.<sup>50</sup>

### ***Aggravated damages***

10.41 There is a further category of damages which can be recovered in such cases, commonly known as “aggravated damages”. These are designed to compensate complainants for distress arising from the offender’s conduct where it is particularly reprehensible or insulting.<sup>51</sup> Although it is widely accepted that the Tribunal has power to make an award for aggravated damages,<sup>52</sup> there have been few cases where such awards have been expressly made.<sup>53</sup> Because they require a court or tribunal to look at the conduct of the respondent, aggravated damages may arguably appear punitive in nature. However, it is overwhelmingly accepted that they are compensatory and not only applicable but appropriate in certain cases of discrimination.<sup>54</sup>

### ***Exemplary damages***

10.42 A third form of damages, known as “exemplary” or punitive damages is not available under the ADA. Exemplary damages “are intended to punish the defendant, and, presumably, to serve one or more of the objects of punishment – moral retribution or deterrence”.<sup>55</sup> For this reason, they have been held not to be available pursuant to a power limited to providing compensation for loss.<sup>56</sup> The argument for providing exemplary damages in the context of anti-discrimination law arises out of criticisms that the law’s “soft approach” does not always induce compliance.<sup>57</sup>

10.43 The availability of exemplary damages in civil actions generally has been criticised, primarily on the ground that it is inappropriate and unjust to dispense punishment to offenders on the balance of probabilities, which is a lower standard of proof than that required by the criminal law. Punishment, it is argued, is more appropriately left to the criminal justice system, which contains appropriate safeguards for defendants.<sup>58</sup> Opponents of exemplary damages also consider them an unfair windfall to plaintiffs.<sup>59</sup> As they are expressly punitive, the purpose of exemplary damages is not to compensate the complainant for any injury suffered.

10.44 Although there may be a trend towards the greater recoverability of exemplary damages at common law,<sup>60</sup> their availability under statute is diminishing in New South Wales. They were removed from defamation proceedings in this State subsequent to a report by the Commission in 1974<sup>61</sup> and a proposal for their reintroduction has been rejected in the Commission's recent report.<sup>62</sup> They were also removed from motor accident cases in 1989<sup>63</sup> and are expressly made unavailable in awards under workers compensation law.<sup>64</sup>

10.45 The majority of submissions received did not support the introduction of exemplary damages. Most agreed that the incidental deterrent value of compensatory damages would be increased once damages more realistically reflect the injury suffered, uninhibited by the current low ceiling on awards.<sup>65</sup> The Commission does not support the availability of exemplary damages in proceedings under the ADA. Any measure to punish offenders should be dealt with in criminal, not civil proceedings, where appropriate standards exist to safeguard civil liberties.

### **Injunctions and other orders**

10.46 Under the ADA injunctive relief is available to prevent the continuation or recurrence of unlawful conduct.<sup>66</sup> The appropriateness of such relief is not questioned, but an issue may arise on occasion as to whether it should be available to a particular complainant who is no longer subject to the conduct complained of. For example, an employee who loses her employment by reason of a pattern of unlawful discriminatory behaviour and who does not seek or obtain reinstatement, may wish to pursue injunctive relief against her former employer in order to prevent a repetition of the particular conduct. In some cases, it will be clear from the established facts that such an order is appropriate, but there remains a question as to whether it should be available at the instigation of an individual complainant who is no longer in the workplace.

10.47 There are practical reasons for thinking that those affected by such an injunction should be given an opportunity to be heard by the Tribunal. In some circumstances, the work force may consider that the benefits to be obtained are illusory and the costs to them of new work practices are likely to be real. Alternatively, whilst the employer may oppose the relief sought, the real issue may be the form of the relief and the complainant may no longer be in a good position to assess contemporary needs of the work force.

10.48 One way to approach the matter may be to require such a complainant to lodge a complaint in a representative capacity as well as an individual capacity. This will allow the Tribunal to consider whether he or she is an appropriate representative and will also involve the procedural requirements, including appropriate forms of notice, which are designed to ensure that group members are appropriately informed of the proceedings and given an opportunity to make such submissions or play such role as they think appropriate. An alternative course is for the Tribunal to ensure that the President of the ADB is notified of the possibility of such relief being sought, or even to notify the President of its own motion if it considers that such relief should be considered.

10.49 While the Commission thinks that one of these two alternatives should be followed, it is also concerned that there may be legitimate reasons in particular cases for not following either procedure and yet permitting the Tribunal to grant the relief sought by the complainant. Accordingly, the preferable course is to make express provision for these circumstances so as to ensure that the Tribunal may, in the exercise of its own discretion take appropriate steps, as it thinks fit.

### **Recommendation 149**

**The Tribunal should have the power to grant an injunction which extends to conduct affecting persons other than the individual complainant in the following circumstances:**

**where the complaint has been lodged in a representative capacity;**

**where the President of the ADB has been notified and given the opportunity to make submissions; or**

**in any other case, where the Tribunal believes that the particular circumstances warrant such action.**

### ***Mandatory orders***

10.50 Injunctive relief involves the prohibition of defined conduct: in some circumstances, however, a mandatory order requiring particular conduct to be undertaken (rather than avoided) may be appropriate. The Tribunal presently has powers which would allow it to formulate appropriate mandatory orders.

10.51 The Tribunal currently has the power to order the respondent to perform any reasonable act aimed at redressing the loss or damage suffered by the complainant.<sup>67</sup> The power has been used, for example, to order a respondent to appoint,<sup>68</sup> to reinstate or promote the complainant,<sup>69</sup> to transfer or suspend the harasser so as to ensure no contact with the victim,<sup>70</sup> to give constructive seniority to the complainant,<sup>71</sup> to apologise to the complainant, to change recruitment and selection practices and to order an employer to take disciplinary action against a harasser.<sup>72</sup>

10.52 The ADA now expressly provides that the Tribunal may also order the implementation of an equal opportunity plan,<sup>73</sup> but only in relation to vilification complaints, implying that the remedy is unavailable for other grounds of discrimination. Under the present wording of s 113(b)(iii), the Tribunal may not be entitled in other cases to make an order for the implementation of an equal opportunity plan. The power to order a respondent to develop and implement programs or practices which comply with the terms of anti-discrimination laws is an especially useful tool against systemic discrimination.

10.53 Two problems arise in relation to mandatory orders of a positive kind. First, they can require the expenditure of funds and, secondly, they may require on-going monitoring.

10.54 In relation to expenditure, the Commission is aware of circumstances in a particular case in which the Tribunal made orders (ultimately by consent) requiring the construction of a sealed road to a remote Aboriginal community. The cost of the work was expected to be many times the statutory ceiling of the Tribunal. The ceiling did not, however, apply in relation to such orders.

10.55 As the matter does not seem to have caused practical difficulties, the Commission does not recommend any limit on the jurisdiction of the Tribunal beyond those relating to monetary relief. However, the Commission considers that, where such an order is not made by consent and where the respondent can establish that the direct costs of compliance with the order would exceed the statutory limit of the Tribunal's jurisdiction, it should have an appeal as of right in relation to the appropriateness of the order.

10.56 The second matter raised concerns the monitoring of orders. The Commission is aware of orders made which require the formulation of compliance programs or attendance at counselling or other educational programs. Where, on occasion, the Tribunal has made such orders, they have often been part of terms of settlement and accordingly made by consent. In one case, the Tribunal made an order requiring counselling of a medical practitioner against whom a number of complaints of sexual harassment by employees had been upheld. On some occasions, the President of the ADB or officers of the ADB are involved in designing or running the relevant programs.

10.57 Such orders should continue to be within the armoury of the Tribunal and express provision should be made in relation to the powers of the President of the ADB which would allow the President or a delegate to be appointed by the Tribunal to undertake appropriate monitoring or related functions. Because, in other contexts, it has been held that a tribunal or court will not have power to make orders



by consent, which it could not make in disputed proceedings,<sup>74</sup> it is necessary that the legislation provide the broadest appropriate powers to the Tribunal to allow it to continue to make such orders.

#### **Recommendation 150**

**That the Tribunal be given express power to make mandatory orders in accordance with the following:**

**where the order is not by consent and the cost of compliance would exceed the statutory maximum, the respondent should have a right of appeal in relation to the appropriateness of the order; and**

**the Tribunal should have the power to make mandatory orders and appoint the President of the ADB to monitor compliance with the order.**

#### ***Declarations***

10.58 Under the current provisions, the Tribunal is required to make a “finding” that a complaint is “substantiated” before granting further relief.<sup>75</sup> However, the Tribunal does not presently have a power specifically to declare that certain conduct was unlawful. In some cases, including representative actions where it may be necessary for group members to bring their own proceedings to obtain specific relief, it is desirable that the unlawful conduct, as found by the Tribunal, be defined with some precision. Accordingly, the Tribunal should be given an express power to make a declaration, whether or not it proceeds to grant other substantive relief.

#### **Recommendation 151**

**The Tribunal should be empowered to make a declaration that certain conduct is unlawful under the ADA.**

#### ***Other orders***

10.59 Both the Tribunal and similar bodies in other jurisdictions and the Commonwealth Human Rights and Equal Opportunity Commission have on occasion ordered respondents to make apologies or publish retractions.

10.60 The extent of the Tribunal’s powers to make such orders is not entirely clear. An apology is not unambiguously a form of “redress” for loss or damage caused<sup>76</sup> and the express power to make such orders, but limited to vilification complaints, casts doubt on the existence of a broader power.<sup>77</sup>

10.61 As the desirability of a power to make such orders seems not to be in question, the Commission recommends that express terms be adopted to put the power of the Tribunal beyond doubt.

10.62 A second kind of order which is expressly provided for in the ADA is one which allows for a variation of contractual terms.<sup>78</sup> This power is consistent with the power of both superior courts and other tribunals and is well established.<sup>79</sup> The Commission has considered whether it is appropriate to formulate relevant criteria to guide the Tribunal, but does not think that such an amendment is necessary. Clearly the power will only be exercised in circumstances where the contract itself involves

or may lead to conduct which is unlawful under the ADA and the appropriate variation should be to avoid or prevent that result.

10.63 Of greater concern is the possibility that such a power might be exercised in relation to contracts of employment which fall within the jurisdiction of industrial courts and tribunals. The Commission considers that an appropriate constraint should be imposed on the Tribunal in relation to such matters, although it may be limited to a requirement that the Tribunal give the respondent an opportunity to invoke the jurisdiction of an industrial court or tribunal if it thinks appropriate, within a reasonable time.

#### **Recommendation 152**

**That the Tribunal be given express power to order a respondent to publish an apology or retraction in relation to all forms of unlawful conduct under the ADA.**

#### **Recommendation 153**

**In relation to the power of the Tribunal to make a variation to the terms of a contract of employment, that the Tribunal be required to allow the respondent to take the matter to the industrial relations jurisdiction within a reasonable time.**

#### ***Victimisation***

10.64 In this chapter, complaints of discrimination, harassment and victimisation have been considered together. Although the concept of victimisation differs in significant respects from the prohibition on unlawful discrimination or harassment, the Commission is satisfied that the range of remedies which exist in relation to discrimination and harassment should be available in relation to victimisation.

#### **VILIFICATION**

10.65 The orders presently available in relation to vilification complaints reflect the different purposes to be served by these complaints. As already noted the Commission recommends that serious vilification complaints be dealt with under an appropriate criminal statute.<sup>80</sup> Accordingly, nothing is said here about the remedies and penalties available in relation to such complaints.

10.66 In relation to other vilification complaints the Tribunal has the general powers which are provided in relation to discrimination complaints under the ADA. In addition, it is empowered to order the respondent to a vilification complaint to publish an apology or retraction.<sup>81</sup> It is also empowered to order a respondent to develop and implement a program or policy aimed at eliminating "unlawful discrimination".<sup>82</sup> This provision is curiously worded because vilification, although a form of conduct which may in some circumstances constitute unlawful discrimination, is separately defined. It is not a proscription on differential treatment based on, for example, race but the incitement of hatred towards members of that racial group. Accordingly, the program or policy which should appropriately be adopted following a substantiated vilification complaint should be directed to eliminating unlawful vilification. However, the criticism is directed to the drafting, rather than the principle at stake. As noted above, the Commission considers that the powers specifically granted in relation to the vilification complaints should be available in relation to unlawful discrimination generally, as well as in relation to vilification.

#### **Recommendation 154**

**The Tribunal should have power to order a respondent to implement a program or policy aimed at eliminating unlawful vilification. A similar power should be available in relation to all forms of unlawful conduct under the ADA.**

#### **REPRESENTATIVE PROCEEDINGS**

10.67 The Commission has already noted that the legislation in other jurisdictions and in particular in the Commonwealth Acts have followed more closely the model of the representative proceeding provisions in the *Federal Court of Australia Act 1976* (Cth). The Commission has recommended that similar procedures be adopted in the ADA.<sup>83</sup> Inclusion of those procedures requires a reconsideration of the relief available to a complainant acting in a representative capacity.

10.68 First, there is the prohibition on the recovery of damages in representative proceedings under the ADA.<sup>84</sup> This gave rise to a curious set of issues in *Leslie Squires v Qantas Airways*.<sup>85</sup> Ms Squires had lodged a complaint of sex discrimination against Qantas which, although ambiguous as to whether it was lodged in a representative capacity or not, clearly alleged systemic discrimination by Qantas against female flight attendants over a lengthy period. The New South Wales Court of Appeal ultimately accepted the complainant's argument that the complaint had not been lodged in a representative capacity, and it is clear that the complainant's position was influenced by the fact that, if it had been a representative complaint, she would not have been able to recover any compensation for her own loss and damage. In policy terms, there appears to be no good reason why an individual should not be able to lodge a complaint on her own behalf and in a representative capacity. The procedures recommended above ensure that this is possible.

10.69 Further, there is no reason of principle why damages should not be claimable in representative proceedings. In many cases the assessment of damages will be an individual issue which will need to be separately pursued by group members on their own behalf. Nevertheless, the correct approach is to provide that such individual issues can be separately determined (whether in the representative proceedings or otherwise).

10.70 In some cases, the loss suffered may be capable of global quantification. This may happen in cases where the unlawful conduct has resulted in a particular fund or limited benefit being unavailable to one group of potential complainants. Where that situation arises, it will be necessary for the Tribunal (or court) to have relevant powers to enable it to assess the amount available to group members, create and administer a fund and distribute appropriate sums to individual group members.<sup>86</sup> Again, these powers are included in the recommended procedures.

#### **Recommendation 155**

**In relation to representative actions, the relief available in representative proceedings under the *Federal Court of Australia Act 1976* (Cth) should be available in the Tribunal.**

#### **ROLE OF THE PRESIDENT OF THE ADB**

10.71 The earlier recommendations of the Commission<sup>87</sup> would permit the President of the ADB to have a special role in both bringing proceedings on his or her own behalf and intervening in proceedings brought by a private complainant. The role of the President may be seen as analogous to that of the Australian Competition and Consumer Commission (ACCC), which is responsible for the administration, among other parts, of the consumer protection provisions in Part V of the *Trade Practices Act 1974* (Cth). The ACCC has, on a number of occasions, taken proceedings in a representative capacity on behalf of consumers who may have suffered loss or damage as a result of a contravention of the *Trade Practices Act 1974* (Cth).<sup>88</sup> The President of the ADB should be expressly authorised to act in a

representative capacity when appearing before the Tribunal in relation to alleged contraventions of the ADA. Similarly, the President should have statutory standing to seek such relief as he or she thinks appropriate on behalf of members of the represented group.

#### **Recommendation 156**

**The President of the ADB should have the express power to act in a representative capacity when appearing before the Tribunal and should have standing to seek relief on behalf of members of the represented group.**

#### **POWERS OF COURTS**

10.72 The foregoing recommendations are directed generally to the powers of the Tribunal. However, as has been noted above, the Commission considers it appropriate to allow claims of unlawful conduct under the ADA to be raised in courts, namely the District Court or the Supreme Court, in appropriate circumstances.<sup>89</sup>

10.73 The power of a court to consider such matters depends upon the repeal or amendment of s 123 of the ADA. Section 123 gives the Tribunal exclusive jurisdiction in relation to the relief arising out of contraventions of the ADA by providing that the conduct shall not attract a criminal or civil sanction except to the extent expressly provided by the Act.<sup>90</sup>

10.74 The *Discrimination Act 1991* (ACT) has a contrary provision which provides as follows:

126. This Act is in addition to, and not in derogation of, any other law in force in the territory which provides for the protection of a person from conduct which is or would be unlawful under this Act.

It follows from the recommendations that the superior courts have jurisdiction in relation to such complaints in certain circumstances, and that s 123 of the ADA will be amended.<sup>91</sup> However, there is no need to make any specific provision in relation to the relief available in a court unless it is sought to limit the powers of the Court, or give it powers equivalent to those available in the Tribunal, which it might not otherwise have.

10.75 The Commission sees no reason to limit the powers of a court to grant relief otherwise available to it. However, there is also no good reason to leave a successful complainant, who has established a contravention of the ADA in a court, without the remedies which might have been available if the proceedings had been in the Tribunal.

#### **Recommendation 157**

**The Supreme and District Courts should have conferred on them the power to grant any relief available if the proceedings had been in the Tribunal, in addition to any other powers available to them.**

#### **INTEREST ON AWARDS**

10.76 Most orders of the Tribunal involve awards of damages or other orders for payment of amounts of money. The ADA has also provided for the enforcement of an order for damages, which may be registered and recovered as a judgment debt in a court of competent jurisdiction.<sup>92</sup> A similar provision now appears in the *Administrative Decisions Tribunal Act 1997* (NSW) ("ADT Act") and will apply to orders of the EO Division.<sup>93</sup>

10.77 The effect of this provision is that a judgment will carry interest at the rate prescribed, for example, by the District Court Rules, from the date of registration in the Court. Lawyers acting for complainants who fail to register an order of the Tribunal promptly, may well be liable for any loss incurred by their negligence in that regard. However, it should be made clear in the legislation, for the benefit of lawyers and lay complainants, that there is indeed a procedure to be followed if interest is to accrue on judgment debts. The alternative course is to provide expressly that a judgment will carry interest from the date of the order of the Tribunal or some other specified date. The Commission favours the latter approach, in the interests of simplicity and transparency. The interest rate can be identified by reference to that applicable in a relevant court, which should be the District Court.

10.78 There is a separate question as to whether the Tribunal should be able to award interest on damages in relation to the period between the time of injury and the date of the Tribunal's determination. Such a provision is available in relation to orders for the recovery of money in superior courts.<sup>94</sup>

10.79 There appear to be three reasons why such a power has not so far been granted to the Tribunal. First, the availability of interest introduces a level of complexity in the calculation of awards, which may have been thought inappropriate. Secondly, the cap on the jurisdiction of the Tribunal reflected a view that, generally speaking, awards were not likely to be of large amounts and, accordingly, it may have been thought unnecessary to introduce a relatively small further amount by way of interest. Thirdly, the emphasis of the procedures available under the ADA was on prompt lodgement of complaints and resolution by conciliation. The short period anticipated prior to a determination may have been thought to render the calculation of interest unnecessary.

10.80 Whilst the Commission accepts that each of these factors has weight, it is also concerned that the present rule involves a further distinction between civil claims generally and claims under the ADA. Where possible, such differential treatment should be avoided. The result has been to provide less than complete compensation in some circumstances to the victims of unlawful discrimination. In addition, some of the assumptions referred to above have not been reflected by experience. For example, in the proceedings brought against Australian Iron and Steel by women at its Wollongong steel-works, several years elapsed between the date of the discriminatory conduct and the date of awards made by the EOT.<sup>95</sup> Further, although the amounts involved in many cases have been relatively low, in a significant number of cases awards have been made at the limit of the jurisdiction of the Tribunal. Finally, the goal of conciliated disputes is not necessarily furthered by the absence of an ability to award prejudgment interest. A respondent which knows that it will not be at risk of increased liability by delaying settlement has no economic incentive to achieve an early resolution of the complaint.

10.81 In all the circumstances, the Commission considers that pre-judgment interest should be available in appropriate circumstances, as it would be if the matter were taken to a court. The relief available to the Tribunal should be as complete as it would be in a court in the absence of some factor suggesting otherwise. In accordance with that principle, the Tribunal should have, within the limits of its appropriate jurisdiction, the powers available to a court to include a component of pre-judgment interest in its calculation of compensable loss.

### **Recommendation 158**

**Unpaid monetary awards should bear interest at the rate applicable to District Court judgments and the Tribunal should be permitted to award pre-judgment interest.**

### **ENFORCEMENT OF ORDERS**

10.82 Failure to comply with an order for a remedy under s 113, or an interim order of the Tribunal, is an offence under the ADA, punishable by a fine.<sup>96</sup> It is also an offence to fail to comply with an order directing that certain matters are not to be published or for the suppression of any information which may identify a person.<sup>97</sup>

10.83 The penalty under the ADA is a monetary fine. By amendment in 1994,<sup>98</sup> penalty amounts were substituted by penalty units in conformity with other New South Wales legislation.<sup>99</sup> The ADA was also amended to apply higher penalties to bodies corporate (50 penalty units) than to individuals (10 penalty units). Prior to the amendment, the penalty amount was \$1000 for all offenders.

10.84 The limitation on the powers of a complainant to ensure that an order other than an order for the payment of money be carried out is a serious limitation on the effectiveness of the relief granted by the Tribunal. The Commission is of the view that any order of the Tribunal should be capable of registration with the District Court or Supreme Court and should be capable of enforcement in the same way as a similar order made by that Court. Further, the President of the ADB should be given a power to take steps on behalf of a complainant to enforce an order, either with the consent of or at the request of the complainant. The President should have such a power to act on his or her own initiative and regardless of the views of the complainant in circumstances where the order is made in representative proceedings or the President otherwise thinks that failure to enforce the order may have consequences for members of the community who were not party to the proceedings.

10.85 These powers of civil enforcement should be additional to the offences created for contravention of an order, which should be retained. Accordingly, it is necessary to consider the adequacy of the penalties provided by the current ADA.

#### **Recommendation 159**

**Any order of the Tribunal should be able to be registered with a court of competent jurisdiction and enforced as an order of that court.**

#### **Recommendation 160**

**The President of the ADB should have power:**

**in the case of an individual complaint, to take steps to enforce an order on behalf of a complainant with their consent; and**

**in the case of a representative complaint (or in any other case where the President believes that the public interest demands), to take steps to enforce an order on his or her own motion.**

#### **Draft Anti-Discrimination Bill 1999: cl 118**

#### **Adequacy of penalties**

10.86 The 1994 amendments did not raise the level of maximum penalties in respect of individuals,<sup>100</sup> but set a higher penalty, at five times the rate of the individual penalty, for corporate offenders. Although the distinction between individual and corporate offenders is welcome, there is a lingering concern that the level of the penalties under the ADA remains too low.<sup>101</sup> In particular, it was submitted that penalties should be on a 10:1 scale and that an appropriate level would be 20 penalty units (\$2200) for individuals and 200 penalty units (\$22,000) for bodies corporate.<sup>102</sup> It was also argued that more serious offences which frustrate a Tribunal inquiry may constitute contempt.<sup>103</sup>

10.87 In determining whether the maximum penalty provisions under the ADA should be increased, the Commission notes that compliance with orders is more likely if defying the legislation is more costly than complying with it. Despite the relatively infrequent prosecution of offences under the ADA, which may indicate either a lack of commitment to the enforcement of orders or a high rate of compliance, the Commission believes that maximum penalties should be increased to 50 penalty units (\$5500) for individuals and 250 penalty units (\$27,500) for corporate offenders.

## Recommendation 161

**Maximum penalties for offences under the ADA should be increased to 50 penalty units for individual offenders and 250 penalty units for corporate offenders.**

### Other offences

10.88 Offences relating to witnesses summoned by, or appearing before, the EOT<sup>104</sup> were created by virtue of the application of the *Royal Commissions Act 1923* (NSW) to inquiries held by the EOT.<sup>105</sup> This provision has been repealed by the ADT Act.<sup>106</sup> Such offences may now be reported to the Supreme Court and may be dealt with as contempt of court.<sup>107</sup>

### Enforcement against the Crown and Crown agencies

10.89 The ADA states that it binds the Crown in right of the State, but there is some doubt as to whether it makes the Crown or any agency or instrumentality of the Crown liable for an offence, especially in relation to the failure to comply with an order. This situation will be ameliorated by the provision of means of civil enforcement, which will be available against the Crown and agencies of the Crown, where required.

10.90 A question also arises as to the operation of these provisions in relation to the Crown and agencies of the Crown in right of another State or Territory or the Commonwealth. In Chapter Two it is recommended that the ADA provide expressly that it bind the Crown, not only in right of the State but in all other capacities, so far as the powers of the Parliament permit.<sup>108</sup> If that is done, it will be clear that civil enforcement proceedings can be taken against the Crown in right of other jurisdictions of New South Wales, as appropriate. It is neither appropriate, nor necessary, to extend the application of penalty provisions to the Crown.<sup>109</sup>

## Footnotes

1. ADA s 113(1)(b)(iiia) and 113(1)(b)(iiib). It has been recommended in this report that serious vilification, should be dealt with in the *Crimes Act 1900* (NSW): see Chapter 7 at para 7.146-7.148 and the *Crimes Amendment (Serious Vilification) Bill 1999* (NSW) at Appendix B.
2. ADA s 124 and 125. Note that in July 1997 the ADT Act was passed which establishes the ADT. The ADT takes over the functions of the EOT: *Administrative Decisions Tribunal Legislation Amendment Act 1997* (NSW) Sch 2.1.
3. See *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 72 ALJR 1270 at para 39-43 per Gaudron, Gummow and Kirby JJ.
4. ADA s 123.
5. See Chapter 8 at para 8.211.
6. See Chapter 9 at para 9.120.
7. See ADT Act and *Administrative Decisions Tribunal Legislation Amendment Act 1997* (NSW).
8. See *Allders International v Anstee* [1986] EOC 92-157 at 76,559.
9. ADA s 113(1)(v).

10. *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217. The Federal Court upheld an appeal from a decision of Einfeld J, where he had found that though complaints of sexual harassment against a medical practitioner were substantiated, he declined to award compensation to the complainants on the ground that the effects of the harassment (on the victims) was temporary, causing only minimal distress. He held that the public disclosure of their complaints against the respondent and the findings of sexual harassment were sufficient relief. This reasoning was over-ruled by the Full Court.
11. ADA s 113(1).
12. ADA s 113(1)(b)(i) and 113(1)(b)(iii).
13. ADA s 113(1)(b)(iiia) and 113(1)(b)(iiib).
14. RR 8 at 51. Of the EOT complainants surveyed, 48% stated that the \$40,000 limit in the EOT is too low: see RR 8 at 12.
15. Anti-Discrimination Board, *Submission 1* at 202 and 216; Disability Discrimination Legal Centre, *Submission* at 6; Eastern Sydney Area Health Service, *Submission* at 1; Gay and Lesbian Rights Lobby, *Submission* at 16; Legal Aid Commission of NSW, *Submission* at 2; J Lennane, *Submission* at 2; National Pay Equity Coalition, *Submission* at 4; NSW Bar Association, *Submission* at 6; D Robertson, *Submission* at 18. However the NSW Department of Health, *Submission* at 10 specifically rejected the suggestion that the limit on damages be increased.
16. ADA s 113(1).
17. ADA s 113(1)(b)(v).
18. *Hall v A&A Sheiban Pty Ltd* (1989) 20 FCR 217.
19. See *Allders International v Anstee* [1986] EOC 92-157 at 76,559.
20. *Hall v Sheiban* (1989) 20 FCR 217 at 238-39 per Lockhart J and *Allders International v Anstee* at 76,559. See also *Australian Iron and Steel Pty Ltd v Najdovska* (1988) 12 NSWLR 587 where the NSW Court of Appeal held that the assessment of damages, at least in the context of economic loss, was largely a matter of fact for the EOT, which depends more on the circumstances of the case than on principles governing damages in tort.
21. ADT Act s 45 provides that, when making an original decision, the Tribunal has the powers conferred under the enactment under which the proceedings are brought.
22. See L Thornthwaite, "The Operation of Anti-Discrimination Legislation in New South Wales in Relation to Employment Complaints" (1993) 6 *Australian Journal of Labour Law* 31 at 44. Thornthwaite found that 94% of the substantiated cases of discrimination in employment between 1976 and 1986 resulted in an award for damages. The size of the awards ranged from about \$1,000 to \$46,500.
23. ADA s 113(1)(b)(i).
24. ADA s 123.
25. New South Wales, Anti-Discrimination Board, *A Review of Damages Orders by the NSW Equal Opportunity Tribunal in the Context of Unlawful Discrimination in Employment: A Report to the Premier under section 119 of the Anti-Discrimination Act 1977* (Sydney, 1986) at 18; Disability Council of NSW, *Submission*; R Hunter, "Equal Opportunity Law Reform" (1991) 4 *Australian Journal of Labour Law* 226 at 246-247.
26. *Anti-Discrimination (Amendment) Act 1982* (NSW) Sch 4[25].



27. D Robertson, *Submission*; Legal Aid Commission of NSW, *Submission* at 2.
28. Legal Aid Commission of NSW, *Submission* at 2.
29. EOA (WA) s 127(b)(i); *Anti-Discrimination Regulations 1994* (NT) reg 2(a).
30. The Victorian Equal Opportunity Board has made awards in excess of \$40,000 in three cases: *Fares v Box Hill College of TAFE* [1993] EOC 92-391 (\$55,000); *Casey v State Electricity Commission of Victoria* [1993] EOC 92-495 (\$48,000) and *Bevacqua v Klinkert* [1993] EOC 92-515 (\$50,000). The South Australian Equal Opportunity Commission awarded \$60,000 in damages in *Jobling v Director-General, Education Department of South Australia* [1993] EOC 92-554. Federally, HREOC awarded a total of \$50,000 in damages in *McNeill v Commonwealth of Australia* [1995] EOC 92-714.
31. The upper limit has also been removed by statute from both the UK race and sex discrimination legislation after it was held that the upper limit in the *Sex Discrimination Act 1977* (UK) was inconsistent with European Community Law: see *Marshall v South-West Hampshire Area Health Authority (No 2)* [1993] 4 All ER 586; *Sex Discrimination and Equal Pay (Remedies) Regulation 1993* (UK). Similar changes have been made in racial discrimination law; see *Race Relations (Remedies) Act 1994* (UK).
32. A statutory maximum applies to awards for non-economic loss under the *Workers Compensation Act 1987* (NSW) s 151G and the *Motor Accidents Act 1988* (NSW) s 79. Note, the Commission found that there was no need to cap damages in defamation cases as the recent *Defamation (Amendment) Act 1994* (NSW) removes jury awards and requires judges to consider damages awarded in personal injury matters. See New South Wales Law Reform Commission, *Defamation* (Report 75, 1995) at para 7.14.
33. Editorial, "Wrong Track" *Sydney Morning Herald* (28 July 1995) at 10. NSW Department of Health, *Submission* at 10.
34. Anti-Discrimination Board, *Submission 1* at 202; NSW Equal Opportunity Tribunal, *Consultation* (25 February 1994); NSW Bar Association, *Submission* at 7-8; Gay and Lesbian Rights Lobby, *Submission*. Note, however, that these submissions were made when the jurisdictional limit of the District Court was \$250,000.
35. M Thornton, "Anti-Discrimination Remedies" (1983) 9 *Adelaide Law Review* 235 at 235.
36. National Pay and Equity Coalition, *Submission*.
37. The limit on damages in the District Court is currently \$750,000.
38. No individual award over \$60,000 has ever been made in Australia, and the awarding of the statutory maximum in NSW has only been given in five reported cases: see *Avens v Qantas Airways* [1994] EOC 92-618; *Bugden v State Rail Authority* [1991] EOC 92-360; *Thompson v Qantas Airways* [1989] EOC 92-251; *Najdovska v Australian Iron and Steel Pty Ltd* [1986] EOC 92-176; [1988] EOC 92-223; and *Metwally v University of Wollongong* [1984] EOC 92-030 (although this decision was set aside on appeal to the High Court on other grounds).
39. A M Leonard, *Pyrrhic Victories: Winning Sex Discrimination and Equal Pay Cases in The Industrial Tribunal* (Equal Opportunities Commission, London, 1987) at 37-39. See also RR 8 at 16.
40. Great Britain, Equal Opportunities Commission, *Dispensing Informal Justice* (London, 1993) at 19-21. The RR 8 found that 68% of complainants pursued the matter in order to prevent it from happening in the future (to self or others), and 49% were motivated by their wish to get the offending behaviour stopped: RR 8 at 16.

41. ADT Act s 22.
42. See para 9.129.
43. *Allders International v Anstee* [1986] EOC 92-157 at 76,556 per Lee J, cited with approval in *Moloney v Golden Ponds Corporation Pty Ltd* [1995] EOC 92-674.
44. *Hall v Sheiban* (1989) 20 FCR 217; *Australian Iron and Steel Pty Ltd v Najdovska* (1988) 12 NSWLR 587.
45. See New South Wales, Anti-Discrimination-Board, *A Review of Damages Orders by the NSW Equal Opportunity Tribunal in the Context of Unlawful Discrimination in Employment, A Report to the Premier Under section 119 of the Anti-Discrimination Act 1977* (Sydney, 1986) at 17-18.
46. It was submitted that awards for general damages have been so small in practice as to be almost "derisory": D Robertson, *Submission* at 18. See also K O'Donovan and E Szyszczak, *Equality and Sex Discrimination Law* (Basil Blackwell, London, 1988) at 221; A M Leonard, *Pyrrhic Victories: Winning Sex Discrimination and Equal Pay Cases in the Industrial Tribunal* (Equal Opportunities Commission, London, 1987) at 15.
47. *Alexander v Home Office* [1988] 1 WLR 968 at 975 per May LJ, cited with approval by Lockhart J in *Hall v Sheiban* (1989) 20 FCR 217 at 238. Also see *MTT v McCarthy* [1993] EOC 92-546 at 79,730.
48. *Burke v Tralagga* [1986] EOC 92-161.
49. *Hill v Water Resources Commission* [1985] EOC 92-127. By comparison, the Commission has found that awards in defamation cases (which are roughly analogous because of the similarity of the harm suffered by the plaintiff or complainant) are generally between \$10,000 and \$100,000. See New South Wales Law Reform Commission, *Defamation* (Report 75, 1995) at para 3.25.
50. See, for example, *Daniels v Hunter Water Board* [1994] EOC 92-626; *Morrisson v Gallipoli Legion Club Newcastle Ltd* [1985] EOC 92-144; *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701; *Hawkins v Malnet Pty Ltd* [1995] EOC 92-767.
51. See, generally, H Luntz, *Assessment of Damages for Personal Injury and Death* (Butterworths, Sydney, 1990) at 60-72.
52. *Hall v Sheiban* (1989) 20 FCR 217 at 239 per Lockhart J, who held that the words of the Act do not restrict the scope of damages available.
53. Aggravated damages were expressly awarded in *Lyon v Godley* [1990] EOC 92-287 (WA) at 77,897. A component of aggravated damages was also awarded in *Lynton v Maugeri* [1995] EOC 92-754 (Qld). See also *Hill v Water Resources Commission* [1985] EOC 92-127 and *Watkins v Fryor* [1995] EOC 92-667 at 78,113 where the HREOC commented that the effect on the complainant (of the discriminatory conduct and the manner in which her complaint was handled internally) was "severe" and that she had suffered "significant" non-economic detriment, awarding her \$20,000. See also *McNeill v Commonwealth of Australia* [1995] EOC 92-714 where aggravated damages were included in the general damages awarded.
54. See M Tilbury, "Factors Inflating Damages Awards" in P D Finn (ed), *Essays on Damages* (Law Book Company, Sydney, 1992) at 95; *Lamb v Cotogno* (1989) 164 CLR 1 at 8.
55. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149 per Windeyer J.
56. *Hall v Sheiban* (1989) 20 FCR 217; *Squires v Qantas Airways Ltd* [1985] EOC 92-135; *Spencer v Dowling* [1994] EOC 92-625 (Vic) at 77,332. Compare *Lyon v Godley* [1990] EOC 92-287 (WA), where the Western Australian EOT claimed that the fact that the respondent knew of the

complaint and knew that it was unlawful to subject her to any detriment because of it was sufficient justification for an award of punitive damages, at 77,898.

57. M Thornton, "Remedying Discriminatory Harms in the Workplace" in R Naughton (ed), *Workplace Discrimination and the Law* (Centre for Employment and Labour Relations Law, University of Melbourne, 1995) at 72.
58. New South Wales Law Reform Commission, *Defamation* (Report 11, 1971) at para 42-50.
59. In the United States, where exemplary damages are available in employment discrimination complaints if the respondent is found to knowingly discriminate against the complainant (*Civil Rights Act 1991* (US)), there have been a number of recent high awards. In 1994, the law firm, Baker and McKenzie was ordered to pay US\$3.8m in damages, of which US\$3.5m was for punitive damages, reduced from almost US\$7m on appeal: see M Thornton, "Remedying Discriminatory Harms in the Workplace" in R Naughton (ed), *Workplace Discrimination and the Law* (Centre for Employment and Labour Relations Law, University of Melbourne, 1995) at 73. In another recent sexual harassment case, the New York Equal Opportunities Commission settled for a record US\$1.185m in punitive damages on behalf of 15 complainants against Del Laboratories: see *New York Times* (4 August 1995) at B-4; *New York Times* (5 August 1995) at 21; *New York Times* (9 August 1995) at D-1.
60. See *Midcalco Pty Ltd v Rabenalt* [1989] VR 461; *Backwell v A* [1997] 1 VR 182.
61. *Defamation Act 1974* (NSW) s 46(3)(a). See New South Wales Law Reform Commission, *Defamation* (Report 11, 1971).
62. New South Wales Law Reform Commission, *Defamation* (Report 75, 1995) at para 2.23.
63. *Motor Accident Act 1988* (NSW) s 81A (amended by *Motor Accidents (Amendment) Act 1989* (NSW)).
64. *Workers Compensation Act 1987* (NSW) s 151R.
65. Anti-Discrimination Board, *Submission 1* at 202; D Robertson, *Submission* at 19; NSW Bar Association, *Submission* at 7-8; NSW Equal Opportunity Tribunal, *Consultation* (25 February 1994). Note that the Legal Aid Commission of NSW, NSW Ministry for the Status and Advancement of Women, and the Gay and Lesbian Rights Lobby supported the introduction of exemplary damages to deal with repeat respondents and in cases of severe victimisation.
66. ADA s 113(1)(b)(ii). In *Allders International v Anstee* [1986] EOC 92-157, the Supreme Court held that the EOT can only make orders between the parties to the dispute as it relates to the conduct in the individual complaint. An injunction does not confer rights on any other person but the complainant and is not enforceable by others against any other party. The only exception would be in the case of a representative complaint.
67. ADA s 113(1)(b)(iii).
68. *Burrows v Commissioner of Police* [1995] EOC 92-676.
69. *Allders International v Anstee* [1986] EOC 92-157. However, an order for reinstatement remains unlikely given that in many cases the complainant does not want to go back to the workplace where the discriminatory conduct occurred and the EOT has expressly said that it does not consider itself a "promotions appeal tribunal": *Harrison v State Bank of NSW* [1987] EOC 92-200 at 76,920. Compare *Russell v Director-General, Department of Juvenile Justice* (NSW, Equal Opportunity Tribunal, Senior Judicial Member Patten J, 17 November 1994, unreported) which held that s 27 of the *Public Sector Management Act 1988* (NSW) does not prevent an order for reinstatement.

70. *Whittington v Morris* (1990) and *Wagstaff v Elida Gibbs Limited* (Leeds 1991) both referred to in A Leonard, "Remedies for Sexual Harassment" (1991) 141 *New Law Journal* 1514 at 1516.
71. *Najdovska v Australian Iron and Steel Pty Ltd* [1986] EOC 92-176.
72. *Bell v Aboriginal and Torres Strait Islander Commission* [1994] EOC 92-565. However, this remedy was never implemented due to an appeal to the High Court on Constitutional grounds – see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
73. ADA s 113(1)(b)(iiib).
74. See *Thomson Australia Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150.
75. ADA s 113(1)(b).
76. ADA s 113(1)(b)(iii).
77. ADA s 113(1)(b)(iiia).
78. ADA s 113(1)(b)(iv).
79. See *Contracts Review Act 1980* (NSW) and *Consumer Claims Tribunals Act 1987* (NSW) s 30 and 31.
80. See Chapter 7 at para 7.148 and *Crimes Amendment (Serious Vilification) Bill 1999* at Appendix B.
81. ADA s 113(1)(b)(iiia).
82. ADA s 113(1)(b)(iiib).
83. See Chapter 9 at para 9.90, Recommendation 140.
84. ADA s 113(1)(b)(i).
85. [1984] EOC 92-102 (NSW CA).
86. Note that in Chapter 9 the Commission recommended that a court or tribunal have the power to make cy-pres orders in relation to damages in representative proceedings under the ADA: see Chapter 9 at para 9.91.
87. See Chapter 8 at para 8.222.
88. See, for example, *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250.
89. See Chapter 8 at para 8.186.
90. ADA s 125 further provides that statutory offences are to be dealt with summarily in the Local Court.
91. The amendment of s 123 has been recommended by the Commission in Chapter 8 Recommendation 124.
92. ADA s 115, repealed by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 2.1.
93. ADT Act s 82.

94. See, for example, *Supreme Court Act 1970* (NSW) s 94.
95. See *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; *Australian Iron and Steel Pty Ltd v Najdovska* (1988) 12 NSWLR 587; *Najdovska v Australian Iron and Steel Pty Ltd* [1985] EOC 92-140.
96. ADA s 116.
97. ADA s 110A(3). See also DP 30 at 193.
98. *Anti-Discrimination Amendment Act 1994* (NSW) Sch 4.
99. A penalty unit is currently equivalent to \$110. See *Statute Law (Miscellaneous Provisions) Act 1997* which amended s 56 of *Interpretation Act 1987* (NSW).
100. Except in the case of failing to appear at a compulsory conciliation conference, the penalty for an individual was raised from \$500 to \$1,000: *Anti-Discrimination (Amendment) Act 1994* Sch 4(29).
101. Gay and Lesbian Rights Lobby, *Submission*; Legal Aid Commission of NSW, *Submission* at 3; and NSW Bar Association, *Submission* at 14.
102. NSW Bar Association, *Submission* at 14.
103. NSW Bar Association, *Submission* at 14.
104. The offences included:
  - failing to attend the EOT where a summons is served;
  - failing to produce a document; or
  - refusing to give evidence.
- See *Royal Commissions Act 1923* (NSW) Pt 3.
105. Section 110 of the ADA previously provided that, except for Div 2 of Pt 2 of the *Royal Commissions Act 1923* (NSW), the *Royal Commissions Act* “shall apply to any witnesses summoned by or appearing before the EOT in the same way as it applies to any witness summoned by or appearing before a commission.”
106. See discussion in Chapter 9 at para 9.64.
107. ADT Act s 131.
108. See Chapter 2 at para 2.93, Recommendation 2.
109. Unless they are expressly stated to have application to the Crown, they will be presumed not to apply: *Cain v Doyle* (1946) 72 CLR 409 at 424.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### Appendix A: Draft Anti-Discrimination Bill 1999

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## Chapter 1

[STATE ARMS]

New South Wales

### **Anti-Discrimination Bill 1999**

No. 1999

#### **A Bill for**

An Act:

- (a) to promote equality of opportunity for all people in identified areas of activity, and
- (b) to protect the human rights and fundamental freedoms of all people against conduct that would infringe those rights and freedoms in ways proscribed by international instruments to which Australia is party, including the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Discrimination, Employment and Occupation Convention 1958*, the *Declaration of the Rights of the Child*, the *Declaration on the Rights of Mentally Retarded Persons* and the *Declaration on the Rights of Disabled Persons*, and
- (c) to provide for equality of treatment which recognises special needs and relevant differences between peoples, and
- (d) to prohibit sexual harassment, certain forms of vilification and victimisation of those who seek to enforce their rights under this Act, and
- (e) to provide civil consequences and, in some circumstances, penalties for those who contravene the provisions of this Act, and
- (f) to repeal and replace the *Anti-Discrimination Act 1977*.

See also: *Crimes Amendment (Serious Vilification) Bill 1999*

**The Legislature of New South Wales enacts:**

### **Chapter 1 Preliminary**

#### **1 Name of Act**

This Act is the *Anti-Discrimination Act 1999*.

#### **2 Commencement**

- (1) This Act commences on the date of assent, except as provided by this section.
- (2) Chapters 2–10 commence on a day or days to be appointed by proclamation.

#### **3 Objects**

The objects of this Act are as follows:

- (a) to promote recognition and acceptance of the rights of equal treatment and equality of opportunity for all people,
- (b) to eliminate, as far as possible, discrimination based on irrelevant characteristics in areas of, or affecting, the public sphere of social activity,
- (c) to eliminate, as far as possible, sexual harassment and certain forms of vilification,
- (d) to provide that equal treatment includes the recognition of relevant differences between people and excludes irrelevant differences,
- (e) to permit and promote activities which recognise relevant disadvantage and which provide special measures for those who require such measures to enjoy equality of opportunity,
- (f) to provide redress for people who have been subjected to unlawful discrimination, sexually harassed, victimised or vilified on proscribed grounds.

#### **4 Definitions**

Words and expressions used in this Act that are defined in the Dictionary have the meanings set out in the Dictionary.

**Note.** The Dictionary is to be found at the end of the Act, before Schedule 1.

#### **5 Notes and examples**

Notes and examples in this Act do not form part of this Act.

#### **6 Act binds Crown**

This Act binds the Crown in right of New South Wales and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

## Chapter 2

### 7 Unlawful discrimination—generally

It is unlawful to discriminate against a person because of an irrelevant characteristic specified in Chapter 3 in an area of activity specified in Chapter 4 unless:

- (a) a particular exception specified in Chapter 4 applies in relation to the area of activity, or
- (b) a general exception or exemption under Chapter 5 applies.

### 8 Forms of unlawful discrimination

For the purposes of this Act, unlawful discrimination may consist of direct discrimination (section 9) or indirect discrimination (section 10).

### 9 Direct discrimination

(1) A person (***the first person***) discriminates directly against another person (***the second person***) if, in doing an act that adversely affects the second person, the first person relies on, requires compliance with or takes into account an irrelevant characteristic of the second person.

(2) For the purposes of subsection (1), an act ***adversely affects*** the second person if it causes or is likely to cause that person to suffer a detriment or disadvantage.

(3) For the purposes of subsection (2), a ***detriment or disadvantage*** includes:

- (a) the loss of an opportunity to obtain a benefit or thing, and
- (b) an effect that the second person reasonably considers to be detrimental or disadvantageous to his or her interests.

**Example.** If male employees are required to do "dirty work", but are paid more to do it, both male and female employees could suffer a detriment or disadvantage. Males may reasonably consider the work to be a detriment to them because it is "dirty work" despite increased remuneration. Females may reasonably consider the loss of an opportunity to obtain increased remuneration to be a detriment to them.

(4) For the purposes of subsection (1), the first person does not discriminate against a second person by relying on or taking into account an attribute commonly imputed to persons having a particular irrelevant characteristic if:

- (a) the second person in fact has the attribute, and
- (b) the attribute is a relevant consideration in the circumstances, and
- (c) the first person acts in good faith on a reasonably held belief that the first person had the attribute.

**Note.** An irrelevant characteristic may include an attribute: see section 16 (3).

**Example.** Dishonesty may be generally imputed to a particular group. Where honesty is relevant in the choice of an employee for a particular position, the employer may reject a member of the group, not because of a stereotyping assumption, but because the employer knows of a conviction of the member for an offence of dishonesty.

### 10 Indirect discrimination

(1) A person (***the first person***) discriminates indirectly against another person (***the second person***) if, in doing an act that adversely affects the second person, the first person relies on, requires compliance with or takes into account a factor that is not itself an irrelevant characteristic, if:

- (a) so acting adversely affects a class of persons having the same irrelevant characteristic as the second person disproportionately to the adverse effects (if any) on persons not having the irrelevant characteristic, and
- (b) it is not reasonably necessary for the first person to rely on or require compliance with the factor, or to take the factor into account, having regard to:
  - (i) the actual or likely benefit sought to be obtained by the first person, and
  - (ii) the actual or likely adverse effects on persons having the irrelevant characteristic, and
  - (iii) the availability to the first person of other options that:
    - (A) could reasonably have been taken by the first person, and
    - (B) would have avoided or lessened the adverse effects on the second person, or on the second person and other persons having the irrelevant characteristic.

(2) If a second person asserts that it was not reasonably necessary for the first person to rely on or require compliance with the factor, or to take the factor into account, the burden of establishing that it was reasonably necessary lies on the first person.

**Note.** If a person proposes to do an act that would be unlawful discrimination under this Act, because it involves an irrelevant characteristic, but that characteristic is believed to be a matter that it is reasonable to take into account, an application for an exemption may be sought from the President: see section 69.

#### **11 What constitutes "doing an act"?**

For the purposes of this Act, a person **does an act** if the person:

- (a) does or omits to do anything, or
- (b) makes or fails to make a decision, or
- (c) undertakes or fails to undertake a course of conduct.

#### **12 What constitutes "relying on, taking into account, or requiring compliance with, an irrelevant characteristic"—generally**

(1) For the purposes of this Chapter, a person (**the first person**) relies on or takes into account an irrelevant characteristic of another person (**the second person**) if the presence or absence of the characteristic is a material or significant consideration in the doing of an act by the first person in relation to the second person.

(2) For the purposes of this Chapter, the first person requires compliance with an irrelevant characteristic if it is a condition or requirement of obtaining a benefit or opportunity, or avoiding a detriment or disadvantage, that the second person have or not have the irrelevant characteristic, whether alone or in combination with, or as an alternative to, other characteristics, qualifications or attributes.

(3) For the purposes of this Chapter, if the first person is a body or group of persons that acts by the decision or determination of a proportion of its members, it relies on or takes into account an irrelevant characteristic if:

- (a) for a majority of its members participating in the act, the characteristic is a material or significant consideration in doing the act, or
- (b) in the case of an act done as the result of a majority decision, the characteristic is a material or significant consideration for so many of the majority as, had they not so decided, would have resulted in a different decision.

#### **13 What constitutes "relying on, taking into account, or requiring compliance with, an irrelevant characteristic"—transgender persons**

For the purposes of this Chapter, a person (**the first person**) relies on, requires compliance with or takes into account an irrelevant characteristic of another person (**the second person**) if the first person



does an act on the basis that the second person, being a recognised transgender person, is of his or her former sex.

#### **14 Unlawful discrimination—obligation to accommodate needs of persons having special characteristics**

- (1) A person (*the first person*) discriminates against another person (*the second person*) who has a special characteristic if:
- (a) the first person fails to take reasonable steps to accommodate those needs of the person that result from having the special characteristic, and
  - (b) the taking of those steps would allow the person to obtain a relevant benefit or avoid a relevant detriment.

**Note.** *Special characteristics* are defined in section 17.

- (2) Steps are not reasonable steps for the purposes of subsection (1) if they would impose unjustifiable hardship on the first person.
- (3) For the purposes of subsection (2), unjustifiable hardship is imposed on the first person if the detriment or disadvantage to the first person (including financial expenditure) involved in taking the steps:
- (a) is significant in all the circumstances, and
  - (b) is disproportionate to any benefit that may be obtained by the first person in the circumstances (including that resulting from any particular qualities of the second person), and
  - (c) is not justifiable, despite the benefit to the second person and any public interest in taking the steps.
- (4) A person who asserts that any steps required to accommodate those needs would not be reasonable bears the burden of establishing unjustifiable hardship.
- (5) If a person takes or offers to take reasonable steps to accommodate the needs of a second person with a special characteristic, those steps do not constitute an act of unlawful discrimination:
- (a) against any other person, or
  - (b) against the second person, if the second person accepts the steps taken.

**Example.** In relation to an application for employment by a person with a physical disability, an employer may be able to show that the cost of any necessary changes to the work-place or work practices would involve significant cost or inconvenience (including that which may result to other employees); that no particular benefit would flow to the employer (because there were many applicants for the job, which required no special abilities, and the disability was rare); and that it was unlikely that people with those disabilities would be excluded from the social benefits of employment generally.

#### **15 Unlawful discrimination under secs 9 and 10—relatives and associates**

- (1) For the purposes of sections 9 and 10, it is unlawful to discriminate against a person because he or she is a relative of, or associates with, another person and because that other person has an irrelevant characteristic.

**Note.** *Relative* is defined in the Dictionary.

- (2) A person, being an incorporated body, associates with another person if the other person is a member or officer of the incorporated body.

**Example.** If an incorporated association applies for a lease of premises and is refused the lease because its officers are homosexual, or of a particular race, the lessor will have discriminated unlawfully against the incorporated association.

## Chapter 3

### 16 Irrelevant characteristics

(1) For the purposes of this Act, the *irrelevant characteristics* of a person are any of the following, namely, his or her:

- (a) race,
- (b) sex,
- (c) domestic status,
- (d) disability,
- (e) sexuality,
- (f) transgender status,
- (g) political opinion,
- (h) religion,
- (i) age,
- (j) carer responsibilities, including family responsibilities.

(2) For the purposes of this Act, the *irrelevant characteristics* of a woman, in addition to those specified in subsection (1), are any of the following, namely, her:

- (a) pregnancy,
- (b) ability to become pregnant,
- (c) involvement in breastfeeding.

(3) For the purposes of this Act, an *irrelevant characteristic* of a person includes:

- (a) an inherent attribute that commonly appertains to persons having a particular irrelevant characteristic specified in subsection (1) or (2), although it may not be unique to those persons, and
- (b) an attribute that is commonly imputed to persons having a particular irrelevant characteristic specified in subsection (1) or (2).

#### Examples.

(1) An inherent attribute that appertains generally to women is the capacity to breast-feed children, although not all women of all ages have it.

(2) An inherent attribute that appertains generally to a race is sickle cell anaemia because, though not unique to one racial group, it is relatively common among African Americans and very rare among other peoples.

(3) Lack of formal education, though it may be more common among some groups than others, is not an "inherent attribute." However, it may be an attribute that is commonly imputed to a particular group.

(4) For the purposes of this Act, an *irrelevant characteristic* of a person (*the second person*) includes a characteristic specified in subsection (1), (2) or (3) that another person (*the first person*) believes the second person has, had, may have or may have in the future.

### 17 Special characteristics

(1) For the purposes of this Act, the *special characteristics* of a person are either or both of the following, namely, his or her:

- (a) disability,
- (b) carer responsibilities, including family responsibilities.

(2) For the purposes of this Act, the *special characteristics* of a woman, in addition to those specified in subsection (1), are any of the following, namely, her:

- (a) pregnancy,
- (b) potential pregnancy,
- (c) involvement in breastfeeding.

### 18 Definitions of irrelevant characteristics

(1) In this Act:

**carer responsibilities** means the responsibilities of a person on whom another person is substantially dependent for ongoing care, attention and support (including financial, physical or emotional support) as a result of a significant personal relationship.

**disability** means:

- (a) total or partial loss of a person's bodily or mental functions or of a part of a person's body, or
- (b) the presence in a person's body of organisms causing or capable of causing disease or illness, or
- (c) the malfunction, malformation or disfigurement of a part of a person's body, or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- (e) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

**domestic status** means a person's status of being:

- (a) single, or
- (b) married (including in accordance with traditional laws and customs of indigenous Australians), or
- (c) married but living separately and apart from one's spouse, or
- (d) divorced, or
- (e) widowed, or
- (f) in cohabitation with another person in a domestic relationship other than marriage.

**family responsibilities** means the responsibilities of a person on whom a relative of the person is substantially dependent for ongoing care, attention and support (including financial, physical or emotional support).

**political opinion** means a belief or opinion concerning:

- (a) the nature and purpose of the state, or
- (b) the distribution and use of state power, or
- (c) interactions between the state and individuals, bodies or groups in the community.

**race** includes colour, nationality, descent and ethnic or national origin.

**recognised transgender person** means a person the record of whose sex is altered under Part 5A of the *Births, Deaths and Marriages Registration Act 1995* or under the corresponding provision of a law of another Australian jurisdiction.

**relative** of a person (**the first person**) means:

- (a) another person who is related to the first person by blood, affinity, adoption or fostering, and
- (b) a spouse of the first person or another person with whom the first person is cohabiting in a domestic relationship, and
- (c) a person related by blood, affinity, adoption or fostering to the spouse or other person referred to in paragraph (b).

**religion** includes:

- (a) holding particular religious beliefs, including traditional spiritual beliefs of Aboriginals and Torres Strait Islanders, or
- (b) engaging in particular religious practices, including traditional spiritual practices of Aboriginals and Torres Strait Islanders.

**religious practice** means a ritual, custom or observance (that does not contravene the criminal law) related to the holding of a religious belief, including communal activities engaged in through membership of or in association with a particular religious institution or church.

**sexuality** means:

- (a) heterosexuality, and
- (b) homosexuality and lesbianism, and
- (c) bisexuality.

**transgender status** means being:

- (a) a recognised transgender person, or
  - (b) a person who:
    - (i) identifies as a member of the opposite sex by living or seeking to live as a member of the opposite sex, or
    - (ii) has identified as a member of the opposite sex by living as a member of the opposite sex,
- or

(iii) being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex.

(2) A reference to a doctrine, tenet or belief of a religion includes any doctrine, tenet or belief accepted by a substantial body of adherents of that religion.

## **19 Carer and family responsibilities**

The operation of this Act in relation to carer responsibilities, including family responsibilities, is limited to the area of work.

## **20 Sex of recognised transgender persons**

For the purposes of this Act, the sex of a recognised transgender person is the sex of the person as altered and not the person's former sex.

## Chapter 4

**Note.** This Chapter identifies the areas of activity in relation to which the prohibition against discrimination set out in section 7 applies.

### **Part 1 The area of work**

#### **Division 1 The area covered**

##### **21 Applicants for work**

The area of work covers acts done by an employer or other person intending to provide work to a second person in determining:

- (a) the arrangements to be for the purpose of offering work, and
- (b) who should be offered work, and
- (c) the terms and conditions on which work is offered.

##### **22 Persons engaged in work**

The area of work also covers acts done by an employer or other person who has a work relationship with a second person in:

- (a) determining the terms and conditions of the work relationship, and
- (b) determining the access to opportunities for promotion, transfer, training or retraining or to any other benefits connected with the work, and
- (c) deciding on the promotion, transfer or admission of the second person to any benefit connected with the work, and
- (d) denying the second person an apprenticeship training program or other occupational training or retraining program, and
- (e) dismissing the second person or otherwise terminating his or her work relationship, and
- (f) subjecting the second person to any other detriment in relation to the work relationship.

##### **23 Partnerships**

The area of work also covers acts done by:

- (a) a person who intends to establish a partnership in determining the terms on which another person is invited to become a partner, and
- (b) a partnership in determining:
  - (i) the arrangements to be made for the purpose of determining who should be offered a position as a partner, and
  - (ii) who should be offered a position as a partner, and
  - (iii) the terms on which a person is offered a position as a partner, and
- (c) a partnership in relation to a partner of that firm in:
  - (i) determining the access by the partner to any benefit arising from partnership in the firm, and
  - (ii) expelling the partner from the firm, and
  - (iii) subjecting the partner to any other detriment.

##### **24 Qualifying bodies**

- (1) The area of work also covers acts done by a qualifying body in:
  - (a) determining whether or not to confer, renew or extend an occupational qualification, and
  - (b) determining the terms on which it confers, renews or extends an occupational qualification, and

- (c) varying the terms on which an occupational qualification is held, and
- (d) revoking or withdrawing an occupational qualification, and
- (e) subjecting a person seeking, or seeking the renewal or extension of, an occupational qualification to any other detriment.

(2) In this section, a reference to a qualifying body includes a reference to each member of the qualifying body.

## **25 Accommodating persons with special characteristics**

(1) For the purposes of section 14 in the area of work, the reasonable steps to be considered in relation to a person with a special characteristic include:

- (a) changes to the physical conditions of the work place, and
  - (b) changes to work practices, and
  - (c) variations in the terms and conditions under which the work would otherwise be undertaken, and
  - (d) the provision of special services or facilities,
- so as to permit the person to perform adequately the essential requirements of the work.

(2) In determining for the purposes of subsection (1) whether or not a person can or could adequately perform the essential requirements of the work, all relevant factors and circumstances must be considered, including:

- (a) the person's training, qualifications and experience, and
- (b) the person's current performance in the employment, if applicable.

**Note.** *Special characteristics* are defined in section 17.

## **26 Definitions**

In this Part:

**contract work** means work done by a person for a principal under a contract between the person's employer and the principal.

**employer** includes:

- (a) a person who employs another person under a contract of service, and
- (b) a person who engages another person under a contract for services, and
- (c) a person who engages another person to perform any work the remuneration for which is based wholly or partly on commission.

**employment** includes being:

- (a) employed under a contract of service, and
  - (b) employed under the *Public Sector Management Act 1988* or appointed to a statutory office, and
  - (c) engaged under a contract for services, and
  - (d) engaged to perform any work the remuneration for which is based wholly or partly on commission,
- but does not include being an unpaid worker or volunteer.

**occupational qualification** means an authorisation or qualification that is needed for, or facilitates:

- (a) practising a profession, or
- (b) carrying on a trade or business, or
- (c) engaging in any other occupation or employment.

**principal** means a person who contracts with another person for work to be done by employees of the other person.

**work** includes:

- (a) employment under a contract of service, and

- (b) employment under the *Public Sector Management Act 1988* or under a statutory appointment, and
- (c) engagement under a contract for services, and
- (d) work that is remunerated wholly or partly on commission, and
- (e) work done by a trainee, and
- (f) work done on a voluntary or an unpaid basis.

**work-relationship** includes a relationship:

- (a) of employment, and
  - (b) of contract work, and
  - (c) where work is done by a volunteer, trainee or unpaid worker,
- and includes services and benefits (other than superannuation) provided in the course of or in relation to that relationship.

## **Division 2 Particular exceptions**

### **27 General: work in dwelling**

This Part does not cover a work-relationship or selection for work if the work is to be done in a dwelling occupied by:

- (a) the person who seeks to have the work done, or
- (b) a relative of the person.

### **28 Genuine occupational requirements**

(1) It is not unlawful under this Act to offer work only to people of one sex if it is a genuine occupational requirement of the work that a person undertaking the work be of that sex.

(2) Without limiting subsection (1), it is a genuine occupational requirement to be a person of a particular sex if:

- (a) the work can be performed only by a person having particular physical characteristics (not including strength or stamina) that are possessed only by people of that sex, or
- (b) the work needs to be performed by a person of that sex to preserve decency or privacy because it involves the fitting of clothing for people of that sex, or
- (c) the work requires searching the clothing or bodies of people of that sex, or
- (d) the person undertaking the work will be required to enter a lavatory ordinarily used by people of that sex while it is in use by people of that sex, or
- (e) the person undertaking the work will be required to enter areas ordinarily used only by people of that sex while those people are in a state of undress.

**Note.** The President may, in granting an exemption under section 69, authorise an employer to limit the offering of employment to people of one sex if they will be required to live in communal accommodation provided by the employer that is not suitable for occupation by people of both sexes.

(3) It is not unlawful under this Act for a person to offer work to, or select for work requiring a dramatic or an artistic performance, entertainment, photographic or modelling work:

- (a) persons of a particular age, sex or race, or
  - (b) persons with or without a particular disability,
- if it is necessary to do so for reasons of authenticity or credibility.

(4) In relation to the provision of services for the promotion of the welfare or advancement of people with a particular characteristic, it is not unlawful under this Act to offer or select for work a person with the same characteristic if those services can be provided most effectively by a person with that characteristic.

(5) It is not unlawful under this Act for a person on behalf of a body or institution (***the offeror***) to decline to offer work to a person:

- (a) who holds or does not hold a particular religious belief, or

- (b) who is, or is not, pregnant, or of a particular sex, domestic status, sexuality or transgender status,  
if to do so, with respect to the particular work to be done,
- (c) is necessary to comply with the doctrines, tenets or beliefs of a particular religion, and
- (d) the offerer is:
- (i) a body established for the purposes of that religion, or
- (ii) a private educational authority under the direction, control or administration of such a body.

**Note.** In relation to a doctrine, tenet or belief of a particular religion, see s. 18 (2).

(6) The exceptions in subsections (1)–(5) are satisfied only if the offeror acted on a bona fide belief that it was necessary to so act.

### **29 Domestic status**

It is not unlawful under this Act to discriminate against a second person on the irrelevant characteristic of domestic status in relation to a job that is one of two to be held by a couple in a bona fide domestic relationship.

### **30 Political employment**

It is not unlawful under this Act for a person to act on the basis of political opinion in offering work to another person as an adviser to, or a member of staff of, a politician or a political party, a councillor (within the meaning of the *Local Government Act 1993*) or a member of the electoral staff of any person.

### **31 Judicial officers: age**

Nothing in this Part applies to the compulsory retirement on the basis of age, or the failure to appoint a person on the basis of age, as a judicial officer within the meaning of the *Judicial Officers Act 1986*.

### **32 Youth wages**

(1) It is not unlawful under this Act for an employer to pay an employee who is under the age of 21 years according to the employee's age.

(2) This section ceases to operate on 31 December 1999.

### **33 Early retirement schemes**

(1) It is not unlawful under this Act for a person to take into account age:

(a) in determining to offer a person or class of persons an incentive to resign or retire from a work-relationship, and

(b) in determining the terms of such an offer.

(2) For the avoidance of doubt, subsection (1) permits an employer or other person providing work to take account of other factors that are related to age, including the eligibility of a person for a benefit under a work-related superannuation scheme, the value of such a benefit, the length of service in the work and related considerations.

### **34 Qualifying bodies**

A qualifying body may set reasonable terms in relation to an occupational qualification or make reasonable variations to those terms, to take into account any special limitations that a person's age impose on his or her capacity to practise the profession, carry on the trade or business or engage in the occupation or employment to which the qualification relates.

## **Part 2 The area of goods and services**



## **Division 1 The area covered**

### **35 Provision of goods and services**

(1) The area of goods and services covers acts done by a person in relation to the provision of goods and services to a second person in:

- (a) determining whether to provide goods or services to the second person, and
- (b) deciding the terms on which goods or services are provided to the second person, and
- (c) determining the manner in which goods or services were provided, and
- (d) terminating the provision of goods or services, or subjecting the second person to any detriment in connection with the provision of goods or services.

(2) This section applies whether or not the goods or services are provided for payment or reward.

### **36 Definitions**

(1) In this Part:

**goods** means things, money and choses in action.

**employment agent** means a person who carries on a business of providing services for the purpose of finding employment for people seeking to be employed or procuring employees for people seeking to employ them, or both.

**services** includes, but is not limited to:

- (a) access to and use of a place, facility or vehicle that members of the public are permitted to enter or use, and
- (b) financial services, including the provision of loans or finance, financial accommodation, credit and the taking of security and guarantees, and
- (c) the provision of superannuation insurance, and
- (d) the provision of health and welfare services, and
- (e) provision of entertainment, recreation or refreshment, and
- (f) services connected with transportation or travel, and
- (g) services of any profession, trade or business, including those of an employment agent, and
- (h) services provided by a government department, public authority, State owned corporation or body constituted under the *Local Government Act 1993*, but does not include:
  - (i) education or training by an educational institution, or
  - (j) accommodation, or
  - (k) services covered by Part 1 of this Chapter.

(2) In this Part, a reference to provision of a service includes, where relevant, a reference to authorising or permitting access to or use of a place, facility or vehicle.

## **Division 2 Particular exceptions**

### **37 Insurance**

It is not unlawful under this Act for an insurer to discriminate against a second person by refusing to provide an insurance policy to the second person, or in the terms on which an insurance policy is provided:

- (a) if the discrimination is:
  - (i) based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely, and
  - (ii) reasonable having regard to that data, and
- (b) if the second person, or the President, gives the insurer a written request for access to the data, the insurer:

- (i) provides a document containing the data, or
- (ii) makes such a document available for inspection and allows the person requesting it to make a copy of the document or any part of the document.

**38 Age: concessional rates and credit**

(1) It is not unlawful under this Act for a person to provide goods and services to a second person at concessional rates based on the age of the second person or a relative or associate of the second person.

(2) It is not unlawful under this Act for a person to discriminate on the ground of age in relation to the provision of credit, or the terms on which credit is provided:

(a) if the criteria upon which an application is assessed or terms imposed are:

(i) based on actuarial or statistical data from a source on which it is reasonable for the credit provider to rely, and

(ii) reasonable having regard to that data, and

(b) if the second person, or the President, gives the credit provider a written request for access to the data, the credit provider:

(i) provides a document containing the data, or

(ii) makes such a document available for inspection and allows the person requesting it to make a copy of or take extracts from the document.

**39 Superannuation: existing fund conditions**

(1) It is not unlawful under this Act for a person to discriminate against a second person on the irrelevant characteristic of sex or domestic status by retaining an existing superannuation fund condition if:

(a) the President has granted an exemption to the person in relation to the condition, or

(b) section 41B of *Sex Discrimination Act 1984* of the Commonwealth applies.

(2) In this section, ***existing superannuation fund condition*** means, in relation to a superannuation fund, a condition of the fund, or of membership of the fund, that is in operation at the commencement of this section.

**40 Superannuation: new fund conditions**

(1) A person (***the first person***) may discriminate against another person (***the second person***) on the basis of age by imposing conditions in relation to a superannuation fund if:

(a) the discrimination occurs in the application of standards in force under the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth, or

(b) the discrimination is required to comply with, obtain benefits, or avoid penalties under any other Commonwealth Act, or

(c) the discrimination is based on:

(i) actuarial or statistical data from a source on which it is reasonable to rely, or

(ii) if there is no such data, other data on which it is reasonable to rely,

and is reasonable having regard to that data and any other relevant factors, or

(d) if paragraph (a), (b) or (c) does not apply, the discrimination is reasonable having regard to any other relevant factors, or

(e) the discrimination is based on an existing condition and relates to a person who became a member of the fund or scheme, or the discrimination happened, before 1 July 1995.

(2) If a person relies on subsection (1)(c) or (d) and the second person, or the President, makes a written request for access to the data or factors relied on, the exception only applies if the first person, on the written request of the second person, or the President, for access to the data:

(a) provides a document containing the data, or

(b) makes such a document available for inspection and allows the person requesting it to make a copy of or take extracts from the document.

- (3) Nothing in this Act makes unlawful an act done in relation to the provision of superannuation:
- (a) on the basis of sex or domestic status, if the act is permitted under section 41A of the *Sex Discrimination Act 1984* of the Commonwealth, or
  - (b) on the basis of disability, if the act is permitted under section 46 of the *Disability Discrimination Act 1992* of the Commonwealth.

### **Part 3 The area of education**

#### **Division 1 The area covered**

##### **41 Provision of education**

- (1) The area of education covers acts done by an educational authority in relation to an application by a person for admission as a student, in:
- (a) determining whether to accept, a person's application for admission as a student, and
  - (b) deciding who should be admitted as a student, and
  - (c) determining the terms on which a person is admitted as a student.
- (2) The area of education also covers acts done by an educational authority, in relation to a student, in:
- (a) denying or limiting access to any benefit provided by the authority, and
  - (b) expelling the student, and
  - (c) subjecting the student to any other detriment.

##### **42 Definitions**

In this Part:

***educational authority*** means a person or body administering a kindergarten, school, college, university or other institution, the primary purpose of which is to provide education or training.

***private educational authority*** means a person or body administering a school, college, university or other institution at which education or training is provided, not being:

- (a) a school, college, university or other institution established under the *Education Reform Act 1990* (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or
- (b) an agricultural college administered by the Minister for Agriculture.

#### **Division 2 Particular exceptions**

##### **43 Single sex schools**

It is not unlawful under this Act for an educational authority that operates an educational institution, being a kindergarten, primary school or secondary school, or a program provided at such an institution, for students of one sex to exclude people who are not of that sex from that institution or program.

##### **44 Religious schools**

It is not unlawful under this Act for a private educational authority that operates an educational institution or program in accordance with the doctrines, tenets or beliefs of a particular religion to exclude persons on the irrelevant characteristics of sex, domestic status, sexuality, transgender status or religion if the exclusion is reasonably necessary to comply with the doctrines, tenets or beliefs of that religion.

##### **45 Age**

It is not unlawful under this Act for an educational authority to discriminate against persons on the irrelevant characteristic of age in relation to:

- (a) the provision of educational services up to and including secondary schooling, or
- (b) the imposition of a minimum age requirement on a particular educational program, or
- (c) the imposition of quotas for students of different ages.

#### **Part 4 The area of accommodation**

##### **Division 1 The area covered**

###### **46 Provision of accommodation**

The area of accommodation covers acts done by a person in relation to the provision of accommodation in:

- (a) determining whether to accept a second person's request or application for accommodation, and
- (b) determining the terms on which accommodation is offered to the second person, and
- (c) varying the terms on which accommodation is provided to the second person, and
- (d) denying or limiting access by the second person to any benefit associated with accommodation, and
- (e) evicting the second person from accommodation, and
- (f) refusing to extend or renew accommodation provided to the second person, and
- (g) determining the terms on which the provision of accommodation to the second person is extended or renewed, and
- (h) subjecting the second person to any other detriment in connection with the provision of accommodation to that person.

###### **47 Allowing alterations**

A person who provides accommodation to a second person must allow the second person, if he or she has a disability, to make reasonable alterations to the accommodation to meet his or her special needs if:

- (a) the alterations are done at the expense of the second person, and
- (b) the alterations do not require alterations to the premises of another occupier, and
- (c) the action required to restore the accommodation to the condition it was in before the alterations were made is reasonably practicable in the circumstances, and
- (d) the second person agrees to restore the accommodation to its previous condition before leaving it and it is reasonably likely that he or she will do so.

###### **48 Persons with guide dogs**

- (1) A person must not refuse to provide accommodation to a person with a visual, hearing or mobility impairment because that person has a guide dog.
- (2) A person must not require, as a term of providing accommodation to a person with a visual, hearing or mobility impairment who has a guide dog:
  - (a) that the dog be kept elsewhere, or
  - (b) that the person pay an extra charge because of the dog.
- (3) This section does not affect the liability of the person with the guide dog for any damage caused by the dog.

###### **49 Definitions**

In this Part:

**accommodation** includes:

- (a) residential premises, being:

- (i) any premises or part of premises (including any land occupied with premises), and
- (ii) any moveable dwelling (within the meaning of the *Local Government Act 1993*) or the site on which a movable dwelling situated or intended to be situated (including any land occupied or intended to be occupied with the moveable dwelling), used or intended to be used as a place of residence, and
- (b) a hotel or motel, or part of a hotel or motel, and
- (c) a camping site, and
- (d) any premises or part of premises (including any land occupied with the premises) used or intended to be used for business purposes.

**guide dog** means a dog that is trained to assist a person who has a visual, hearing or mobility impairment.

## **Division 2 Particular exceptions**

### **50 Private home**

- (1) This Part does not apply to the provision of residential accommodation:
  - (a) that is the main home in which the person or a near relative of the person lives and intends to continue to live, and
  - (b) that is reasonably capable of occupation by no more than 6 people in addition to the people referred to in paragraph (a),
 unless the accommodation is provided in a self-contained dwelling or flat.

### **51 Other accommodation**

- (1) It is not unlawful under this Act for an educational authority that operates an educational institution wholly or mainly for students of a particular sex to provide accommodation that is limited to students of that sex.
- (2) It is not unlawful under this Act for a person to refuse to provide accommodation to a second person in a hostel or similar institution established wholly or mainly for the welfare of persons of a particular religion if the second person is not of that religion.

## **Part 5 The area of clubs and associations**

### **Division 1 The area covered**

#### **52 Membership**

The area of clubs and associations covers acts done by a club or association, the committee or other governing body of the association, or a member of the committee or other governing body of the club or association:

- (a) in relation to applications for membership, in:
  - (i) determining the terms of categories or types of membership of the association, and
  - (ii) the arrangements made for deciding who should be offered membership, and
  - (iii) determining a person's application for membership, and
  - (iv) determining the terms on which the person is admitted as a member, and
- (b) in relation to members in:
  - (i) determining a member's application for a different category or type of membership, and
  - (ii) determining access to any benefit provided by the club or association, and
  - (iii) varying the terms of membership, and
  - (iv) depriving the member of membership, and
  - (v) subjecting the member to any other detriment.

#### **53 Definitions**

In this Part:

**club or association** means:

- (a) a registered club within the meaning of the *Registered Clubs Act 1976*, and
- (b) an industrial organisation within the terms of the *Industrial Relations Act 1996* or an organisation registered under the *Workplace Relations Act 1996* of the Commonwealth, and
- (c) a society registered under the *Co-operation Act 1923*, the *Co-operatives Act 1992*, or the *Friendly Societies (NSW) Code*, and
- (d) an association incorporated under the *Associations Incorporation Act 1984*, and
- (e) a building society or credit union, and
- (f) a body registered or incorporated under the equivalent law of any other State or Territory.

## **Division 2 Particular exceptions**

### **54 Clubs and benefits for particular age groups**

(1) It is not unlawful under this Part for a club or association or a member of the committee or other governing body of a club or association, to exclude a person from membership if:

- (a) the club or association exists principally to provide benefits for people of a particular age group, and
- (b) the person is not in that age group.

(2) It is not unlawful under this Part for a club or association or a member of the committee or other governing body of a club or association to restrict a benefit to members who are members of a particular age group, if it is reasonable to do so in the circumstances.

(3) In relation to sporting activities conducted or arranged by a club or association, subsection (2) only applies in relation to competitive sporting activities where the reason for the restriction is the strength, stamina or physique of the participants.

### **55 Clubs and benefits for persons of particular cultural identity**

It is not unlawful under this Part for a club or association or a member of the committee or other governing body of a club or association, to exclude from membership a person who is not a member of the group of people with an attribute for whom the club or association is established if the club or association operates principally:

- (a) to prevent or reduce disadvantage suffered by people of that group, or
- (b) to preserve a minority culture.

### **56 Separate access to benefits for men and women and persons of transgender status**

(1) A club or association or a member of the committee or other governing body of a club or association may limit a member's access to a benefit on the basis of the member's sex:

- (a) if it is not practicable for men and women to enjoy the benefit at the same time, and
- (b) if:
  - (i) access to the same or an equivalent benefit is provided for men and women separately, or
  - (ii) men and women are each entitled to a fair and reasonably equivalent opportunity to enjoy the benefit, and
- (c) if it is reasonable to do so in the circumstances.

(2) It is not unlawful under this Part for a club or association or a member of the committee or other governing body of a club or association to limit a member's access to a benefit, in the case of a member who is a transgender person, on the basis of the member's former sex:

- (a) if the requirements of subsection (1) (a) and (b) are satisfied, and
- (b) if it is reasonable to do so in the circumstances.

(3) In relation to sporting activities conducted or arranged by a club or association, this section applies only in relation to competitive sporting activities where the reason for the restriction is the strength, stamina or physique of the participants.

## **57 Political opinion**

It is not unlawful under this Part for a club or association or a member of the committee or other governing body of a club or association, to exclude a person from membership if:

- (a) the club or association exists principally to provide benefits for people of a particular political opinion, and
- (b) the person is not of that political opinion.

## **58 Religion**

It is not unlawful under this Part for a club or association or a member of the committee or other governing body of a club or association, to exclude a person from membership if:

- (a) the club or association exists principally to provide benefits for people of a particular religion, and
- (b) the person is not of that religion.

## **Part 6 The area of disposal of interests in land**

### **Division 1 The area covered**

#### **59 Interests in land**

- (1) The area of disposal of interests in land covers acts done by a person in:
  - (a) determining whether to dispose of any land to a second person, and
  - (b) determining the terms on which any land is offered or disposed of to the other person.
- (2) This section does not apply to the disposal or offering of an interest in land for the purpose of accommodation that is covered by Part 4.
- (3) This section applies despite anything to the contrary in any document affecting or relating to the land.
- (4) A person is not personally liable for breach of any covenant or obligation contained in any document referred to in subsection (3) if the person would have contravened this section if the person had complied with the covenant or obligation.

#### **60 Definitions**

In this Part:

**dispose**, in relation to land, includes sell, assign, lease, sublease, license, mortgage and create or transfer an interest in land in or to another person.

**interest in land** means:

- (a) a legal or equitable estate or interest in the land, or
- (b) any other right (including a right under an option and a right of redemption), charge, power or privilege over or in connection with:
  - (i) the land, or
  - (ii) an estate or interest in the land, or
  - (c) a restriction on the use of the land, whether or not annexed to other land.

**land** includes an interest in land.

### **Division 2 Particular exception**

#### **61 Charities and relatives**

This Part does not apply to the disposal of an interest in land to:

- (a) a charity, or
- (b) a relative of the person disposing of the interest,

if the interest was not made available, directly or indirectly, to the public or a section of the public by the person disposing of the interest at any time before the interest was disposed of by that person.

## **Part 7 The area of government activities**

### **62 Government activities**

(1) The area of government activities covers acts done in the course of:

- (a) exercising any function under a law of the State, and
- (b) carrying out any responsibility for the administration of a State law or the conduct of a State program.

(2) In this Act:

**State law** means:

- (a) an Act, regulation, a statutory instrument, or made under or pursuant to an Act, or
- (b) a determination, order or award made under or pursuant to such an Act, regulation or statutory instrument.

**State program** means a program conducted by or on behalf of:

- (a) the State Government, or
- (b) a council established under the *Local Government Act 1993*.



## Chapter 5

### **63 Things done with statutory authority**

(1) Nothing in this Act renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of:

- (a) an Act, other than this Act, or
- (b) an instrument made under any other Act, or
- (c) an order of the Tribunal, or
- (d) an order of any other tribunal or any court.

(2) This section ceases to have effect from the day following the expiration of one year from the commencement of this section.

### **64 Judicial orders**

An act done in order to comply with an order, judgment or decree of any court or tribunal, including courts and tribunals established under a law of the Commonwealth or a State or Territory, is not covered by any area identified in Chapter 4.

### **65 Statutory authority: age**

(1) It is not unlawful under this Act to discriminate on the irrelevant characteristic of age by the doing of an act:

- (a) that is required by, or
  - (b) that it is necessary for a person to do in order to comply with a requirement of, or
  - (c) that is expressly permitted by,
- any other Act or an instrument made under any other Act.

(2) Nothing in this Act affects any law in relation to the legal capacity or incapacity of any person or the age of majority.

### **66 Religious appointments**

It is not unlawful under this Act to discriminate in relation to:

- (a) the selection, ordination or appointment, or
  - (b) the training or education for selection, ordination or appointment,
- of persons to perform functions in relation to a religion if the discrimination is necessary in order to comply with the doctrines, tenets or beliefs of that religion.

### **67 Health related acts**

(1) It is not unlawful under this Act to do an act in relation to a person with a disability that is necessary to protect the health or safety of any person or the public generally if:

- (a) the disability of the person involves a condition (including any infectious or contagious disease) that is transmissible in circumstances that may arise if the act is not done, and
- (b) the act is done on the basis of medical or other expert opinion on which it is, in all the circumstances, reasonable to rely, and
- (c) the act involves measures the severity of which is not disproportionate to the risk involved.

(2) It is not unlawful under this Act to do an act in relation to a person with a disability that is necessary in order to comply with, or give effect to, a requirement under the *Public Health Act 1991* or the *Mental Health Act 1990*.

### **68 Special measures**

It is not unlawful under this Act for a person to do an act if:

- (a) it is not done for the purpose of causing detriment or disadvantage to any other person or class of other persons on the ground of an irrelevant characteristic, and
- (b) it is done in good faith for the beneficial purpose of:
  - (i) securing the advancement of members of a particular class of persons, or
  - (ii) protecting the welfare or interests of such person, and
- (c) some or all of the particular class of person, needed such advancement or protection:
  - (i) because they were in a position of social isolation or disadvantage, either generally, or in a particular respect, including by reason of prior discriminatory treatment, and
  - (ii) sought or would be likely to accept the benefit offered, and
- (d) the act was reasonably capable of achieving its beneficial purpose, and
- (e) the act would not continue:
  - (i) indefinitely, unless the purpose sought to be achieved so required, or
  - (ii) beyond a period reasonably necessary to achieve the beneficial purpose.

**Examples.**

(1) A program designed to remedy a level of gender imbalance in a work-place might involve offering certain positions only to women. Such a program would not be unlawful discrimination against men if it complied with the requirements of this section. It would need to cease operating when the gender imbalance was rectified, unless there was reason to think that the imbalance would reappear in the absence of the program.

(2) A program designed to promote the use of an Aboriginal language as a means of preserving a culture may need to continue indefinitely, at least while the language is under threat. The need may disappear only if the program is unsuccessful.

**69 Exemptions by the President**

(1) The President, by notice published in the Gazette, may grant an exemption from any of the provisions of this Act specified in the notice in relation to:

- (a) a person or class of people, or
- (b) an activity or class of activities.

(2) An exemption remains in force for the period, not exceeding 5 years, that is specified in the notice.

(3) An exemption is subject to such terms and conditions as may be specified in the notice.

(4) The President, by notice published in the Gazette, may:

- (a) renew an exemption from time to time for the period, not exceeding 3 years, specified in the notice, or
- (b) vary or revoke an exemption with effect from the date specified in the notice, which must be a date not less than 3 months after the date the notice is published.

(5) If the President varies or revokes an exemption granted on the application of a person it must notify that person in writing at least 3 months before the date on which the variation or revocation is to come into effect.

(6) A decision of the President:

- (a) to grant or renew an exemption for a specified period, or
- (b) to grant or renew an exemption subject to conditions, or
- (c) to refuse to grant or renew an exemption, or
- (d) to vary or revoke an exemption,

may be reviewed by the Administrative Decisions Tribunal on the application of a person with a sufficient interest.

**70 Criteria to be considered**

- (1) The President may decide to grant or renew an exemption under section 69, only if President is satisfied:
- (a) that the activity for which exemption is sought would or might constitute a contravention of this Act, and
  - (b) that:
    - (i) the exemption is sought to allow the applicant to make the necessary arrangements for the applicant to comply with the Act, or
    - (ii) the irrelevant characteristic sought to be relied on or taken into account by the applicant is a relevant consideration in the particular circumstances, or
    - (iii) the activity for which the exemption is sought has a legitimate and beneficial purpose that is consistent with the objects of this Act and may contravene this Act only to a limited extent or in a relatively insignificant respect, and
  - (c) if the activity may contravene a law of the Commonwealth or a State or Territory having similar objects to this Act, an exemption from the terms of that law has been granted or will be sought, and
  - (d) it is in the public interest to do so.
- (2) In considering whether to vary or revoke an exemption, the President is to take into account:
- (a) whether the circumstances in which the exemption was granted have changed, and
  - (b) whether any conditions applying to the exemption have been contravened, and
  - (c) any other circumstance the President considers relevant.

## 71 What is sexual harassment?

- (1) For the purposes of this Act, a person **sexually harasses** another person if he or she:
- (a) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or
  - (b) engages in any other unwelcome conduct of a sexual nature in relation to the other person, in circumstances in which a reasonable person, having regard to all the circumstances, including pertinent characteristics of the other person, would have anticipated that the other person would be offended, humiliated or intimidated.
- (2) In this section, **conduct of a sexual nature** includes:
- (a) subjecting a person to an act of physical intimacy, and
  - (b) making, orally or in writing, a remark or statement with sexual connotations to a person or about a person in his or her presence, and
  - (c) making any gesture, action or comment of a sexual nature in a person's presence.

## 72 Workplace harassment

- (1) It is unlawful for one workplace participant to harass another workplace participant at a place that is a workplace for both persons.
- (2) In this section:

**place** includes a ship, aircraft, train or vehicle.

**workplace** means a place at which a workplace participant works or otherwise attends in connection with his or her work.

**workplace participant** means any of the following:

- (a) an employer, partner, principal or self-employed person,
- (b) an employee, contract worker, commission agent, or consultant,
- (c) a trainee, volunteer or work experience student,
- (d) a member of either House of Parliament,
- (e) a member of a body established under the *Local Government Act 1993*,
- (f) a person elected or appointed to any other office or position under an Act or statutory instrument.

(3) Without limiting the definition of **workplace**, the workplace of a member of either House of Parliament is taken to include the following:

- (a) the whole of Parliament House, and
- (b) any ministerial office or electoral office of the member, and
- (c) any other place that the member otherwise attends in connection with his or her Ministerial, parliamentary or electoral duties.

## 73 Harassment by members of qualifying bodies

- (1) It is unlawful for a member of a qualifying body to sexually harass:
- (a) a person seeking action in connection with an occupational qualification, or
  - (b) another member of that qualifying body, or
  - (c) an employee of that qualifying body.
- (2) It is unlawful for an employee of a qualifying body to sexually harass:
- (a) a person seeking action in connection with an occupational qualification, or

(b) a member of that qualifying body.

(3) In this section, ***action in connection with an occupational qualification*** means conferring, renewing, extending, revoking or withdrawing an occupational qualification.

#### **74 Harassment: employment agencies**

(1) It is unlawful for:

(a) a person who operates an employment agency, or

(b) an employee of an employment agency,

to sexually harass another person in the course of providing, or offering to provide, any of the agency's services to that other person.

(2) In this section, ***employment agency*** means a person who, for profit or not, provides services for the purpose of finding work or employment for others or for supplying employers with workers or employees.

#### **75 Harassment: educational institutions**

(1) It is unlawful for a member, or a member of staff, of an educational institution to sexually harass:

(a) a person seeking admission to that institution as a student, or

(b) a student at that institution.

(2) It is unlawful for a person of or above the age of 16 years who is a student at an educational institution to sexually harass:

(a) another student at that institution, or

(b) an employee or member of staff of that institution, or

(c) a member of the educational authority administering that institution.

#### **76 Harassment: provision of goods and services**

(1) It is unlawful for a person to sexually harass another person in the course of providing, or offering to provide, goods or services to that other person.

(2) It is unlawful for a person to sexually harass another person in the course of receiving or selecting goods or services provided by that other person.

(3) This section applies whether or not the goods or services are provided or received for payment.

#### **77 Harassment: provision of accommodation**

It is unlawful for a person to sexually harass another person in the course of providing, or offering to provide, accommodation to that other person.

#### **78 Harassment: sport**

(1) It is unlawful for a person engaged in a sporting activity to sexually harass another person engaged in a sporting activity.

(2) For the purposes of this section, a person is ***engaged in a sporting activity*** if:

(a) the person is involved in an organised sporting competition, or

(b) the person is coaching a person or team, or is being coached, for the purposes of an organised sporting competition, or

(c) the person is carrying out an activity relating to the administration of a sport or an organised sporting competition, or

- (d) the person is officiating at an organised sporting competition or carrying out related duties or functions, or
- (e) the person is officially involved in a function relating to a sport or an organised sporting competition.

**79 Harassment: clubs and associations**

It is unlawful for a member of a club or association, including a member of the committee or other governing body, to sexually harass:

- (a) a person seeking to become a member of the club or association, or
- (b) another member of the club or association, or
- (c) an employee of the club or association.

**80 Harassment: State laws and programs**

It is unlawful for a person to sexually harass another person in the course of:

- (a) performing a function under a State law or for the purposes of a State program, or
- (b) carrying out any responsibility for the administration of a State law or the conduct of a State program.

**Note.** The terms **State law** and **State program** are defined in the Dictionary by reference to section 62 (2).

**81 Harassment: disposal of land**

It is unlawful for a person to sexually harass another person in the course of dealing (whether as a principal or agent) with that other person in connection with:

- (a) disposing of, or offering to dispose of, an estate or interest in land to the other person, or
- (b) acquiring, or offering to acquire, an estate or interest in land from the other person.

## **Part 1 Victimisation**

### **82 Prohibition of victimisation**

It is unlawful for a person to victimise another person.

### **83 What is victimisation?**

(1) A person (*the first person*) **victimises** another person if the first person subjects or threatens to subject another person (*the second person*) to any detriment because the second person, or a person associated with the second person has:

- (a) made a complaint against any person, or
  - (b) brought proceedings against any person under this Act, or
  - (c) given evidence or information, or produced a document, in connection with any proceedings under this Act, or
  - (d) otherwise done anything under or by reference to this Act in relation to any person, or
  - (e) alleged that a person has contravened a provision of this Act, or
  - (f) refused to do anything that would contravene a provision of Chapter 3, 5 or 6,
- or because the first person believes that the second person or the associate has done or intends to do any of those things.

(2) This section does not apply if the conduct in question was not done in good faith and was the supply of false information or the making of a false allegation or complaint.

(3) In determining whether a person victimises another person, a matter identified in subsection (1) need not be the only or dominant reason for the treatment or threatened treatment as long as it is a significant reason.

## **Part 2 Authorising or assisting discrimination**

### **84 Prohibition of authorising or assisting discrimination**

(1) It is unlawful for a person (*the first person*) to cause, instruct, induce, encourage, authorise or assist another person (*the second person*) to contravene a provision of this Act.

(2) If, as a result of the first person doing any of the things specified in subsection (1), the second person contravenes a provision of this Act, both persons are taken to have contravened the provision and a complaint about the contravention may be lodged against either or both of them.

## **Part 3 Vicarious liability**

### **85 Vicarious liability of employers and principals**

(1) If a person in the course of employment or while acting as an agent:

- (a) contravenes a provision of this Act, or
  - (b) engages in any conduct that would, if engaged in by the person's employer, or principal, contravene a provision of this Act,
- both the person and the employer, or principal, are taken to have contravened the provision, and a complaint about the contravention may be lodged against either or both of them.

(2) An employer, or principal, is not vicariously liable for a contravention of a provision of this Act pursuant to this section if the employer, or principal, took reasonable precautions to prevent the employee or agent contravening the Act.

## **Part 4     Advertisements**

### **86           Publishing advertisement**

(1)           In this Part:

(a)           **advertisement**, without limiting the expression, includes any notice, sign, label, circular and any similar thing, and includes any matter that is not writing but which, by reason of the form or context in which it appears, conveys a message, and

(b)           a reference to the publishing of an advertisement is a reference to the publishing of the advertisement by any means including the publishing thereof in a newspaper or periodical, by radio or television broadcast or in a film.

(2)           A person must not publish or cause to be published an advertisement that indicates an intention to do an act that is unlawful under this Act.

Maximum penalty: 50 penalty units in the case of a body corporate and 10 penalty units in any other case.

### **87           Offer of job**

For the purposes of section 86 (2), but without limiting the generality of that subsection, the use of a word that, by reason of its gender, denotes a person or persons of a particular sex:

(a)           as or as part of:

(i)           the description of a job offered, or

(ii)          the description of a class of persons to whom an offer or invitation is made,

by an advertisement, or

(b)           as or as part of a classification or heading under which an advertisement that makes any offer or invitation is published,

is taken to indicate the intention that the offer of the job or other offer or invitation made by the advertisement is made only to persons of that sex, unless the contrary intention appears in the advertisement or in the classification or heading.

### **88           Defence**

It is a defence in proceedings for an offence under section 86 (2) for the defendant to prove that he or she believed on reasonable grounds that the publication of the advertisement was not an offence under that subsection.



## Chapter 8

### 89 Prescribed characteristics

For the purposes of this Part, the **prescribed characteristics** are as follows:

- (a) race,
- (b) homosexuality or lesbianism,
- (c) HIV/AIDS status,
- (d) transgender status.

### 90 Inciting hatred etc

(1) It is unlawful for a person, by a public communication, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of a prescribed characteristic of the person or members of the group.

- (2) Nothing in this section renders unlawful:
- (a) a fair report of a public communication referred to in subsection (1), or
  - (b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of Part 3 of the *Defamation Act 1974* or that is otherwise subject to a defence of absolute privilege in proceedings for defamation, or
  - (c) a public communication, made reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

### 91 Application of section 90

(1) For the purposes of section 90:

**a public communication** means any means of invoking, disseminating, communicating or demonstrating beliefs, information or attitudes by words, symbols, displays or conduct that is intended or likely to be received by a person or persons other than a member of the group being vilified.

- (2) A person does not contravene section 90 merely because the person distributed or disseminated the communication, if the person is ignorant of the content of the communication.
- (3) The requirements of section 90 may be satisfied whether or not the person making the communication intends the prohibited effect.
- (4) The requirements of section 90 may be satisfied by a public communication:
- (a) that is likely to have the prohibited effect on a person who is intended or likely to receive the communication, and
  - (b) whether or not it would be likely to have that effect on a fair-minded member of the community if a person who is intended or likely to receive the communication has a special susceptibility to that effect and the communication would be likely to have such an effect on that person.

### 92 Reference of complaint to DPP

- (1) If the President:
- (a) receives a complaint of unlawful vilification, or
  - (b) otherwise becomes aware of an act that may constitute unlawful vilification,
- that the President is satisfied may constitute serious vilification, the President may refer the matter to the Director of Public Prosecutions, with such recommendations or other material as seems fit to the President.

(2) In this section, **serious vilification** means vilification of a kind that, if it were to be carried out, would constitute an offence under section 93IH of the *Crimes Act 1900*.

## Part 1 Making a complaint

### 93 Nature of complaint

- (1) A complaint may be lodged with the President alleging that a person (***the respondent***) has done, or threatens to do, an unlawful act (other than an act that is an offence) under this Act.
- (2) The complaint must be in writing, signed by the person making it, and may be lodged:
  - (a) by delivery by post or hand to the office of the Board, or
  - (b) by facsimile or other form of electronic transmission to the Board.
- (3) The complaint:
  - (a) must identify the complainant and the respondent, and
  - (b) must describe the conduct complained of, and
  - (c) may but need not state why it is said the conduct contravenes or, if the conduct is threatened, will contravene the Act, and
  - (d) may but need not indicate the nature of the relief sought.
- (4) The complaint may but need not include the material that would support the allegations and need not demonstrate a prima facie case.

### 94 Who may complain?

- (1) A person may make a complaint on his or her own behalf.
- (2) A representative body may make a complaint that Chapter 8 (Unlawful vilification) has been contravened.
- (3) A member or officer of an incorporated body may make a complaint if the incorporated body is or may be affected by the conduct complained of.
- (4) A legal practitioner may make a complaint, including a representative complaint, on behalf of a person affected by the conduct complained of.
- (5) If a person affected by the conduct is a child, a parent or guardian may make a complaint (including a representative complaint) on behalf of the child.
- (6) If a person suffers from an impairment that affects his or her ability to make a complaint (but not his or her capacity to authorise the making of a complaint), an agent authorised in that behalf may make a complaint (including a representative complaint) on behalf of that person.
- (7) Any person may make a complaint on behalf of a person who lacks capacity:
  - (a) to make a complaint, or
  - (b) to authorise an agent to act on his or her behalf.
- (8) In relation to a complaint about conduct affecting a person in relation to his or her work, an officer of an industrial organisation, of which the affected person is a member, may make a complaint on behalf of the person.

### 95 Representative complaints

A person entitled to make a complaint under section 94 may make a representative complaint on behalf of one or more other persons:

- (a) if each such person is or may be affected by the conduct complained of, and

- (b) if each such person made a complaint, it would arise out of, or relate to the same, similar or related circumstances, and
- (c) if each such complaint were made, it would give rise to a substantial common question of law or fact.

## **96 Assistance with complaint**

If requested, an officer of the Board must assist any person entitled to make a complaint, to formulate the complaint.

## **97 Complaint by President**

- (1) If the President becomes aware of conduct that could constitute a contravention of the Act, the President may request the Minister to refer a matter for investigation.
- (2) If the Minister:
  - (a) believes that conduct may involve a contravention of this Act, or
  - (b) receives a request from the President under subsection (1),the Minister may refer a matter to the President for investigation.
- (3) If a matter is referred to the President for investigation under subsection (2), he or she must cause the matter to be reduced to writing and the document so produced is taken to be a complaint that has been accepted for the purposes of this Act.
- (4) In determining whether to request the Minister to refer a matter for investigation under this section, the President is to have regard to the following:
  - (a) the seriousness of the possible unlawful conduct,
  - (b) the number of persons who may have been affected by the conduct,
  - (c) the period that has elapsed since the conduct occurred,
  - (d) the likelihood of a complaint being made in relation to the conduct,
  - (e) if a complaint has been made or were to be made, the ability of the actual or possible complainant to prosecute the matter efficiently and effectively,
  - (f) the public interest in the investigation of the conduct and the resolution of any question as to its lawfulness or otherwise,
  - (g) the remedies that may be available if the conduct were found to be unlawful.
- (5) In considering, for the purposes of subsection (4) (c), the period that has elapsed since the conduct occurred, the President may have regard to whether or not the limitation period under section 98 has expired but may deal with the conduct under subsection (1) even though it was, in part or in whole, outside the limitation period.

## **Part 2 Procedure after a complaint is made**

### **98 Acceptance**

- (1) If a complaint is received by the Board, the President must determine whether the complaint is to be accepted or not.
- (2) The President must accept the complaint unless:
  - (a) no part of the conduct complained of could constitute an unlawful act under this Act, or
  - (b) the complaint does not provide adequate information to comply with section 93 (3), or
  - (c) no part of the conduct complained of falls within the period specified in subsection (3), or
  - (d) the complaint is not made in writing.
- (3) The specified period is 12 months after:
  - (a) the occurrence of the conduct complained of, or
  - (b) if the conduct complained of is a course of conduct that takes place over a period of time - the termination of the course of conduct, or

(c) if the complainant or any other person has pursued, in respect of that conduct, any other complaint resolution process (whether formal or informal) - the termination of that process, whichever is the latest.

(4) In considering whether to accept a complaint lodged outside the period specified in subsection (3), the President:

(a) must take into account any explanation provided by or on behalf of the complainant for the delay, and

(b) must consider whether the delay is likely to have created such prejudice to the respondent that the complaint should not be accepted, and

(c) may, in appropriate cases, seek the views of the respondent, and

(d) must not take into account the likelihood of the complainant obtaining a favourable result if the complaint is allowed to proceed, except to the extent that it is relevant in relation to the reason for delay.

(5) In determining whether or not to accept a complaint, the President may carry out such preliminary inquiries as he or she thinks necessary and appropriate.

#### **99 Time for determining**

Unless the President thinks it necessary to carry out preliminary inquiries for the purpose of determining whether to accept a complaint or not, he or she is to determine whether or not to accept the complaint within 28 days after the complaint is lodged with the Board.

#### **100 Notifying respondent etc**

If the President accepts a complaint, the Board must, so far as is reasonably practicable, notify the person who made the complaint and the respondent of the complaint and its acceptance within 28 days after its acceptance.

#### **101 Investigating complaint**

(1) If a complaint is accepted, the President is to investigate or cause the subject matter of the complaint to be investigated.

(2) For the purposes of the investigation, the person carrying out the investigation must:

(a) make such inquiries as are necessary to identify in detail the conduct complained of, the manner in which it is said to contravene this Act and the person or persons responsible for the conduct, and

(b) notify the respondent of the conduct complained of and the basis on which it is said to contravene this Act, and seek a response in writing to the complaint and to any matters identified by the person in relation to the complaint, and

(c) if it appears that a person may have a document relevant to the investigation, request the person by notice in writing to produce the document to the Board.

(3) A person requested to produce a document pursuant to subsection (2) must produce the document within the time specified for the purpose in the notice.

(4) A notice requiring production of a document within a specified time must include a statement of the consequences of failure to produce the document within the specified time.

**Note.** The consequences are specified in subsection (5) and, if the person to whom it is addressed is a party, in section 105.

(5) Failure to comply with a notice without reasonable excuse is an offence.  
Maximum penalty: 20 penalty units.

(6) The time for production specified in the notice may be extended and, if written notice is given of the extension, the time as extended is taken to be the time specified in the notice.

#### **102 Joint investigation of complaints**

(1) The President may conduct an investigation, or cause an investigation to be conducted, into more than one complaint.

(2) The President must notify the parties if a joint investigation is undertaken.

#### **103 Notification of investigation**

The President must, as frequently as is reasonably convenient and, in any event, at periods not exceeding 60 days, notify the parties of the steps taken for the purpose of the investigation and the results of the investigation.

#### **104 Expedited complaints**

(1) A party to a complaint may request in writing that the complaint be dealt with as an expedited complaint.

(2) Within 14 days after receiving such a request, the President is to determine:

(a) whether to accept the complaint, and

(b) whether the complaint is to be dealt with as an expedited complaint.

The President is to notify the parties in writing of the determination and, if the determination is that the complaint is not to be dealt with as an expedited complaint, of the reasons for the determination.

(3) In relation to an expedited complaint:

(a) a conciliation conference must be held within 28 days after the lodgment of the complaint, and

(b) the complaint must be referred to the Tribunal on the request of a party if no settlement is achieved within 40 days after of lodgment, and

(c) the President need not undertake any independent investigation of the complaint, and

(d) the Tribunal is to hear and determine the complaint as soon as reasonably practicable after referral.

(4) In determining whether to treat a complaint as an expedited complaint, the President is to consider the following:

(a) whether it appears that the complaint can be adequately addressed without an investigation of factual matters,

(b) the need for an urgent resolution of the matter,

(c) the importance of the outcome, both to the immediate parties and in the public interest,

(d) whether speedy consideration will enhance the likelihood of a conciliated settlement.

#### **105 Supplying documents etc**

(1) The President may require the person who made the complaint or the person or persons against whom the complaint is made:

(a) to provide information (orally or in writing), or

(b) to supply documents,

within 28 days after the date of the requirement or such other period as the President determines and specifies when making the requirement.

(2) A person of whom a requirement is made under subsection (1):

(a) must provide to the President such information and such documents specified in the requirement as are in the person's possession, custody or control within the period specified in the requirement, unless the person has a lawful excuse for not doing so, and

(b) must, if the person has a lawful excuse for not providing information or a document or documents specified in the requirement, notify the President of the excuse and the information or the document or documents to which it relates within the period specified in the requirement for providing the information or the document or documents to the President.

Maximum penalty: 50 penalty units.

(3) If the material is not so provided or supplied, the President is to notify the other party of the failure and that party may request that the matter be immediately referred to the Tribunal.

(4) If a request is received from a party by the President under subsection (3):

(a) the President must notify the other party of the request within 7 days, and

(b) the other party has a period of 14 days to show cause why the matter should not be referred to the Tribunal, and

(c) the President is to refer the matter to the Tribunal at the expiration of the 14-day period unless the President is satisfied that there is good reason not to refer the matter.

(5) The President may, by notice in writing, require a person other than a person referred to in subsection (1) to supply documents within 28 days after the date of the requirement or such other period as the President determines and specifies in the notice.

(6) A person who receives a notice under subsection (5):

(a) must provide to the President such documents specified in the notice as are in the person's possession, custody or control within the period specified in the notice, unless the person has a lawful excuse for not doing so, and

(b) must, if the person has a lawful excuse for not providing a document or documents specified in the notice, notify the President of the excuse and the document or documents to which it relates within the period specified in the notice for providing the document or documents to the President.

Maximum penalty (subsection (6)): 50 penalty units.

#### **106 Provision of information to conciliation officer**

A person who carries out an investigation must provide the information obtained from the investigation to the conciliation officer responsible for attempting conciliation.

#### **107 Conciliation**

(1) The President must endeavour to resolve a complaint by way of conciliation.

(2) The President may delegate responsibility for conciliation under this section, but such a delegation may be made only to an officer of the Board who has not undertaken investigation of the complaint, except with the consent of the complainant and the person against whom the complaint was made.

(3) The President may, by notice in writing, require the complainant and the respondent, or either of them, to appear before the President or a conciliation officer, either separately or together, for the purpose of endeavouring to resolve the complaint by conciliation.

(4) A person must not fail to comply with the terms of a notice under subsection (3).

Maximum penalty (subsection 4): 20 penalty units.

#### **108 Amendment of complaint**

(1) If, at any time after a complaint is made and before the complaint is finally dealt with by the President:

- (a) the person making the complaint seeks to amend the complaint, or
  - (b) the President becomes aware of information that could conveniently be dealt with as part of the complaint,
- the person making the complaint is to be offered the opportunity to amend the complaint.

(2) An amendment may be made in writing but if further written material is already in the possession of the President or the Board, the President may treat the written material as if it formed part of the complaint.

(3) If a complaint is amended at any time, the respondent must be informed in writing by the President of the substance of the amendment and, if the effect of the amendment is to cause the complaint to be made against further or other persons, they must be informed in writing of the complaint as amended.

#### **109 Withdrawal of complaint**

(1) A person who has lodged a complaint, other than a representative complaint, may at any time, by notice in writing lodged with the President, withdraw the complaint.

(2) If the President receives a notice under subsection (1) signed by or on behalf of the complainant or, if more than one, all the complainants, the President is to deal with the complaint under section 111.

(3) If the President receives a notice under subsection (1) signed by or on behalf of some, but not all, of the complainants, the President is to treat the notice as an amendment removing the names of those persons as complainants from the complaint.

#### **110 Abandonment of complaint**

(1) If a complainant has:

- (a) failed to respond to a request for documents or information, or
- (b) failed to notify the President of an address (or new address) at which he or she may be contacted,

the President may serve a notice on the complainant at his or her address last known to the President stating that, if a response is not received within 30 days, the complaint will be taken to be abandoned and dealt with under section 111.

(2) If a complaint is taken to have been abandoned under this section, it may be revived if, within 12 months after its abandonment, the complainant satisfies the President that:

- (a) he or she wishes to pursue the complaint, and
- (b) the failure relied on for the purpose of subsection (1) did not take place or ought reasonably to be excused, and
- (c) no undue prejudice would be caused to the respondent by reviving the complaint.

#### **111 Termination of investigation**

(1) The President may terminate the investigation of a complaint after its acceptance if:

- (a) the conduct alleged, if proven, would not constitute an unlawful act under this Act, or
- (b) the complaint has been withdrawn or taken to be abandoned, or
- (c) the complaint was lodged more than 12 months after the alleged unlawful act took place, or
- (d) the complaint was frivolous, vexatious, misconceived or lacking in substance, or
- (e) in a case where some other remedy has been sought in relation to the subject-matter of the complaint—the subject-matter of the complaint has been adequately dealt with, or
- (f) the subject-matter of the complaint has been settled or resolved by agreement between the parties.



(2) If the President is satisfied that an investigation should be terminated, the President is to give notice to the complainant of the proposed termination and the reasons for the termination.

(3) The complainant has 28 days, or such longer time as may be agreed to by the President, to seek to satisfy the President that the investigation should not be terminated.

(4) If the complainant fails to satisfy the President that the investigation should not be terminated, the President must terminate the investigation and give notice to each of the parties to the complaint of the termination.

(5) If a complainant receives a notice of termination under subsection (4), the complainant may, within 28 days after the date of the notice, serve on the President a notice in writing requiring the President to refer the complaint to the Tribunal.

(6) If a complainant serves a notice under subsection (5), the President must refer the complaint to the Tribunal.

**Note.** The President does not, in considering whether to terminate an investigation, consider factual disputes. A complaint is not required to include material establishing a prima facie case.

#### **112 Effect of termination**

(1) If the President has terminated an investigation, no further complaint may be made by the complainant or by another person on his or her behalf, in relation to conduct which was the subject matter of the terminated investigation.

(2) No other civil proceedings may be taken in relation to the conduct complained of under the terminated investigation on the basis that the conduct constitutes unlawful discrimination.

(3) This section does not apply to a complaint deemed to have been made and accepted by the President under section 97.

#### **113 Death of complainant or respondent**

(1) If a complainant dies before his or her complaint is finally determined, the complaint survives and the estate of the complainant:

(a) may continue the carriage of the complaint, including any appeal, and

(b) is entitled to the benefit of any monetary sum ordered to be paid by the respondent in respect of the complaint.

(2) If a respondent dies before any complaint against him or her is finally determined, the complainant may continue to pursue the complaint (including any appeal) and any monetary sum ordered to be paid in respect of the complaint is payable from the estate of the respondent.

#### **114 Conciliation procedure**

(1) The President may carry out appropriate endeavours to conciliate a matter in such manner as the President thinks fit.

(2) If the President requires the parties to attend a conference pursuant to section 105, the parties cannot be represented by any other person at the conference except by leave of the President.

(3) Anything said and any information supplied during a conference called by the President pursuant to section 105 is not admissible in evidence in any proceedings relating to the complaint except for the purpose of establishing whether or not the complaint, or any part of the complaint, was resolved by conciliation.

## **115 Resolution of complaint**

- (1) If a complaint is resolved by conciliation to the satisfaction of the parties, the person conducting that conciliation must advise the President in writing of that outcome.
- (2) Any agreement reached pursuant to conciliation is enforceable by law.
- (3) On receiving a notice under subsection (1), the President may terminate the investigation of the complaint in whole or in part, in accordance with the terms of the notice.
- (4) If the President is satisfied that:
  - (a) a party to an agreement reached pursuant to conciliation is not fulfilling in good faith the party's obligations under the agreement, and
  - (b) another party to the agreement wishes the President to take steps under this section, the President may take such steps as the President considers appropriate to enforce the agreement or any of its terms, including by way of instituting and prosecuting legal proceedings.
- (5) If the President institutes and prosecutes legal proceedings under subsection (4), the President:
  - (a) has power to prosecute or settle the proceedings as the President thinks fit, and
  - (b) may obtain or pay costs, but no party may seek or seek to recover costs from a party for whose benefit the proceedings were brought who has not participated as a party in the proceedings.

## **116 Referral to Tribunal**

- (1) The President is to refer a complaint to the Tribunal for enquiry, if satisfied that:
  - (a) all parties wish the complaint to be referred to the Tribunal, or
  - (b) the nature of the complaint is such that it should be referred to the Tribunal, or
  - (c) all reasonable attempts have been made to resolve the complaint by conciliation but have not been successful, or
  - (d) the complaint cannot be resolved by conciliation.
- (2) Despite subsection (1), if the complaint is taken to have been made and accepted pursuant to section 97, the President may refer the complaint to the Tribunal at any time and is, for the purpose of proceedings before the Tribunal, to be the complainant.
- (3) If a complaint has not been resolved within 12 months after the date of lodgment, a party to the complaint may request the President by notice in writing to refer the complaint to the Tribunal.
- (4) On receipt of a notice under subsection (3), the President must notify in writing all other parties to the complaint.
- (5) If, within 28 days after notifying the parties under subsection (4), no party has objected to referral of the complaint, the President is to refer the complaint to the Tribunal.
- (6) If the complainant objects to referral of the complaint, the President must not refer the complaint to the Tribunal, but may, if satisfied that there is no reasonable prospect of a conciliated agreement, terminate the investigation pursuant to section 109.
- (7) If the respondent objects to referral of the complaint, the President is to refer the complaint to the Tribunal, unless satisfied that there are reasonable prospects of a conciliated agreement.
- (8) If there is more than one complainant or respondent to the complaint, the President may, if the President thinks fit, deal with the complaint as a number of complaints by or against each such complainant or respondent.
- (9) The President in exercising functions under this section may refer a complaint to the Tribunal over the objections of the complainant only in exceptional circumstances.

- (10) If a complaint is referred to the Tribunal, the complaint is to comprise:
- (a) the original complaint lodged with the President, and
  - (b) any amendment made pursuant to section 108, and
  - (c) any other documents or information obtained or recorded by the President and identified by the President as part of the complaint that, in the opinion of the President, help to identify the subject-matter of the complaint or otherwise contain an allegation of an unlawful act under the Act.

#### **117 Settlement of representative complaints**

- (1) A representative complaint may be settled by agreement between the parties and may be resolved by conciliation.
- (2) The President must not terminate the investigation of a representative complaint unless satisfied that the settlement or resolution by conciliation:
- (a) constitutes a bona fide settlement or resolution on behalf of the group members, and
  - (b) appears to be in the interests of group members generally,
- and is to refer the complainant to the Tribunal for approval of the settlement or resolution.
- (3) If, at any time during the investigation or conciliation of a representative complaint, the President is of the view that the complainant is unwilling or unable adequately to represent the group members, the President may treat the complaint as having been accepted on behalf of a class comprising some or all of the group members and the President is thereafter be the complainant for those group members.
- (4) If the parties agree to settle a representative complaint or a resolution by conciliation is proposed, the settlement or resolution does not take effect until:
- (a) such steps have been taken as may be approved or directed by the President for the purposes of notifying group members of the terms of the intended settlement or proposed resolution, and
  - (b) the settlement or resolution has been approved by the Tribunal.
- (5) A notice given for the purposes of section 116 must, in the case of a representative complaint, permit group members to opt out of the complaint, to the extent, in the manner and within the time provided for in the notice.
- (6) The content and timing of the notice must be approved by the President before the notice is given.

#### **118 Enforcement of orders of the Tribunal**

The President may:

- (a) in the case of an individual complaint, take steps to enforce an order of the Tribunal on behalf of a complainant with the complainant's consent, or
- (b) in the case of a representative complaint, or in any other case in which the President believes that the public interest demands it, take steps to enforce an order of the Tribunal on the President's own motion.

#### **119 Effect of contravention of Act**

- (1) A contravention of this Act does not attract a sanction (whether criminal or civil) except to the extent provided by this Act.
- (2) This section does not prevent a party to proceedings brought against the party from relying on a contravention of this Act by way of defence, set-off or cross-claim.
- (3) This section does not prevent a person obtaining relief in civil proceedings for a contravention of this Act, if:

(a) the civil proceedings are taken in good faith to obtain relief in respect of a matter not arising under this Act, and

(b) a claim based on a contravention of this Act could conveniently be dealt with in those proceedings.

(4) If a person seeks to rely on a contravention of this Act in other proceedings, pursuant to subsection (2) or (3), and the Court or Tribunal in which those proceedings are brought has a discretion in relation to the joinder of causes of action or parties, it may take into account the scheme and procedures available under this Act in exercising that discretion.

(5) A reference in this section to a contravention of this Act includes a reference to a threatened contravention of this Act.

## Chapter 10

### Part 1 The Anti-Discrimination Board

#### Division 1 Constitution of the Board

##### 120 Constitution of the Board

There is constituted by this Act a corporation with the corporate name of the Anti-Discrimination Board.

##### 121 Membership of Board

The Board is to consist of 5 members, of whom:

- (a) one is the President, and
- (b) the other 4 are persons appointed by the Governor.

##### 122 Term of office

- (1) An appointed member of the Board holds office for the period, not exceeding 5 years, specified in his or her instrument of appointment.
- (2) An appointed member of the Board is eligible for reappointment.
- (3) The *Public Sector Management Act 1988* does not apply to the appointment of an appointed member of the Board.

##### 123 Resignation and removal

- (1) An appointed member of the Board ceases to be a member if he or she is absent, without leave having been granted by the Board, from 3 consecutive meetings of which reasonable notice has been given to the member, either personally or by post.
- (2) An appointed member of the Board may resign the office of member by notifying the Minister in writing.
- (3) The Governor may at any time remove an appointed member of the Board from office.

##### 124 Filling casual vacancies

- (1) If an appointed member of the Board ceases to hold office before his or her term of office expires, the Governor may fill the vacant office.
- (2) A member appointed under this section holds office for the balance of the term of appointment of the member whose place he or she fills.

##### 125 Procedure of Board

- (1) The President is to preside at a meeting of the Board at which he or she is present.
- (2) If the President is not present, the members present may elect a member to preside.
- (3) The President or presiding member has a deliberative vote and a second or casting vote.
- (4) A majority of the members of the Board currently holding office constitutes a quorum.
- (5) Subject to this Act, the Board may regulate its own proceedings.

**126 Effect of vacancy or defect**

An act or decision of the Board is not invalid only because:

- (a) of a vacancy in its membership, or
- (b) of a defect or irregularity in the appointment of any member, or
- (c) in the case of a person appointed to act as a member, the occasion for his or her acting had not arisen or had ceased.

**127 Delegation by Board**

The Board may delegate to a member of the Board any of its functions, other than this power of delegation.

**Division 2 Functions of the Board**

**128 Functions of the Board: generally**

(1) The Board has the following functions:

- (a) to establish and undertake information and education programs in furtherance of the objects of this Act,
- (b) to receive complaints under this Act,
- (c) to establish policies and issue guidelines and directions on the manner in which the objects of this Act may be pursued by the those affected, including Government employees, providers of goods and services, educational institutions, providers of accommodation, clubs and associations and members of the community generally,
- (d) any other functions conferred on it by or under this Act or any other Act.

(2) The Board has all the powers necessary and convenient to enable it to perform its functions.

(3) Without limiting subsection (2), the Board is empowered to enter into agreements or arrangements with the Human Rights and Equal Opportunity Commission or any other body having similar functions under legislation with similar objects to this Act, for the purpose of the co-operative exercise of those functions or agency arrangements in relation to those functions.

**129 Educative and research functions**

(1) The Board is to undertake programs for the dissemination of information for the education of the public with respect to:

- (a) the elimination of discrimination and sexual harassment, and
- (b) the promotion of equality of opportunity, and
- (c) any other matters relevant to this Act.

(2) The Board may undertake research into any matter arising from, or incidental to, the operation of this Act.

(3) If the Board becomes aware of any provision of an Act that discriminates or has the effect of discriminating against any person or authorises or permits conduct that may constitute a contravention of this Act (ignoring any express or implied repeal of this Act), the Board must notify the Minister responsible for administering that provision or Act as soon as practicable.

(4) The Board may, at any time, submit a report to the Minister on any matter arising from the performance of the Board's functions under this section.

**130 Codes of conduct**

- (1) The Board may consult with a representative body and persons operating in an industry or other area of conduct to which this Act applies for the purpose of developing codes of conduct.
- (2) A code of conduct is to provide guidance to persons in a specified area as to:
  - (a) the kinds of activity that may involve or constitute a contravention of the Act, and
  - (b) means of limiting, avoiding or restricting the width of any such activity or contravention, and
  - (c) any other matter that the Board considers necessary or convenient in the exercise of its functions and powers under section 129.
- (3) A code of conduct is not legally binding on any person, but evidence of compliance with or contravention of a code may be considered by the President and the Tribunal in the exercise of functions under this Act.
- (4) To avoid doubt, a code of conduct does not have the effect:
  - (a) of rendering lawful any conduct that contravenes this Act, or
  - (b) of rendering unlawful any conduct not otherwise unlawful.

## **Part 2 President**

### **131 Appointment of President**

There is to be a President of the Board appointed by the Governor.

### **132 Term of office**

- (1) The President holds office for the period, not exceeding 5 years, specified in his or her instrument of appointment.
- (2) The President is eligible for reappointment.

### **133 Resignation and removal**

- (1) The President may resign that office by writing signed by him or her and addressed to the Governor.
- (2) The Governor may at any time remove the President from office.

### **134 Acting President**

- (1) If the President is unable to perform his or her functions, the Governor may appoint a person to act as President during the period of inability.
- (2) The Governor:
  - (a) subject to this Act, may determine the terms of appointment of an acting President, and
  - (b) may at any time terminate the appointment.
- (3) While his or her appointment remains in force, the acting President has and may exercise all the functions of the President.

### **135 Payment of President**

- (1) The President is entitled to remuneration in accordance with the *Statutory and Offices Remuneration Act 1975*.
- (2) The President is entitled to receive such travelling and subsistence allowances as are from time to time determined by the Minister.

### **136 Functions of President**

(1) The President is the chief executive officer of the Board and has the functions conferred on the President by this Act.

(2) In addition to all other functions, the President is to administer the affairs of the Board in accordance with the policies and directions of the Board.

### **137 Delegation by President**

(1) The President may delegate to an officer of the Board any of the President's functions, other than this power of delegation.

(2) If the President delegates a function of conciliation of complaints, either generally or in relation to a specific complaint, the function must not be exercised in relation to a complaint by an officer who has been responsible for the investigation, or any part of the investigation, of that complaint.

## **Part 3 General provisions**

### **138 Staff**

Such staff as may be necessary to assist in the carrying out of the functions of the Board and the President may be appointed under the *Public Sector Management Act 1988*.

### **139 Secrecy**

(1) This section applies to every person who is or has been:

- (a) an appointed member or acting member of the Board, or
- (b) the President, or
- (c) a member of staff of the Board, or
- (d) any other person acting under the authority of the Board, or
- (e) a person appointed pursuant to section 86(1) of the former Act.

(2) This section applies to information concerning the affairs of any person that is or has been obtained by a person to whom this section applies:

- (a) in the course of exercising functions under this Act or the former Act, or
- (b) as a result of another person exercising functions under this Act or the former Act,

unless the information is otherwise publicly available.

(3) A person to whom this section applies must not, either directly or indirectly, make a record of, disclose or communicate to any person any information to which this section applies unless it is necessary to do so for the purposes of, or in connection with, the exercise of a function under this Act or the former Act.

Maximum penalty: 10 penalty units.

(4) A person to whom this section applies must not be required:

- (a) to produce in a court any document containing information to which this section applies, or
- (b) to disclose or communicate to any court any information to which this section applies,

unless it is necessary to do so for the purposes of, or for a prosecution under or arising out of, this Act or the former Act.

(5) In this section:

**court** includes a tribunal, authority or person having power to require the production of documents or the answering of questions.

**produce** includes permit access to.

### **140 Protection from liability**



- (1) This section applies to every person who is or has been:
- (a) an appointed member or acting member of the Board, or
  - (b) the President, or
  - (c) a member of staff of the Board, or
  - (d) any other person acting under the authority of the Board.

(2) A person to whom this section applies is not personally liable for anything done or omitted to be done in good faith:

- (a) in the exercise of a function under this Act, or
- (b) in the reasonable belief that the thing done or omitted to be done was in the exercise of a function under this Act, or
- (c) in the provision of information or advice in relation to this or any other Act or any Commonwealth Act or any Act of another State or of a Territory.

#### **141 Annual reports**

(1) In its report of operations for a financial year, the Board:

- (a) must report on the administration of this Act and the regulations during that financial year, and
- (b) must include information on education programs, research and the review of Acts undertaken under section 129 during that financial year, and
- (c) may contain any recommendations the Board considers appropriate for the elimination or modification of discriminatory legislative provisions.

(2) The Minister must cause each report under subsection (1) to be laid before each House of the Parliament within 7 sitting days of that House after it is received by the Minister.

## Chapter 11

### **142 Employer of people in the Public Service, Police Service or Education Teaching Service**

- (1) A reference in this Act to an employer:
- (a) in relation to employment in a Department, is a reference to the relevant Department head, and
  - (b) in relation to employment in the Police Service, is a reference to the Commissioner of Police, and
  - (c) in relation to employment in the Education Teaching Service, is a reference to the Director-General of the Department of Education and Training.

(2) Anything determined or done with respect to any matter concerning any such employment by an officer or employee in any Department, in the Police Service or in the Education Teaching Service who is authorised to determine and do things in that respect is taken to have been determined or done by the Department Head, Commissioner of Police or Director-General of the Department of Education and Training, respectively.

- (3) Subsection (2) includes anything determined or done with respect to:
- (a) any offer of employment, or
  - (b) the terms and conditions on which employment is offered, or
  - (c) the opportunity afforded for promotion, transfer, training or other benefits associated with employment, or
  - (d) dismissal from employment.

### **143 Repeal of Anti-Discrimination Act 1977**

The *Anti-Discrimination Act 1977* is repealed.

### **144 Savings, transitional and other provisions**

Schedule 1 has effect.

### **145 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

### **146 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Dictionary

**Board** means the Anti-Discrimination Board.

**carer responsibilities**—see section 18.

**child** means a person under the age of 18 years.

**complaint** means a complaint made under Chapter 9.

**complainant** means a person by whom or on whose behalf a complaint is made.

**Department** and **Department Head** have the same meanings as they have in the *Public Sector Management Act 1988*.

**disability**—see section 18.

**doing an act** — see section 11.

**domestic status**—see section 18.

**employer**—see section 142.

**exercise** a function includes perform a duty.

**family responsibilities**—see section 18.

**former Act** means the *Anti-Discrimination Act 1977*.

**function** includes a power, authority or duty.

**irrelevant characteristics** — see section 16.

**party** to a complaint or proceedings before the Tribunal means the complainant, the respondent, any third party joined by the Tribunal and any person granted leave to intervene.

**person** includes a body politic, a body corporate an unincorporated association and, in relation to a natural person, means a person of any age.

**political opinion**—see section 18.

**President** means the President of the Anti-Discrimination Board.

**private educational authority** — see section 42.

**proceedings**, in relation to the Tribunal, means all proceedings before the Tribunal in relation to a complaint, including applications for interim orders and applications.

**qualifying body** means a person or body that is empowered to confer, renew or extend an occupational qualification.

**race**—see section 18.

**recognised transgender person**—see section 18.

**relative**—see section 18.

**religion**—see section 18.

**religious practice**—see section 18.

**Registrar** means the Registrar of the Tribunal.

**representative body** means a body (whether incorporated or unincorporated):

(a) which represents or purports to represent a group of people within New South Wales who are capable of being the subject of unlawful vilification (whether or not the body is authorised to do so by the group concerned), and

(b) which has as its primary object the promotion of the interests and welfare of the group.

**respondent** means a person about whose conduct a complaint has been lodged.

**sexual harassment** — see section 71.

**sexuality**—see section 18.

**special characteristics** — see section 17.

**State law** — see section 62 (2).

**State program** — see section 62 (2).

**transgender status**—see section 18.

**Tribunal** means the Equal Opportunity Division of the Administrative Decisions Tribunal.

**victimise** — see section 83.

Schedule 1

**1 Regulations**

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of any of the following Acts:

this Act

*Crimes Amendment (Serious Vilification) Act 1999*

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

**2 Definitions**

In this Schedule:

**former Board** means the Anti-Discrimination Board established by section 71 of the former Act.

**3 Vesting of undertaking of former Board in the new Board**

(1) On the dissolution of the former Board, the following provisions have effect:

(a) the assets of the former Board vest in the Board constituted by this Act by virtue of this clause and without the need for any further conveyance, transfer, assignment or assurance,

(b) the rights or liabilities of the former Board become by virtue of this clause the rights and liabilities of the Board constituted by this Act,

(c) all proceedings relating to the assets, rights or liabilities commenced before the transfer by or against the former Board and pending immediately before the transfer are taken to be proceedings pending by or against the Board constituted by this Act,

(d) any act, matter or thing done or omitted to be done in relation to the assets, rights or liabilities before the transfer by, to or in respect of the former Board is (to the extent to which that act matter or thing has any force or effect) taken to have been done or omitted by, to or in respect of the Board constituted by this Act.

(2) The operation of this clause is not to be regarded:

(a) as a breach of contract or confidence or otherwise as a civil wrong, or

(b) as a breach of any contractual provision prohibiting, restricting or regulating the assignment or transfer of assets, rights or liabilities, or

(c) as giving rise to any remedy by a party to an instrument, or as causing or permitting the termination of any instrument, because of a change in the beneficial or legal ownership of any asset, right or liability.

(3) The operation of this clause is not to be regarded as an event of default under any contract or other instrument.

(4) No attornment to the transferee by a lessee from the former Board is required.

(5) No compensation is payable to any person or body in connection with a transfer.

(6) Subclause (5) does not affect the rights of any member of staff who is the subject of a transfer.

(7) In this clause:

**assets** means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description (including money), and includes securities, choses in action and documents.

**liabilities** means any liabilities, debts or obligations (whether present or future and whether vested or contingent).

**rights** means any rights, powers, privileges or immunities (whether present or future and whether vested or contingent).

#### **4 Board members to continue in office**

(1) An appointed member of the former Board who was in office immediately before the commencement of Chapter 10 is taken to have been appointed as a member of the Board constituted by this Act on that commencement for the balance of his or her term of appointment to the former Board, subject to the terms and conditions of that appointment, but may resign or be removed from office by the Governor.

(2) The person who held office as President of the former Board immediately before the commencement of Chapter 10 is taken to have been appointed President of the Board constituted by this Act on that commencement for the balance of his or her term of appointment as President of the former Board, subject to the terms and conditions of that appointment, but may resign or be removed by the Governor.

#### **5 Dealing with complaints already lodged**

(1) This clause applies to a complaint lodged under section 88 of the former Act that was not finally disposed of immediately before the commencement of Chapter 9 (an **existing complaint**).

(2) An existing complaint is to be dealt with under the former Act as if the former Act had not been repealed.

(3) A proceeding in relation to an existing complaint that is awaiting hearing by the Tribunal at the commencement of this clause, or that is referred to the Tribunal after the commencement of this clause, is to be heard by the Tribunal under the former Act as if the former Act had not been repealed.

(4) If:

(a) the Tribunal has begun hearing a proceeding in relation to an existing complaint but has not made a final order in that proceeding, or

(b) the Tribunal has made a final order in a proceeding relating to an existing complaint but, on appeal, the matter is referred back to the Tribunal for a rehearing, the proceeding or matter is to continue to be heard, or to be reheard, by the Tribunal under the former Act as if the former Act had not been repealed.

#### **6 Dealing with new complaints**

(1) A complaint may be lodged with the President in respect of an alleged contravention of the former Act that occurred before the commencement of this clause.

(2) If the alleged contravention would have been a contravention of this Act had this Act been in force at the time of the alleged contravention, the complaint may be dealt with under this Act as if this Act had been in force at the relevant time.

**7            Current investigations and inquiries**

Any matter that is under investigation by the President under section 89 of the former Act must continue to be dealt with according to the former Act, as if the former Act had not been repealed.

**8            Temporary exemptions continue**

An exemption granted under the former Act that is in force immediately before the commencement of this Act continues in force in accordance with its terms until it expires, but may be sooner revoked by the person and in the manner applicable under the former Act.

## REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)

### Appendix B: Draft Crimes Amendment (Serious Vilification) Bill 1999

#### Contents

- 1 Name of Act
  - 2 Commencement
  - 3 Amendment of Crimes Act 1900 No 40
- Schedule 1 Amendment

#### New South Wales

#### Crimes Amendment (Serious Vilification) Bill 1999

No , 1999

#### A Bill for

An Act to amend the *Crimes Act 1900* to include in that Act the offences of serious racial, transgender, homosexual, lesbian and HIV/AIDS vilification previously included in the *Anti-Discrimination Act 1977*.

#### The Legislature of New South Wales enacts:

##### 1 Name of Act

This Act is the *Crimes Amendment (Serious Vilification) Bill Act 1999*.

##### 2 Commencement

This Act commences on a day to be appointed by proclamation.

##### 3 Amendment of Crimes Act 1900 No 40

The *Crimes Act 1900* is amended as set out in Schedule 1.

#### Schedule 1 Amendment

(Section 3)

##### Part 3D

Insert after Part 3C:

##### Part 3D Serious vilification

##### 93 IH Serious vilification

- (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe



ridicule of, a person or group of persons on a prohibited ground that applies to the person or members of the group by means which include:

- (b) threatening physical harm towards, or towards any property of, the person or group of persons, or
- (c) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Maximum penalty:

In the case of an individual—50 penalty units or imprisonment for 6 months, or both.

In the case of a corporation—100 penalty units.

- (2) A person must not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.
- (3) In this section:

***HIV/AIDS infected*** means infected by the Human Immunodeficiency Virus or having the medical condition known as Acquired Immunodeficiency Syndrome.

***prohibited ground***, in relation to a person or group of persons, means any one or more of the following:

- (b) his, her or their race,
- (c) his, her or their homosexuality or lesbianism,
- (d) that the person is or members of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected),
- (e) that the person is a transgender person or that the members of the group are transgender persons.

***public act*** includes:

- (b) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- (c) any conduct (not being a form of communication referred to in paragraph

(a) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and

(d) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on a prohibited ground that applies to the person or members of the group.

**race** includes colour, nationality, descent and ethnic or national origin.

(4) For the purposes of this section, the fact that a race may comprise two or more distinct races does not prevent it from being a race.

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### Appendix C: Written Submissions Received

Ahmadiyya Anjuman Ishaat-i-Islam (29 July 1993)  
AIDS Council of New South Wales (13 June 1996)

Anderson, Ms J (26 March 1993)

Anderson, Dr J M E (9 May 1992)

Anglican Church Diocese of Sydney (29 July 1993)

Anonymous (undated) *Anonymous Submission 1*

Anonymous (17 May 1992) *Anonymous Submission 2*

Anonymous (undated) *Anonymous Submission 3*

Anti-Discrimination Board (*Balancing the Act*, May 1994) *ADB Submission 1*

Anti-Discrimination Board (*Can They Really Get Away With That?* February 1997) *ADB Submission 2*

Anti-Discrimination Board (*Enforcement Mechanisms*, 22 April 1997) *ADB Submission 3*

[The Commission has also met with the legal and conciliation staff of the Anti-Discrimination Board and received other formal and informal comments from them on various issues of concern, which have been considered in this Report.]

Association of Superannuation Funds of Australia Limited (22 December 1994)

Atallah-Clugston, Mrs M (27 February 1996)

Auckland Lesbian & Gay Lawyers (31 May 1993)

Australian Business Chamber (1 July 1998)

Australian Catholics Pro Life Association (20 May 1993)

Australian Chemical Trauma Alliance Inc. (23 March 1993) *ACTA Submission 1*

Australian Chemical Trauma Alliance Inc. (23 April 1993) *ACTA Submission 2*

Australian Chemical Trauma Alliance Inc. (27 April 1993) *ACTA Submission 3*

Australian Chemical Trauma Alliance Inc. (15 June 1993) *ACTA Submission 4*

Australian Chemical Trauma Alliance Inc. (5 July 1993) *ACTA Submission 5*

Australian Quadriplegic Association (1 April 1993)

Australian Transgenderists Support Association of Queensland Inc. (August 1992)

Blacktown State Electorate Council (4 April 1995)

Brading, Mr N R (16 July 1993)

Brethren Christian Fellowship (28 May 1993)

Burgmann, Dr M (29 November 1993)

Call to Australia (29 July 1993)

Cartwright, Ms J (14 May 1993)

Catholic Education Commission (29 June 1993)

Church of Scientology (29 June 1993) *Church of Scientology Submission 1*

Church of Scientology (31 July 1993) *Church of Scientology Submission 2*

Cipriotti, Ms S J (19 May 1997)

Clarke, N and E (23 April 1993)

Clementson, Mr J W (5 July 1993)

Coates, Mr S W (17 September 1993)

Combined Community Legal Centre Group of NSW (1 May 1996)

Confidential Submission (24 June 1993) *Confidential Submission 1*

Confidential Submission (5 July 1993) *Confidential Submission 2*

Confidential Submission (7 April 1998) *Confidential Submission 3*

Confidential Submission (undated) *Confidential Submission 4*

Cummings, Ms C (undated)

De Marco, Mr E (undated)

Dimasi, Mr J (5 July 1993)

Diocesan Catholic Education Commission (Wagga Wagga) (28 May 1993)

Disability Council of New South Wales (29 July 1993)

Discrimination Disability Legal Centre (26 February 1996)

Eastern Sydney Area Health Service (19 August 1993)

Else, Ms S (5 June 1993)

Ethnic Affairs Commission (13 May 1993)

Equal Opportunity Commission of South Australia (Ms J Tiddy, Commr) (26 July 1993)

Family Resource and Network Support Inc. (31 May 1993)

Fitzgerald, Ms P (8 November 1995)

Fitzpatrick, Ms E (13 February 1994)

Gaffney, Mr P (10 July 1996)

Gay and Lesbian Rights Lobby Inc. (30 July 1993)

The Gender Centre (20 January 1998)

George (surname withheld) (25 June 1993)

Gibbs, Richard James (15 February 1994)

Griffin, Ms J (17 May 1993)

Guide Dog Association of New South Wales (26 July 1993)

Hains, Mr M G (20 March 1993) *Hains Submission 1*

Hains, Mr M G (28 March 1993) *Hains Submission 2*

Hains, Mr M G (4 May 1993) *Hains Submission 3*

Hains, Mr M G (23 May 1993) *Hains Submission 4*

Hains, Mr M G (10 June 1993) *Hains Submission 5*

Hains, Mr M G (22 June 1993) *Hains Submission 6*

Hains, Mr M G (22 April 1995) *Hains Submission 7*

Higgins, Mr G M (8 May 1995)

Hollier, Mr J (31 May 1993)

Hyde, Mr J (23 June 1993)

Intellectual Disability Rights Service Inc. (19 August 1998)

Jenkin, Mr P W (24 May 1993)

Jeziarski, T (8 June 1994)

Johnston, Mr C (undated)

Johnston, Dr T (6 July 1993)

Jones, Mr G (21 June 1993)

K and M Mackenzie and Co. (13 December 1995)

Kent-Vote, Mr N P (5 July 1993)

Kirby, Mr M (5 August 1993)

Lambert, Mrs A (25 May 1993)

Law Society of New South Wales (28 July 1993)

Legal Aid Commission (30 July 1993)

Lenane, Dr J (21 July 1993)

Lindsay, Ms J (28 May 1993)

Lovren, Mr R (11 February 1998)

MacDonald, Mr G (23 September 1993)

McEvoy, Mr J (4 June 1993)

Mc Gee, Ms M (24 June 1996)

Mental Health Co-ordinating Council Inc. (7 July 1993)

Mikeli, Ms L (undated)

Ministry for the Status and Advancement of Women (26 August 1998)

National Children's and Youth Law Centre (6 August 1993)

National Pay Equity Coalition (19 November 1993)

New South Wales Bar Association (October 1994)

New South Wales Council for Intellectual Disability (8 May 1996)

New South Wales Council of Churches (9 June 1993)

New South Wales Department of Industrial Relations, Employment, Training and Further Education (November 1993)

New South Wales Department of Health (8 June 1993)

New South Wales Independent Teachers' Association (31 May 1993)

New South Wales Parents' Council Inc. (8 July 1993)

New South Wales Women's Advisory Council (29 July 1993)

Norton, Mr A (28 May 1993)

O'Farrell, Mr B R (12 July 1995)

Office of the Director of Equal Opportunity in Public Employment (7 October 1993)

Owen Trembath & Associates (3 April 1992)

Palmer, D J (19 May 1993)

Patterson, Mr R (22 April 1996)

Peck, Mr K (4 May 1993)

People with Disabilities (New South Wales) Inc. (13 July 1993)

Presbyterian Church of Australia (10 August 1995)

Privacy Committee (3 August 1993)

Public Service Association (4 February 1994)

Quirk, Mr A (21 July 1993)

Rendall, Mr P P (3 May 1993)

Rice, Mr C E (28 May 1993)

Riders Rights Australia (29 May 1993)

Rieneck, Mr B P (12 February 1994)

Right to Life Association (New South Wales) Inc. (31 May 1993)

Robertson, Mr D (16 June 1993)

Ryan, Ms S (30 July 1993)

St. John's Anglican Church (20 March 1993)

Santin, Mr M (8 February 1994)

Scientologists Taking Action For Non-Discrimination (8 February 1994)

Segal, Mr H (9 February 1994)

Seventh Day Adventist Church (31 May 1993)

Sex Workers Outreach Project (20 May 1998)

Smith, Ms M (30 July 1993)

Solomon, Mr L (11 September 1996)

Stucken, Mr A (31 May 1993)

Thompson M A (14 September 1998)

Transgender Liberation Coalition Inc. (22 December 1993)

Transgender Liberation Coalition Inc. (20 March 1998)

Transexual Action Group (26 July 1993)

University of Newcastle, Equal Employment Opportunity Unit (29 July 1993)

Varnai, W (10 June 1993)

Wallbank, Mr R (undated)

Walker, J (6 May 1993)

Walsh, Ms H (2 April 1997)

Webster, Me E (22 July 1998)

Wesley Mission (22 September 1993)

Wright, Mr W (19 March 1993)

The Attorney General's Department has also forwarded to the Commission a number of representations from various individuals and interest groups on issues of concern which the Commission has considered in this Report.



**REPORT 92 (1999) - REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)**

**Appendix D: List of Honorary Consultants**

Mr John Basten QC  
Barrister

Ms Phillipa Hall  
Deputy Director-General, Department For Women

Nancy Hennessy  
Deputy President, Administrative Decisions Tribunal

Professor Rosemary Hunter  
Principal Research Officer, Justice Research Centre

Mr Simon Rice  
Director, Law Foundation

Mr David Robertson  
Barrister

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#### Commonwealth

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Commonwealth Electoral Act 1918	5.184
Conciliation and Arbitration Act 1904	2.77
Disability Discrimination Act 1992	2.9, 2.27, 2.28, 2.30, 2.31, 2.34, 2.52, 2.66, 3.45, 3.63, 4.7, 4.100, 4.141, 4.145, 4.192, 4.193, 4.210, 4.211, 4.221, 4.222, 4.224, 4.225, 4.245, 4.265, 4.273, 4.274, 4.276, 5.61, 5.62, 5.71, 5.79, 6.42, 6.49, 6.79, 6.128, 6.212, 6.273, 6.283, 6.291, 6.293, 6.299, 6.300, 8.227, 8.231
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<b>s 29</b>	4.299
<b>s 47</b>	6.12
Federal Court Act 1976	10.67
<b>Part IVA</b>	9.87, 9.88, 9.89
Human Rights and Equal Opportunity Commission Act 1986	2.9,
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Industrial Relations Act 1988	2.37
<b>s 152(1A)</b>	2.79, 2.84
<b>s 170DF(1)(f)</b>	6.388
Insurance Contracts Act 1984	6.292
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<b>s 64</b>	2.90
Life Insurance Act 1945	2.63, 6.90, 6.291
<b>s 78</b>	6.290
Marriage Act 1961	5.54
National Health Act 1953	4.298
Occupational Superannuation Standards Act 1987	6.367
Racial Discrimination Act 1975	2.9, 2.15, 2.16, 2.17, 2.18, 2.19, 2.20, 2.34, 2.47, 2.48, 2.51, 2.52, 2.65, 2.66, 3.5, 3.43, 3.44, 4.4, 4.7, 4.29, 4.35, 4.91, 4.100, 4.141, 4.176, 4.192, 4.207, 4.224, 4.245, 4.265, 4.273, 4.275, 5.9, 6.49, 6.79, 6.80, 6.98, 6.104, 6.146, 6.151, 6.154, 6.156, 7.57, 7.108, 7.134, 7.168, 7.197, 7.204, 8.227, 8.229, 10.16
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<b>s 9</b>	4.20, 4.23, 4.24, 4.25, 4.26, 4.27, 4.28, 4.29, 4.35, 4.140, 4.245
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<b>s 13</b>	4.140
<b>Part IIA</b>	7.105, 7.109, 7.110
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Sex Discrimination Act 1984	2.9, 2.21, 2.22, 2.25, 2.26, 2.34, 2.45, 2.46, 2.52, 2.66, 2.67, 2.68, 2.69, 3.46, 3.102, 3.104, 3.106, 3.111, 4.7, 4.78, 4.100, 4.107, 4.119, 4.125, 4.141, 4.143, 4.145, 4.177, 4.180, 4.192, 4.209, 4.224, 4.225, 4.247, 4.256, 4.273, 4.274, 4.276, 5.27, 5.39, 5.44, 5.191, 5.192, 5.194, 6.12, 6.18, 6.19, 6.49, 6.98, 6.99, 6.106, 6.114, 6.128, 6.173, 6.174, 6.175, 6.178, 6.193, 6.196, 6.202, 6.203, 6.204, 6.209, 6.212, 6.227, 6.228, 6.229, 6.230,

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