

REVIEW OF SOUTH AUSTRALIAN EQUAL OPPORTUNITY LEGISLATION

FRAMEWORK PAPER

Comment is invited no later than **12 January 2004** and should be sent to:

Equal Opportunity Act Review
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**Government
of South Australia**

REVIEW OF EQUAL OPPORTUNITY LEGISLATION

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Introduction - Government Policy

It is the policy of the Rann Labor Government to review Equal Opportunity law. Chapter 13 of the Labor Party policy platform, dealing with Justice and the Law, says that Labor will:

17. *Modernise the State's Equal Opportunity and Anti-Discrimination legislation to ensure comprehensive protection of South Australians against unjustified discrimination.*
29. *Provide for anti-vilification legislation to be extended to other groups within the community as appropriate.*
33. *Review the Equal Opportunity Act to enhance its effectiveness, in particular to:*
 - *Include an increase in the time for lodging complaints and the ability of the tribunal to grant extensions of time.*
 - *Extend disability discrimination to mirror the definition of the Disability Discrimination Act.*
 - *Amend vicarious liability provisions to place onus on the employer to establish that they took all reasonable steps to prevent the discrimination, harassment or victimisation.*
 - *Ensure that provisions relating to age and industrial relations are enforceable.*
 - *Extend the grounds of discrimination, for example to include discrimination on the ground of family/caring responsibilities, locational disadvantage, including indirect discrimination; and*
 - *Extend the areas covered by the Act to include independent contractors.*
34. *Ensure that same sex relationships are recognised in the same way as heterosexual relationships in terms of the provision of the Act.*
35. *Review the current avenues of complainant support and advocacy, including representation at a hearing in the Tribunal, and ensure the adequate resourcing of advocates to assist complainants.*
36. *Ensure shorter response times for the resolution of complaints and enquiries, including timely conciliation proceedings, and whether the complaint is deemed to have sufficient grounds to proceed.*

In addition, the October 2002 Convention passed Justice Resolution 107, which says that the Government is to '*consider legislation to make the vilification of gay men, lesbians, bisexuals and transgender people, or persons regarded as such, and of persons infected with HIV/AIDS or presumed to be so, unlawful consistent with the approach adopted in New South Wales in the Anti-Discrimination Act 1977*'.

Some of the above commitments are progressing separately. For example, the Attorney-General in June 2002 released a discussion paper on religious discrimination and vilification.

Submissions closed on 30 August 2002. There was great public interest in the paper and over 3 000 submissions were received. This issue is therefore not addressed in this paper.

Similarly, the issue of discrimination against same-sex couples is the subject of a separate discussion paper published for comment in February 2003. That topic would require amendments to many other Acts apart from the *Equal Opportunity Act*, and will therefore be the subject of separate legislation.

Superannuation entitlements for the same-sex partners of members of State superannuation funds was the subject of a Private Members' Bill (the *Statutes Amendment (Equal Superannuation Entitlements for Same-Sex Couples) Bill*) recently passed by the Parliament, and was also addressed in the same-sex couples discussion paper released earlier this year.

The question of industrial relations laws is under separate consideration following the Stevens review.

The issue of paid maternity leave is under consideration at Commonwealth level and is not considered in this project.

Further, not all of the matters set out in the Government's policy require legislative change. The question of the Commissioner's response times (item 36) is one that can be addressed administratively. There is no evidence of a current problem with response times. Likewise, item 35, relating to the resourcing of the Commission's advocacy function, does not require legislative amendment. These issues are therefore not canvassed in this paper.

This paper will therefore deal with the above commitments numbered 17, 29, and 33.

The Government is concerned that amendment to South Australia's equal opportunity laws is long overdue. Whereas South Australia was once a leader in equal opportunity matters, it now lags behind other Australian jurisdictions. The aim of this review is, therefore, by the end of 2004, to have amended the *Equal Opportunity Act 1984* so as to implement Labor Party policy on equal opportunity, to the extent that this requires legislation.

Background - the Martin Review

In 1994, at the request of the former Government, Mr Brian Martin QC (as he then was) published a review of the *Equal Opportunity Act 1984* (the 'Martin Report'). The Report recommended many changes to the 1984 Act. Chief among them were:

- extension of the sexual harassment laws to cover a wider range of relationships
- amendment to the definition of 'sexual harassment'
- expansion of vicarious liability for sexual harassment
- coverage of direct discrimination on the ground of family responsibility
- coverage of independent contractors
- amendment of access-to-premises provisions to match Commonwealth law
- expansion of the definition of 'impairment' to cover mental illness and infection with HIV, preferably by adopting the Commonwealth definition of 'disability'
- coverage of relatives and associates, past and presumed characteristics
- coverage of discrimination on the ground of identity of spouse

- extension of time to complain, but removal of the discretion to extend time
- power for the Commissioner to require the complainant to produce documents and attend conciliation
- provision for representative actions
- reduction of the conflict of interest inherent in the Commissioner's role by:
 - limiting the scope of the investigative role to that needed to decide whether to conciliate
 - removing the Commissioner's role as advocate before the Tribunal
 - the appointment of an independent solicitor for this purpose
 - giving the Commissioner a power to intervene in proceedings with respect to interpretation of the Act and points of law, with the approval of the Attorney-General
 - repealing unproclaimed ss. 12 and 101.
- vesting in the District Court the jurisdiction of the Tribunal (but without changing the rules as to evidence, costs, lay members, etc.).

(Time has overtaken some of the other Martin proposals. For example, there has been separate legislation dealing with sexual harassment by judges, Members of Parliament and members of local councils,.)

The former Government had introduced a Bill to amend the Act to implement some but not all of the Martin recommendations. This Bill was debated in the Legislative Council but debate was not completed and it lapsed on the calling of the election.

This paper therefore deals both with the matters raised by the Government's policy set out above, and also the outstanding recommendations of the Martin Report.

Other jurisdictions

The South Australian *Equal Opportunity Act*, enacted in 1984, was among the earliest comprehensive pieces of equal opportunity legislation in Australia. (New South Wales was the first with the *Anti-Discrimination Act 1977*, and WA legislated at about the same time as SA). This Act replaced the earlier *Sex Discrimination Act 1975*, the *Racial Discrimination Act 1976* and the *Handicapped Persons Equal Opportunity Act 1981*. It was later amended to include discrimination on the ground of age (1991).

Since then, all other Australian jurisdictions have enacted comprehensive equal opportunity statutes (variously named Equal Opportunity or Anti-Discrimination Acts). Many of these now cover grounds not covered by the South Australian Act. Examples include discrimination on the ground of religious belief, political affiliation, caring responsibilities, spent criminal convictions and others. Further, some also proscribe vilification, for example on the ground of race, religion, and homosexuality.

South Australia has separately legislated to address racial vilification, in the form of the *Racial Vilification Act 1996*. No other type of vilification is expressly made illegal in South Australia. Of course, the general criminal law proscribes some types of speech that might also be vilificatory, such as the making of threats to harm a person or property. There are also civil and criminal laws against defamation. There is, however, no equal opportunity remedy for racial vilification or victimisation.

Vilification laws

Policy

29. *Provide for anti-vilification legislation to be extended to other groups within the community as appropriate.*

All Australian jurisdictions except the Northern Territory now prohibit racial vilification. Three jurisdictions (Victoria, Tasmania and Queensland) prohibit religious vilification. New South Wales, Queensland and Tasmania prohibit vilification on the ground of homosexuality/sexual orientation, and New South Wales also covers HIV/AIDS and transgender vilification. Tasmania also prohibits vilification on the ground of disability. Queensland now also covers vilification on the ground of gender identity.

All of these jurisdictions except Tasmania distinguish two different unlawful behaviours. One is a crime, and the other a civil wrong. Speaking generally, the civil wrong is committed where a person does a public act that incites hatred, contempt or severe ridicule of another person or a group. The crime is committed when the public act includes threats to harm a person or his or her property. This is in keeping with the ordinary criminal law, under which it is always an offence for one person to threaten to harm another, regardless of the reason.

Commonly, other jurisdictions use the term ‘vilification’, to refer to the wrong, and a ‘serious vilification’ to refer to the criminal offence. In the case of acts that are not criminal offences, they provide for a complaint to be made to the Commissioner (or equivalent) and to proceed to the Tribunal (or equivalent) if not conciliated. However, if the act constitutes a criminal offence, it may be treated differently. In New South Wales if the complaint discloses an offence of ‘serious vilification’, it is to be referred to the Attorney-General (s. 89B(2)) and Tribunal proceedings are stayed pending proceedings for the alleged offence (s. 89B(5)). In Victoria, such offences are not the subject of complaint to the Commission but are prosecuted.

In Queensland, it appears that a complaint of an offence of racial or religious vilification can be dealt with through the ordinary equal opportunity process, as an alternative to criminal prosecution, that is, the Tribunal has a criminal jurisdiction.

In Tasmania, inciting hatred is not a criminal offence but is prohibited conduct within the jurisdiction of the equal opportunity authorities, so the issue does not arise.

Racial vilification

In South Australia, under the *Racial Vilification Act 1996*, racial *vilification* is a criminal offence leading to prosecution, whereas racial *victimization* is a civil wrong, giving rise to a right to damages. ‘Vilification’ is committed when a person:

‘by a public act, incite[s] hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by—

(a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or

(b) *inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group.*’ (Racial Vilification Act, s. 4).

A ‘public act’ means:

(a) *any form of communication with the public; or*

(b) *conduct in a public place*’. (s. 3).

Racial victimization means:

‘a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race but does not include—

(a) *publication of a fair report of the act of another person; or*

(b) *publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or*

(c) *a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or exposition*’ (s. 7, now embodied in s. 37, Wrongs Act).

If the victimisation produces ‘detriment’, the person can claim damages, as provided by s. 77:

‘(2) An act of racial victimisation that results in detriment is actionable as a tort by the person who suffers the detriment.

(3) In an action for damages for racial victimisation, damages may be awarded to compensate any form of detriment.

(4) The total amount of the damages that may be awarded for the same act or series of acts cannot exceed \$40 000.’

‘Detriment’ means:

(a) *injury, damage or loss; or*

(b) *distress in the nature of intimidation, harassment or humiliation*’ (Wrongs Act, s. 37(1).)

Note that in both cases, the unlawful act must be a public act. This means that neither vilification nor victimization can be committed by a private action, such as a private conversation or telephone call in which racist remarks are made. It has to happen in a public place, or be a form of communication to the public. Examples might be publishing vilificatory material in the media, or making vilificatory statements at a public gathering.

Note also that speech does not amount to vilification or victimization just because it is rude, ignorant or culturally insensitive. Rather, to be illegal, the public act must, in the case of

vilification, threaten harm to a person or a group of persons or their property, and in the case of victimization, incite hatred, serious contempt or severe ridicule for the person or group.

Proposal

The Government considers that, although these remedies are useful, it would be better if the person victimized also had the option of a complaint under the *Equal Opportunity Act*. It would work in the same way as other equal opportunity complaints. That is, conciliation would be the first step, but if the matter could not be resolved, then the case would be heard by the Tribunal (or court, see later).

(Note that this would not apply to the criminal offence of vilification. This is because it is not appropriate to attempt to conciliate a criminal offence or a matter involving violence. It is an offence against the public (the fomenting of racial hatred in the community) as well as against the person or persons vilified. It must be proven to the criminal standard. The accused is presumed innocent until proven guilty. Such a matter is not amenable to an equal opportunity remedy. Rather, it would be the civil wrong of victimization that would be dealt with by the Commissioner for Equal Opportunity.)

The Government is concerned that people may be hesitant to take a racial victimization case to court. Plaintiffs may be discouraged by the risk of bearing the other party's legal costs if the case does not succeed, or by the formality of the process and the need to engage lawyers. In the case of some cultures, there may be a reluctance to deal with this type of problem through the court system. An equal opportunity remedy may be more attractive for any of these reasons.

There would be no cost risk in taking equal opportunity action. It also offers the complainant the benefit of free advocacy if the case goes to the Tribunal (or court). Further, equal opportunity remedies are more flexible than those available through the civil courts. Whereas the civil courts would only be able to award monetary compensation, the Tribunal (or court) could order any form of remedy, including a public apology or retraction, the provision of some benefit by the wrongdoer to the victimized person, education of the wrongdoer, or other remedies.

It would presumably be necessary for the person victimized to choose which remedy to pursue. They could not pursue both, because the intention of the law is to provide a remedy that makes up (as far as it can do) for the distress or harm they have suffered. Once this is provided by one or other avenue, the matter is at an end.

The lapsed Bill

This Bill would have provided a limited equal opportunity remedy for racial victimization (clause 51). It would have permitted a complaint to the Commissioner, and a conciliation process, but would not have provided a remedy in the Tribunal. The Government believes that a complete equal opportunity remedy should be provided.

Accordingly, the Government proposes that:

1. **There should be an equal opportunity remedy for racial victimization.**
2. **For consistency, racial victimization should have the same meaning under the *Equal Opportunity Act* as under the *Racial Vilification Act*.**
3. **The person victimized would need to choose whether he or she wished to pursue the equal opportunity remedy or the civil case.**
4. **The crime of racial vilification would continue to be dealt with by prosecution.**

Other vilification

There are no laws in South Australia at present against vilification or victimisation on other grounds. The making of threats to harm a person or his or her property are however unlawful, whatever the grounds. If someone is in fact harmed by the making of unlawful threats, he or she may be entitled to compensation from the offender under the *Criminal Law (Sentencing) Act* or, if it is an injury, the *Victims of Crime Act*. This applies just as much to threats of harm on the ground of a person's sexuality or disability, as threats made for any other reason.

The Government invites comment on whether the proposed model for racial victimization should also apply to victimization on the grounds of sexuality, gender identity, disability and HIV/AIDS infection, as has been done in some other jurisdictions. The Government also invites comment on whether there are other grounds of vilification that should be covered.

Further, the Government invites comment on whether the *Racial Vilification Act* model is an appropriate model for other kinds of vilification, or if not, what alternatives should be considered.

The Government recognizes that this may be a contentious issue, because vilification/victimization laws are sometimes perceived as restrictive of free speech. For example, a religion may hold a strong view against the practice of a particular sexuality. Adherents of the religion may feel entitled and indeed obliged by conscience to speak against the practice condemned by the religion.

It should be understood, however, that merely speaking against a particular practice does not amount to vilification or victimization in the legal sense. These terms do not, as shown above, simply refer to criticism or negative comment. Rather, they refer to the incitement of hatred, contempt or ridicule of a person or a group of persons, or the making of threats against them. Thus, for example, it would not be victimization to assert that a particular sexual practice was against God's law or would result in spiritual harm. It would not be victimization to urge people to give up that practice, or to campaign for it to be made unlawful. Victimization would only occur if the speech amounted to incitement of hatred, serious contempt for or severe ridicule of, a person or a group of persons. Vilification would only occur if actual threats were made.

As discussed above, other jurisdictions have extended their laws to cover vilification on the grounds of sexuality and HIV/AIDS infection. These may have been chosen because people in these groups are considered particularly likely to be subject to victimization. One reason might be the public fear of AIDS. There may, however, be evidence of victimization on other grounds covered by the Equal Opportunity Act and the Government would be interested to know if this is the case.

The Government invites comment on:

- a) **whether the present laws dealing with racial vilification and victimization should be extended to cover any and what other grounds, and**
- b) **whether, if the laws are extended, the model used in the Racial Vilification Act is an appropriate model.**

Time limits

Policy

33. *Include an increase in the time for lodging complaints and the ability of the tribunal to grant extensions of time.*

Three issues arise in respect of the time limit for making a complaint. They are:

- extension of the present limit
- the grounds for granting extensions, and
- the question of who should be able to grant extensions.

In South Australia, a complaint must be made within six months after the unlawful act occurs (s. 93(2)). There is no provision for an extension of time. Such an extension may, however, be possible under s. 47 or 48 of the *Limitation of Actions Act*, on application to the Tribunal.

Most other States and Territories have a twelve-month time limit. The exceptions are New South Wales and the Northern Territory, where the limit is six months. In Victoria and the ACT, and in the Federal jurisdiction, there is no time limit at all, but the Commissioner can decline a complaint that is made more than 12 months after the event.

Martin recommended extending the South Australian limit to 12 months. He commented that he had received submissions from employer groups opposing an increase in the limit. There was concern about vexatious complaints. It was argued that a genuine complaint would be made shortly after the event. The lapsed Bill would not have increased the six-month time limit.

Commonly, under South Australian law, a person who has been wronged has more than six months to take action for redress. For example, injury claims generally have a three-year time limit. An important exception is a wrongful dismissal claim, which must be brought within 21 days of the dismissal, but this reflects the practical consideration that a claim for reinstatement needs to be made early, because otherwise the job may be given to someone else.

The Government agrees that many complaints can readily be brought within six months, but it also thinks that there may sometimes be good reason why longer is needed. It therefore intends to increase the time limit to twelve months. It may be possible to address legitimate concerns of respondents, however, in the matters to be taken into account in deciding whether

to grant an extension. It is not intended that extensions would be automatic. Note that the Commissioner also has power to decline a complaint that is frivolous or vexatious.

As to whether there should be power to grant an extension when the complaint has not been made within time, Martin recommended against this. However, in the alternative, he proposed that if there were such a power, the complainant should have to show:

- good cause why the complaint was not made in time
- good cause why time should be extended, and
- that the respondent would not be unfairly prejudiced by an extension.

The lapsed Bill would have retained the time limit of six months, but would have permitted the Court to grant an extension of time, if satisfied:

- a) that there was good reason why the complaint was not made in time and
- b) that in all the circumstances, an extension would be just and equitable (clause 43).

This is broadly similar to the Martin criteria. It may not be necessary to distinguish between the requirement for 'good cause why the complaint was not made in time' and 'good cause why time should be extended', as they may tend to be inextricable in practice. The 'just and equitable' criterion allows consideration of any prejudice to the respondent.

The Government proposes to adopt these criteria. This will allow a respondent the opportunity to demonstrate any prejudice that might be caused by an extension in a particular case.

As to who should be able to grant extensions, the Government proposes that either the Tribunal (or court) or the Commissioner should be able to extend time. In other jurisdictions, the equivalent authorities generally have power to extend time. Otherwise, the complainant must first apply to the Tribunal (or court) for an extension of time, before the matter can even be investigated by the Commissioner. This causes further delay.

The Government proposes that:

- **the present time limit of six months should be replaced with a limit of twelve months;**
- **extension should be possible. The complainant should have to show good reason, and any prejudice to the respondent would need to be considered; and**
- **the Commissioner, as well as the Tribunal, should be able to extend time.**

Comment is invited.

Definition of 'disability'

Policy

33. *Extend disability discrimination to mirror the definition of the Disability Discrimination Act.*

All States and Territories except South Australia now use wide definitions of disability or impairment in their equal opportunity legislation. The Commonwealth *Disability Discrimination Act 1992* ('DDA') uses a very wide definition, covering such matters as mental illness and HIV infection (not covered by the South Australian Act).

The South Australian Act speaks of 'impairment', which is defined to exclude mental illnesses and infections that do not produce symptoms. The Act covers physical and intellectual impairment only. It is the only Australian Act still limited in this way. In passing, the Government notes that the term 'impairment' is now less commonly used than 'disability', since the passage of the Commonwealth legislation. It proposes to substitute the term 'disability'.

The Martin Report recommended that the Act be amended to cover mental illness and infection with HIV. It proposed that the existing definitions of 'impairment' be replaced by a provision mirroring the DDA definition of 'disability'.

The lapsed Bill took a different approach (clause 4). It would have amended the definition of 'impairment' to include mental illness, defined to mean 'any illness or disorder of the mind'. (This definition was taken from the *Mental Health Act*, where it is used, for instance, in the context of compulsory treatment and detention of patients.) It would also have expanded the definition of 'physical impairment' to cover infection with the HIV virus. Although this would have rectified the two principal deficiencies pointed out by Martin, the result would still have been a narrower coverage than that of the DDA.

The Government proposes to accept the Martin recommendation.

The lapsed Bill would have permitted reasonable measures to stop the spread of HIV (clause 29). This is considered too narrow under the proposed expanded definition. Instead, the Government proposes to mirror the Commonwealth exceptions, allowing reasonable measures to stop the spread of infectious disease.

The Government proposes to:

- **replace the term 'impairment' with the more modern 'disability'**
- **mirror the definition of 'disability' used in the Commonwealth DDA, and**
- **mirror the Commonwealth defence of reasonable measures taken to stop the spread of infection.**

Comment is invited.

Vicarious liability

Policy

33. *Amend vicarious liability provisions to place onus on the employer to establish that they took all reasonable steps to prevent the discrimination, harassment or victimisation.*

Although, in general, an employer is liable for unlawful acts of discrimination or victimisation by an employee, this does not apply to sexual harassment. The employer is liable only if it 'authorised, instructed or connived at' the harassment (s. 91(2)).

Other jurisdictions

Most other jurisdictions make no distinction between the vicarious liability of the employer for sexual harassment, and vicarious liability for other unlawful acts.

New South Wales is the only other State to protect an employer in respect of an unauthorised act of an employee. In New South Wales, the employer is not liable if it did not 'authorise' the action, either expressly or by implication, and the employer has a defence if it took all reasonable steps to prevent the contravention (s. 53). This applies equally to sexual harassment and other contraventions.

In Victoria, if the employee commits sexual harassment, the employer is taken to have contravened the Act (s. 102). It is a defence for the employer to prove that it took 'reasonable precautions to prevent the employee or agent contravening the Act'. The Queensland provisions (s. 133) and the Western Australian provisions (s. 161) are very similar. Similarly, also, in the ACT, a person or body is liable for the acts of an employee unless it proves that reasonable precautions were taken and due diligence exercised to avoid the conduct (s. 108I).

In Tasmania, s. 104 imposes an obligation on an organisation to ensure that:

- its members, officers and employees are made aware of the discrimination and prohibited conduct to which the Act applies
- the terms of any order made against the organisation in relation to prohibited conduct are brought to their notice
- no member, officer or employee engages in, repeats or continues such conduct.

If it fails to do so, it is liable for the employee or agent's contravention.

The Northern Territory Act uses the same general rule as the Commonwealth, but goes on to stipulate the matters that must be considered in determining whether a person has taken 'all reasonable steps'. These are:

- the provision of anti-discrimination training
- the development and implementation of an equal employment opportunity management plan
- the publication of an anti-discrimination policy
- the financial circumstances of the person, and
- the number of workers (s. 105(3)).

Martin recommended that the law be changed so that the employer is vicariously liable in the ordinary way, subject to an exemption mirroring s. 106(2) of the Commonwealth *Sex*

Discrimination Act. That section provides a defence of having taken all reasonable steps to prevent the employee or agent from doing acts of the prohibited kind. His reasoning was that, as long as the employer has no liability for actions in which it was not involved, there is less incentive for the employer to take steps to ensure that a workplace is free of sexual harassment. Section 87(7) provides that employers must take such steps as are reasonably practicable to prevent sexual harassment in the workplace, but damages cannot be awarded unless the employer instructed, etc. the harassment.

Martin also noted that it would be a mistake to assume that the South Australian Act is the only source of vicarious liability of the employer for sexual harassment. Under the Commonwealth *Sex Discrimination Act*, s. 106, an employer may be liable for the acts of an employee unless it is shown that the employer took 'all reasonable steps' to prevent the harassment. This will apply to South Australian private sector employers, at least in the case of harassment of women.

Martin recommended that the South Australian law should mirror the Commonwealth provision. He also canvassed the possibility that a defence could be provided where an employer has implemented an appropriate policy (though he had in mind that these would be officially published, rather than devised by employers).

The lapsed Bill would have applied the ordinary vicarious liability provisions of the Act to sexual harassment (clause 40). It provided a defence of 'reasonable steps', but in addition would have provided that the defence was made out if the employer proved that it had in force a policy for prevention of sexual harassment, and had taken reasonable steps to implement and enforce the policy, including reasonable steps to make staff aware of the terms of the policy and prompt investigation of any complaint. If the employer could make out the defence, there would be no vicarious liability and the employee would be personally liable.

The Government agrees with Martin that the present law should be changed. Rarely, if ever, will a complainant be able to show that the employer actually instructed, authorised or connived at the act, but there may often be cases where the employer could have done more to prevent it.

On the other hand, the Government acknowledges that, particularly in the case of a large employer, it will not always be possible for the employer to step in to prevent acts of sexual harassment by staff members. That degree of supervision and surveillance of employees may be impossible or undesirable. The employer may have to discharge its duties not by the individual supervision of staff, but through the promulgation and promotion of policies against sexual harassment. Accordingly, the Government proposes that, although the present restriction on the employer's liability should be removed, the employer should be able to defend a complaint if it had in force, and acted on, a policy against sexual harassment.

This should help to prevent sexual harassment in the workplace, without imposing unduly burdensome obligations on employers.

The Labor Opposition filed amendments to the lapsed Bill. These amendments would have provided that the only way in which the employer could avoid vicarious liability for sexual harassment would be to show that:

- a) the employer had in force at the relevant time a policy an appropriate policy for the prevention of an act of sexual harassment, and
- b) the employer had taken reasonable steps to implement and enforce the policy including:
 - reasonable steps to make its employees and agents aware of the terms of the policy and
 - prompt investigation of any complaint and appropriate action to deal with it.

That is, the main difference between the lapsed Bill and the Labor Opposition's amendments lay in whether the employer should be able to defend successfully in a case where he or she had not met these requirements. The Government proposes that there should be no other defence.

The Government proposes that:

- **employers should be vicariously liable for sexual harassment, whether or not they instruct, authorise or connive at it,**
- **an employer should, however, be able to defend a complaint on the ground that it used all reasonable diligence to prevent the harassment, and**
- **this defence can be established by showing that the employer had in force a policy against sexual harassment, and had taken reasonable steps to make staff aware of the policy, and to investigate complaints promptly and deal with them.**
- **The defence of having taken all reasonable steps cannot be established in any other way.**

New grounds of discrimination

Policy

33. *Extend the grounds of discrimination, for example to include discrimination on the ground of family/caring responsibilities, locational disadvantage, including indirect discrimination.*

Family/caring responsibilities

At present, the *Equal Opportunity Act* does not cover discrimination against a person on the ground of his or her family responsibilities, for example, responsibilities to care for a child or an elderly parent. All other States and Territories now cover this, at least to the extent of responsibilities as a parent. Martin recommended that the South Australian Act be extended to cover direct discrimination on this ground. The lapsed Bill proposed to do so. The Government proposes to adopt this recommendation. Several issues arise:

- a) *Scope of coverage*

An important question is which caring responsibilities should be covered. The lapsed Bill would have defined ‘caring responsibilities’ as responsibilities to provide ongoing care for a spouse, parent, child, grand-parent or grand-child (clause 4). This ambit was derived from s. 77 of the *Industrial and Employee Relations Act*, the provision dealing with the entitlement to use sick leave to care for a family member. The Bill would, however, have defined a ‘child’ to include any person toward whom the carer had at any time stood *in loco parentis*. This could include a foster child or step-child, or any child toward whom the person had assumed parental responsibilities, even if not related.

In most States and Territories, caring responsibilities towards members of the family or household are covered, but in Victoria, the ACT and Western Australia go further, covering any ongoing responsibility to care for another person, even if not a member of the family or household.

The New South Wales law bases its coverage on immediate family ties or legal responsibility for the person. Thus, it covers responsibility to care for a parent, spouse, child, grandparent, grandchild and sibling (and equivalent step-relationships, and relationships through a former marriage). Further, it covers situations of legal responsibility, such as toward persons under one’s legal guardianship, persons for whom one has parental responsibility under a law, or children in the person’s authorised care under child welfare laws (s. 49S). The New South Wales Law Reform Commission Report on Anti-Discrimination Laws (1999) proposed a move away from this approach, recommending extension of the Act to cover carer responsibilities, defined as ‘responsibilities to care for or support another person in a significant relationship involving dependency, commitment, care or support’ (Rec. 41).

The Victorian Act does not require any family or legal tie between the parties, nor that they share accommodation. A carer is any person ‘on whom another person is wholly or substantially dependent for ongoing care and attention’, excluding commercial carers (s. 4(1)). (The ACT provision is similar but does not exclude paid carers, s. 4(1)). No other relationship is required apart from the reliance on care. The term ‘substantially dependent’ however may limit the range of persons toward whom any one person could be considered a carer.

Western Australia covers ‘family responsibility or family status’, which extends to having responsibility for the care of another person, apparently regardless of whether the person is in fact a family member (s. 4(1)), but excluding paid carers.

Queensland and the Northern Territory take a narrower approach, limiting protection to ‘parental status’ (Qld. s. 4) or ‘parenthood’ (NT s. 4).

Tasmania covers ‘family responsibilities’, defined to mean responsibilities to care for or support a child who is wholly or substantially dependent, or any other immediate family member in need of care and support (s.3). An ‘immediate family member’ includes a spouse, child (of any age), parent, grandparent, grandchild or sibling of a person or their spouse. Because the definition is inclusive, other relations may also be covered.

The Labor Opposition proposed amendments to the lapsed Bill to extend the proposed definition of caring responsibilities to cover any responsibility to provide ongoing care for another person, except where the care was provided commercially. It proposes that this should be the law. Under this definition, it would not be necessary to establish any relationship between the carer and the recipient of care, but only that a responsibility to

provide care existed. Such a responsibility might derive from a family relationship, but could equally derive from something else, such as an established history of care for that person. It would thus cover moral, as well as legal, responsibilities. This approach avoids drawing arbitrary distinctions on the ground of blood or marriage ties. It also acknowledges cultural obligations that are not based on such ties.

An alternate view is that the law should particularly protect caring responsibilities of the kind that arise within a family or household. These are social obligations that fall on everyone. Voluntarily-assumed caring duties towards people who are not part of the carer's family or household, such as neighbours, fellow-members of a church or club, or friends should not be covered because it is the person's choice whether to assume these. Arguably, it is not reasonable to expect employers to accommodate them in the workplace. It may be difficult to know when they arise. This could lead to litigation and cause uncertainty for employers and others as to their legal obligations.

The Government proposes that the Act be extended to cover discrimination on the ground of family responsibilities.

The Government thinks this should cover responsibility to provide ongoing care for any other person, regardless of whether there is any relationship, but should not cover commercial arrangements.

Comment is invited.

b) Indirect discrimination

Indirect discrimination arises where a requirement is set that is harder for people who are of a particular sex, race, age or disability to meet, and the requirement is not reasonable. Martin proposed that the coverage of family responsibilities be limited, at least initially, to direct discrimination. All other States and Territories, however have legislated to cover both direct and indirect discrimination on the ground of family responsibilities, some since Martin reported.

The lapsed Bill would not have extended to indirect discrimination (clause 37).

Indirect discrimination is likely to be the most common form of discrimination on the ground of family responsibilities. It is unlikely that a person would be refused a job, for example, because he or she had school-age children, or an elderly parent at home. It is more likely that the person may have to meet requirements that pose a particular difficulty for him or her because of the responsibility to care for those people. An example might be a requirement to work late, or on weekends, or to work varying shifts.

Indirect discrimination only occurs where the requirement is unreasonable. As long as the requirement made by the employer is reasonable, it is not unlawful. Thus, for example, it would not be unlawful for an employer to require a person to work shifts, if it acted reasonably in doing so, even if this interfered with the employee's ability to care for his or her children. In deciding whether the employer had acted reasonably, no doubt the Tribunal (or court) would consider such matters as whether other workers were asked to work shifts,

whether there were options for workers to exchange shifts, and so on. The mere fact that the requirement interfered with the person's caring responsibilities would not mean that discrimination had occurred.

Accordingly, the Government proposes that the Act be extended to cover indirect discrimination on the ground of family responsibilities.

The Government proposes that the Act cover both direct and indirect discrimination on the ground of family responsibilities.

c) *Breastfeeding*

The Martin Report specifically referred to discrimination against nursing mothers. It recommended that the proposed family-responsibilities provisions cover the responsibility to feed a child, whether by breast-feeding or otherwise. The lapsed Bill would have implemented this. Other Australian jurisdictions except New South Wales and Western Australia also cover this. In New South Wales, the Law Reform Commission has recommended including breast-feeding as a separate ground of discrimination (Rec. 31).

The Government proposes the specific inclusion of breastfeeding, to avoid doubt.

2. Locational disadvantage

The Act does not, at present, cover discrimination on the ground of a person's local origin. As yet, no other jurisdiction has this ground of discrimination. This matter was not raised in the Martin Report nor covered by the lapsed Bill. It is Government policy to consider an amendment to cover this.

The Act now covers discrimination on the ground of a person's national origin ('country of origin') as part of race discrimination (s. 5(1)). Thus, a person who is the object of discrimination because he or she comes from a particular country, has a right to a remedy. The term 'country' is not defined but it is likely to have its natural meaning and probably does not extend to local origin, in the sense of coming from a particular town or suburb. It may be, however, that some people experience discrimination because of the town or suburb from which they come. The Government would be interested to know if there is evidence of discrimination of this kind. Since local origin is irrelevant to a person's entitlement to employment, accommodation, goods and services, it should be covered by the Act.

The Government proposes to add local origin as a ground of discrimination.

3. Other grounds

a) Potential pregnancy

The South Australian Act does not deal expressly with discrimination on the ground that a woman might in future become pregnant. This ground may well be an aspect of sex discrimination, however, because sex discrimination includes discrimination on the ground of characteristics that appertain generally to persons of one sex, and characteristics generally imputed to persons of that sex (s. 29(2)(c)). It is probable that one or both of these covers discrimination on the ground that a woman might become pregnant.

For the same reason, it is likely that most Australian jurisdictions cover discrimination on the ground of potential pregnancy. In some, express provision has been made. For example, in New South Wales ‘the fact that a woman is or may become pregnant’ is expressly declared to be a characteristic that appertains generally to women, and so is covered by the sex discrimination provisions (s. 24(1B)). The New South Wales Law Reform Commission has also recommended that pregnancy, including potential pregnancy, should be a separate ground of discrimination (Rec. 31). In Tasmania, pregnancy is defined to include ‘child-bearing capacity’ (s. 3), so that there is no need for a separate ground of ‘potential pregnancy’. The Northern Territory takes a similar approach.

The Commonwealth *Sex Discrimination Act* covers potential pregnancy, and defines it to mean:

- (a) the fact that a woman is or may be capable of bearing children, or*
- (b) the fact that the woman has expressed a desire to become pregnant, or*
- (c) the fact that the woman is likely, or is perceived as being likely to become pregnant’.*

The lapsed Bill would have added this ground of discrimination, but proposed a different definition taken from (c) above (‘that the woman is likely, or is perceived as being likely, to become pregnant’, clause 4). In substance, this is little different from the Commonwealth provision, but the Government considers that, unless there is some reason why a different definition is to be preferred at State level, it would be best to adopt the terms of the Commonwealth definition, so that there can be no doubt that there is an equivalent remedy at State as well as at Federal level.

The Government proposes to add this ground of discrimination. It proposes to use the *Commonwealth Sex Discrimination Act* definition.

b) Political belief or activity

All other States and Territories except New South Wales have prohibited discrimination on this ground. In New South Wales, the Law Reform Commission has recommended that this ground be added to the Act.

If this ground is added to the Act, it is necessary to consider its scope. In Victoria, ‘political belief or activity’ is defined to mean:

- (a) holding or not holding a lawful political belief or view;*

(b) *engaging in, not engaging in or refusing to engage in a lawful political activity*' (s. 4(1)).

Likewise, in Tasmania, 'political activity' is defined to mean 'engaging in, not engaging in, or refusing to engage in, political activity, and 'political belief or affiliation' means 'holding or not holding a political belief or view' (s. 3).

As well as protecting those who hold political views or engage in political activity, these definitions protect those who refuse for conscientious reasons to engage in political activity, as well as those who simply hold no political views.

In Queensland, Western Australia and the ACT, on the other hand, the terms 'political belief or activity' (Queensland) and 'political conviction' (Western Australia and ACT) are used without being defined. The Western Australian Act specifically states that 'political conviction' includes the lack or absence of such conviction (s. 4(3)).

Whether or not defined, it is likely that, based on the case law, these terms would include beliefs or activities relating to the policies, structure, composition, roles, obligations, purposes or activities of government.

The Government is inclined to the view that, if this ground is added, a definition similar to that used in Victoria and Tasmania would be suitable. This would give comprehensive coverage.

It would, however, be necessary to provide an exception for the case where a particular political belief or affiliation is a genuine occupational requirement. Examples would include the employment of Ministerial staff, or of staff of political parties and electoral staff. In those cases, political belief or activity is a genuine occupational requirement. This has been done in Queensland, by s. 25, which provides:

'A person may impose genuine occupational requirements for a position.

Examples of genuine requirements for a position -

Example 1

Selecting an actor for a dramatic performance on the basis of age, race or sex for reasons of authenticity.

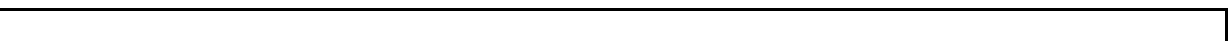
Example 2

Using membership of a particular political party as a criterion for a position as an adviser to a political party or a worker in the office of a member of Parliament.

Example 3

Considering only women applicants for a position involving body searches of women.'

The Government considers that, if this ground is added, the Act should include an exception for the case where political belief or affiliation is a genuine occupational requirement.



The Government invites comment on:

- **whether the Act should include a new ground of discrimination on the basis of political belief or activity, and if so**
- **what should be covered and**
- **what exceptions are appropriate.**

c) Industrial activity

All other States and Territories except New South Wales and Western Australia prohibit discrimination on the ground of a person's participation in industrial activity. A comprehensive approach is illustrated by the Victorian Act, which covers being or not being a member of a trade union, joining or refusing to join an industrial organisation, and taking part, not taking part or refusing to take part in lawful industrial activity promoted by an industrial organisation. The Tasmanian Act also covers 'proposing to join' an industrial organisation. In these cases, coverage is comprehensive.

A simpler and more limited approach is the Queensland approach, which refers to 'trade union activity' without defining it. It is likely, however, that the Queensland legislation does not cover refusal to join a union or refusal to participate in union activity. It is also perhaps unclear whether it covers mere membership, without participating in any particular activity.

The ACT takes a different approach, covering 'membership or non membership of an association or organisation of employers or employees'. That is, there is no coverage for the activity itself, but only for affiliation with the organisation.

The Government invites comment on whether this ground should be added to the Act. If it is to be added, comment is invited on its scope. One issue is whether it should cover membership, activity or both. Another is whether the protection of the Act should extend also to non-membership and refusal or failure to participate in activities.

Comment is invited on whether the Act should cover discrimination on the ground of industrial activity and if so, what should be the scope of the provision.

d) Irrelevant criminal record

Two jurisdictions (Tasmania and the Northern Territory) specifically prohibit discrimination on the ground of a person's irrelevant criminal record, defined to include irrelevant offences and irrelevant criminal charges or prosecutions. Two others (Western Australia and the ACT) prohibit discrimination on the ground of spent convictions under their *Spent Convictions Acts*, that is, where the person had been convicted of an offence (generally, excluding the most serious offences) and a certain number of years had elapsed without further offending. South Australia has no such Act.

It may be useful to distinguish these two cases. If a person has been investigated in connection with an offence, charged, and even proceeded against, but has not been found guilty of an offence, then as a matter of law the person is considered innocent. In that case, it would be unfair to treat the person unfavourably on the ground of the police action against

him or her. The Government seeks comment on whether the Act should provide that a person must not be subjected to discrimination on the ground that he or she:

- has been investigated by police in connection with an offence
- has been charged with an offence without having been found guilty
- has been reported to police as a suspect in connection with an offence
- has been questioned by the police in connection with an offence.
- has been the defendant in criminal proceedings that were withdrawn or were not completed.

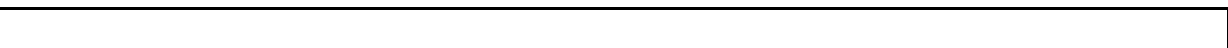
It is, perhaps, misleading to speak of such situations as a person's 'criminal record', and it may be more useful to refer to a person's 'dealings with the police' or 'police history'. Arguably, a person should not be subjected to unfavourable treatment simply because he or she has come under suspicion in connection with an offence.

The second situation is where a person has in fact been found guilty, or has pleaded guilty, to an offence. Here, either of two views might be taken. Some would argue that the fact that the person has committed an offence is a relevant matter to be taken into account in future dealings with that person. It goes to the person's general character. On that view, it is fair to take into account, in one's conduct toward that person, the fact that he or she is a person capable of criminal conduct. This may justify unfavourable treatment.

The other view is that one should also weigh the nature of the offence and its relevance to the circumstances of one's dealings with that person. For example, the fact that the person has a drink-driving conviction might be relevant to the question whether to hire that person as a taxi driver, but would not be relevant to selling land to them. This view allows for the fact that not all offences go to character in the same way. A difficulty is, however, that it is not always clear whether a conviction is relevant to a particular situation. On the one hand, a conviction for sexual offences against children would clearly be relevant to a decision whether to hire a person to work with children. On the other, it is less clear whether a conviction for assaulting another adult should be taken into account. Opinions might legitimately differ. A conviction for fraud would not, on this argument, generally be relevant, but it might be if it were a conviction for claiming to have professional qualifications that the person did not have.

An intermediate situation arises where a person has been found guilty of an offence at first instance, but has later been acquitted on appeal. On one view, the fact of the conviction remains relevant, even though the conviction has been overturned. On the other, the person is entitled to be regarded as innocent in just the same way as if he or she had never been charged.

Further, some jurisdictions have spent convictions legislation. The effect of such legislation is that convictions for certain lesser offences are expunged from a person's record after a substantial period of good behaviour. Such legislation may also provide that there is to be no discrimination against the person on the ground of a conviction that is spent. There is at present no spent convictions legislation in South Australia so there is no necessity for the Act to deal with this issue. If such legislation is considered by the Government in future, then this issue would be canvassed in that context.



The Government invites comment on whether the Act should be extended to cover discrimination on the ground of:

- **dealings with the police, where a person has not been found guilty of any offence, or**
- **a finding of guilt, plea of guilty or a conviction.**

If the Act should cover the latter situation, how and to what extent should it deal with criminal offending that is relevant to the situation? How are legitimate differences of view about what is relevant to be accommodated?

How should the case where a person has been first convicted, and later acquitted, be dealt with?

e) Irrelevant medical record

Tasmania and the Northern Territory cover irrelevant medical record as a separate ground of discrimination. The Government considers that, if the DDA definition of ‘disability’ is adopted, and the coverage of the Act is extended to past attributes, as are proposed, this will achieve the same results. This is because the Act would then cover:

- any past illness, injury or disability
- any disability that may exist in the future, and
- any existing infection that could later cause disease.

It is difficult to imagine any other condition that would be disclosed by the person’s medical record and might give rise to discrimination. There is therefore no need for express coverage of irrelevant medical record as a separate ground.

The Government does not propose to add this ground to the Act, because the same matters are covered by the proposed adoption of the Commonwealth definition of ‘disability’.

f) Occupation or trade

The ACT alone has a provision prohibiting discrimination on the ground of the person’s profession, trade, occupation or calling. This might be relevant where a person belongs to an occupation that, although lawful, is unpopular or frowned-upon.

The Government would be interested to know of any evidence that this type of discrimination presents a problem in South Australia. In principle, the Government thinks that a person’s occupation or trade is generally irrelevant to such matters as the person’s access to goods and services, to education and so on. Comment is invited.

The Government invites comment on whether the Act should cover discrimination on the ground of a person's occupation or trade.

If so, comment is invited on any appropriate exceptions.

g) Physical features

The Government invites comment on whether the Act should include a new ground of discrimination on the ground of physical features. So far, only Victoria has so legislated.

The Victorian Act prohibits discrimination on the ground of physical features, defined to mean 'a person's height, weight, size or other bodily characteristics' (s. 4(1)), in the areas of employment, education, goods and services, disposal of land, accommodation, clubs, sport and local government. Some exceptions are provided, for example, in the case of dramatic or artistic performances, photographic or modelling work, and reasonable requirements imposed by employers or qualifying bodies. Service providers can discriminate on the ground of physical features if the person requires the service to be provided in a special manner because of the feature and this cannot reasonably be done. There do not appear to be any decided cases on the application of this provision as yet.

Examples of this type of discrimination might include refusing to let a flat to a very underweight person because of a suspicion that he or she may be drug-addicted, or refusing to admit a person to a club because of tattoos or piercings.

It can be argued that this ground is especially relevant to women, because of cultural tendencies to evaluate women based on their appearance. It might, however, also be relevant to persons who are judged on physical appearance in other ways.

The Government invites comment on how widespread such discrimination is in South Australia, whether it is serious in its effects and whether including this new ground in the Act would be of value in reducing it.

If it is desirable to include such a ground in the Act, what if any exceptions would be required?

4. Independent contractors

Policy

33. *Extend the areas covered by the Act to include independent contractors.*

All other States and Territories cover independent contractors. Martin recommended this and the lapsed Bill would have implemented it.

Changes in the workplace mean that many people now work as independent contractors, but in similar circumstances to employees. Criteria such as the person's race, age or sexuality are equally irrelevant in deciding whether to deal with this person as a contractor as they are

when deciding whether to employ him or her. The Government therefore proposes to extend the Act to cover independent contractors. As with employees, however, the Government intends that these rules should not apply in the private home.

The Government proposes to extend the Act to cover independent contractors.

Comment is invited.

5. Sexuality

Policy

34. *Ensure that same sex relationships are recognised in the same way as heterosexual relationships in terms of the provision of the Act.*

The particular question of equality for same-sex couples is dealt with separately in the Government's discussion paper and is not canvassed here. Amendments arising from that paper would cover many other Acts as well as the *Equal Opportunity Act*.

However, the Act is also limited in some respects in the protection it gives on the ground of sexuality, as compared with the protection against other types of discrimination. This arises in three areas.

a) Religions

A religion may discriminate on the ground of sexuality in certain respects. This exception is necessary to respect the tenets held by some religions about sexuality. The Government does not intend to alter the existing law in respect of the ordination of priests, the training of candidates for ordination, or other practices of a body established for religious purposes that are necessary to avoid injury to the religious susceptibilities of the adherents of the religion (s. 50(1)).

The Government does, however, invite comment on the s. 50(2) exemption. This covers the case of an institution that is not a religious institution in itself but is administered in accordance with the precepts of a particular religion. This could include, for instance, a school, an aged care facility or a welfare organisation. Under the present law, such institutions can lawfully discriminate on the ground of sexuality in the administration of the institution, if the discrimination is founded on the precepts of the religion. Hence, for example, a church school could lawfully decline to hire a homosexual person as a teacher.

No other Australian jurisdiction specifically exempts religious bodies in relation to sexuality discrimination. The comparable New South Wales provision, for example, is limited to the acts or practices of a body 'established to propagate religion' (s. 56(d)). The Victorian provision simply exempts discrimination that is 'necessary ... to comply with the person's genuine religious beliefs or principles' (s. 77). Victoria also provides a special exception for religious schools (s. 76). Western Australia exempts an 'act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of

that religion' (s. 72). The Tasmanian exception is similar (s 52), as is the NT law (s.51) and the ACT s. 32. The ACT also has a specific exemption for discrimination on any grounds by an educational institution conducted in accordance with the precepts of a particular religion.

Of interest, comparable Queensland provisions have recently been amended to restrict the corresponding exemption so that religious organisations cannot refuse to employ staff on the ground of their sexuality, but, if it is a genuine requirement that staff act in a way consistent with the religious beliefs, then they must not in the course of work openly engage in activity contrary to the beliefs of the religion (s. 25(3)). The amendments also make clear that it is a genuine occupational requirement for a religious school to require that staff be of the relevant religion.

Some of these institutions receive substantial Government funding. The functions they carry out are not religious functions and may have close parallels in secular institutions (for example, providing education or training, social work services, housing or the like). It can be argued that a body administering public funds for a secular purpose should be required to comply with the equal opportunity standards of the community, as expressed in legislation. The fact that the secular purpose is carried out in accordance with the religious ethos, or by people of a particular religion arguably should not entitle the institution to an exemption from the general law.

Conversely, it can be argued that to remove the exemption is an unacceptable interference by the state in religious matters. On this view, the use of public funds is irrelevant. The institution exists primarily because persons of the particular religion have established it in accordance with and for the purposes of their faith. Secular parallels notwithstanding, they might argue, the institution provides a service not available from their secular counterparts because the religious ethos is all-important. That the Government recognises the value of this service by supplying funding does not give the Government a right to interfere in the delivery of the service in accordance with the religious values that are its *raison d'être*.

The Government has formed no view on this issue as yet, but invites comment.

Comment is invited on:

- a) **whether this law should be changed, and**
- b) **if so, whether the Queensland provision might strike a fair balance between competing views.**

b) *Associations*

An association may discriminate on the ground of sexuality in deciding whom to admit to membership, or in fixing its classes of membership. Only trade union and employer organisations are exempt from this rule (s. 35A).

The rule does not appear to exist in any other Australian jurisdiction, although Victoria gives 'private clubs' an exemption from all the anti-discrimination laws. A 'private club' is a social, recreational, sporting or community service club that does not occupy Crown land or receive government funding (s. 78).

The reason for the rule is unclear. It may rest on some analogy between the club and the private home, which is generally exempt from the Act. However, clubs and associations are not generally entitled to discriminate on other grounds, such as sex, race or disability.

This rule is arguably unfair. Injustice may be caused to people who are excluded from membership of an organisation, such as a professional association or a sports club, on the ground of their sexuality. There is no countervailing principle of conscience, as in the case of religion. The Government therefore proposes to abolish this exemption. Comment is sought.

The Government proposes to amend the Act so that no association may discriminate on the ground of sexuality, either in admitting persons to membership or in the conditions or classes of membership.

c) Appearance or dress

Section 29(4) permits discrimination on the basis of appearance or dress which is characteristic of, or is an expression of, the person's sexuality, as long as it is 'reasonable in all the circumstances'. This discrimination is permitted only in the employment context, that is, in relation to applicants for employment, employees, agents, contract workers and partners. (Independent contractors would also be covered if the Act is amended as proposed above.)

The provision is an exception to the general rule about discrimination on the ground of sexuality. It could arguably support forms of discrimination, such as refusal to consider a job application by a person who is wearing the clothing of the biologically-opposite sex even though that person might be willing, if offered the job, to meet the employer's dress requirements. Of course, such a refusal might not be 'reasonable', but this would be a matter for the Tribunal.

Some other jurisdictions do not advert to this issue at all. Victoria has a narrower provision, which permits an employer to:

'set and enforce standards of dress, appearance or behaviour for employees that are reasonable having regard to the nature and circumstances of the employment' (s. 24).

This is limited to employment and does not extend to contractual or partnership relationships. It reflects the fact that an employer has rights of control over employees that do not subsist in respect of other people such as job applicants, agents or partners. This provision is not specific to sexuality.

It can be argued that the Victorian exemption is broader than the South Australian exemption, in that it is not limited to sexuality and it extends to 'behaviour'. However, because the South Australian exception appears anomalous and because it is specific to sexuality, a provision similar to that in the Victorian legislation may be preferable, and comment is invited.

The Government invites comment on whether s. 29(4) should be retained, or should be replaced with a provision similar to the Victorian s. 24.

6. Support and Advocacy

Policy

35. *Review the current avenues of complainant support and advocacy, including representation at a hearing in the Tribunal, and ensure the adequate resourcing of advocates to assist complainants.*

a) Complainants

Discriminatory practices are more likely to occur in situations where people do not share power, information or resources on an equal basis. It is not surprising therefore that complainants are more often than not subordinate in some way to respondents. They may be an employee, or seeking an essential service, for example. Complainants can and do represent themselves in conciliation and negotiation, but in view of these power imbalances, it may be desirable that support and advocacy services are provided.

There are several possible sources of free or low-cost support for complainants. They may be assisted by specialist advocacy services such as the Working Women's Centre, the Aboriginal Legal Rights Movement, Disability Action, the Aged Rights Advocacy Service, trade unions and other sources.

Advocacy at the Tribunal stage is provided free of charge by the Commissioner as discussed later.

b) Respondents

Respondents may be assisted by employer organisations, by training materials and information published by the Equal Opportunity Commission and by the Human Rights and Equal Opportunity Commission (HREOC), and perhaps other sources such as the Office of the Small Business Advocate. In some cases, respondents may be better able to pay for private legal representation than are complainants.

c) Both

Some sources of help are open equally to both complainants and respondents. These include community legal centres, the Legal Services Commission, the Law Society Advisory Service, private legal practitioners, and the Equal Opportunity Commission itself.

Comment is invited on the scope of existing support and advocacy services, that is, on any particular support or advocacy services that are absent, leaving complainants or respondents on a particular matter without help.

7. Complaint Handling

Policy

36. *Ensure shorter response times for the resolution of complaints and enquiries, including timely conciliation proceedings, and whether the complaint is deemed to have sufficient grounds to proceed.*

The Act does not currently include any time limits for the disposition of complaints. For example, there are no requirements as to how long the initial investigation of the complaint may take, or how soon the Commissioner must convene a conciliation meeting between the parties. Likewise, there is no rule about how long the Commissioner may keep a complaint before deciding to decline it.

Most other jurisdictions similarly omit to impose such time limits, although Victoria requires a strike-out application to be heard within 14 days, and sets time limits for dealing with an 'expedited complaint'.

The lapsed Bill did not deal with this issue. The Labor Opposition filed an amendment that would have required that, unless the Commissioner declined the complaint, a preliminary conference between the parties must be held within six weeks of lodgement of the complaint. In conducting the preliminary conference, the Commissioner would have been required to:

- ensure that both parties were fully aware of their rights and obligations,
- seek to clarify the complaint and
- explore the possibilities of resolving it by conciliation.

The Government invites comment on whether these or similar provisions are desirable. In particular, the Government would be interested in hearing from parties about any unacceptable delay in the resolution of complaints.

On the one hand, it can be argued that a statutory timeframe for preliminary meetings and conciliation processes is beneficial in ensuring that matters are resolved as early as possible. It may well be that prospects of resolution of a complaint diminish with time and that the Act should direct the Commissioner as to what are acceptable limits for the required steps in dealing with the complaint. On the other hand, it can be argued that, if the parties are not ready (for instance, they do not have all the necessary information), such early meetings are likely to be wasted.

The Government invites comment on:

- **whether parties to complaints have in recent years experienced unacceptable delays in complaint-handling,**
- **whether a statutory requirement to hold a preliminary conference at an early date would be beneficial to the parties, and**
- **whether other statutory timeframes for complaint-handling are desirable.**

4. Martin Report recommendations

There is some overlap between the recommendations of the Martin Report and the Government's policy. There are also some Martin recommendations which, although not specifically listed in the policy, are encompassed in the general commitment to modernize the law.

1. Sexual harassment

In addition to the amendment to the vicarious liability provisions, discussed above, Martin recommended:

- widening the coverage of the Act so that more relationships are covered. Martin noted in particular that the Act does not now cover a range of relationships in which such harassment could occur; and
- amending the definition to remove the requirement that the remark be repeated and broaden the scope of behaviours covered, including the presentation of offensive or intimidatory written material with sexual connotations relating to the other person.

a) Coverage

The relationships covered by sexual harassment provisions around Australia vary widely. In New South Wales, apart from the relationships that are covered under the South Australian Act, coverage extends also to harassment by:

- 'workplace participants', including employees, contract workers, commission agents, self-employed people, employers, partners, volunteers and unpaid trainees (s. 22B), in respect of other workplace participants;
- members of qualifying bodies, in respect of persons applying for conferral of qualifications (s. 22C)
- adult students, in respect of other students or staff (s. 22E)
- customers in respect of goods or service providers (s. 22F)
- participants in a land transaction (s. 22H)
- participants in a sporting activity (s. 22I)
- persons engaged in the performance of State laws and programs (s. 22J).

The Victorian Act covers, in addition to the categories covered in South Australia:

- members of the governing body of an association, in respect of employees (s. 86)
- persons in common workplaces (irrespective of any employment relationship between them or whether they have a common employer) (s. 87)
- partners (s. 88)
- members and employees of industrial organisations (s. 89)
- members and employees of qualifying bodies (s. 90)
- recipients of goods and services (s. 92)
- club members and club committee members, in respect of members, applicants or employees (s. 94).

The Queensland Act takes a different approach. It prohibits all sexual harassment, regardless of relationship (s. 118). The Tasmanian Act does the same, by s. 17(2).

The Western Australian provisions are narrower than ours. They cover only employees, job applicants, commission agents, contract workers, students and applicants for accommodation (ss. 24 and 25).

The ACT law covers, in addition to the categories covered in our Act:

- partners
- workplace participants (s. 59)
- students (s. 60)
- providers of access to premises (s. 61), and
- club committee members (s. 64).

The Northern Territory prohibits sexual harassment not by reference to listed relationships but rather by reference to areas of activity. Thus, sexual harassment is unlawful in education, work, accommodation, goods, services, facilities, clubs, insurance, and superannuation (s. 28).

Martin proposed that the South Australian Act should cover, in addition to the categories presently covered, the following situations:

- harassment of one workplace participant by another,
- harassment of applicants by members of qualifying bodies
- harassment of customers by employment agency operators or by persons dealing in land,
- harassment of club members and prospective members by club committee members
- harassment of staff in the hospitality industry by patrons
- harassment of health industry employees by patients
- harassment of contractors and consultants by employees (likely to be covered also by ‘workplace participants’)
- harassment of retail employees and service deliverers by customers
- harassment by members of the board of an association of employees of the association.
- harassment of hospital staff by medical consultants (also workplace participants)
- harassment of work experience staff, trainees and students (also workplace participants)
- harassment by school students (see later).

In addition, Martin recommended coverage of sexual harassment by members of the judiciary, Members of Parliament, and council members. The Act has already been amended to cover these.

The lapsed Bill would have covered most of these categories. It referred to ‘fellow workers’, people who work for educational authorities, people to whom goods, services or accommodation were being offered or supplied, qualifying bodies, and boards of associations (clause 38). It would not have covered school students.

The Government proposes to adopt Martin’s recommendations as to the scope of coverage of the sexual harassment provisions.

One question that arises is whether the Act should be limited to the coverage of sexual harassment in identified relationships, or should be widened to provide that all sexual harassment is unlawful, as in Queensland and the Northern Territory.

The argument for the narrower approach is that the concern of the law here is with the misuse of power, not with the general regulation of sexual behaviour, which is achieved through the criminal law. Harassment that occurs outside the context of these identified relationships is dealt with, for example, by existing laws against offensive behaviour, assault and stalking. These laws can result in the punishment of the offender, and also give rise to rights to compensation if the victim is physically or mentally injured. The equal opportunity remedy is applicable where, in one of the areas of life regulated by that Act, this type of misuse of power has occurred. The Act should therefore identify the relationships in which there is a power imbalance or other constraint such that the person harassed may, because of the relationship, be under pressure to tolerate the harassment or accede to demands. It can be argued that equal opportunity law does not exist to regulate purely social behaviour.

The argument for the broader approach is that sexual harassment is of itself contrary to the principles of equal opportunity, regardless of the context in which it occurs. That is, sexual harassment restricts the equal participation of its victims in society as a whole, a matter that is of fundamental concern to equal opportunity law.

The Government proposes at least to widen the coverage of the sexual harassment provisions of the Act to encompass the relationships identified by Martin.

The Government invites comment on whether the Act should go further and cover sexual harassment in any context.

Comment is also invited as to whether there are any other relationships not now covered by the Act, which should be covered, apart from those listed by Martin.

b) Definition of sexual harassment

At the moment, the Act provides that:

‘a person subjects another person to sexual harassment if he or she does any of the following acts in such a manner or in such circumstances that the other person feels offended, humiliated or intimidated:

(a) he or she subjects the other to an unsolicited and intentional act of physical intimacy;

(b) he or she demands or requests (directly or by implication) sexual favours from the other;

(c) he or she makes, on more than one occasion, a remark with sexual connotations relating to the other,

and it is reasonable in all the circumstances that the other person should feel offended, humiliated or intimidated by that conduct’ (s. 87(11)).

The Commonwealth *Sex Discrimination Act*, s. 28A, provides that sexual harassment occurs when:

*'(1)(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
b) engages in any other unwelcome conduct of a sexual nature in relation to the person harassed,*

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

(2) In this section:

'conduct of a sexual nature' includes the making of a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.'

New South Wales uses the same definition (s. 22A), as does Victoria (s. 85), although Victoria also goes on to say that 'conduct of a sexual nature' includes:

*(a) subjecting the person to any act of physical intimacy
(b) making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence;
(c) making any gesture, action or comment of a sexual nature in a person's presence.'* (s. 85(2)).

The ACT definition is closely modelled on the Commonwealth's.

Queensland uses a more elaborate definition that combines elements of these and of the South Australian provision (s. 119). A single remark can amount to harassment. The Western Australian definition is somewhat different, in particular in requiring that the person harassed believe on reasonable grounds that taking objection to the conduct would disadvantage them (Division 4). This highlights the misuse of power aspect of the provision. Again, a single remark can constitute harassment.

Both the Northern Territory and Tasmania have used definitions closely modelled on the Commonwealth's, but, in the case of Tasmania, somewhat elaborated.

It is likely that most of the conduct that is unlawful in one State and Territory would be likely to be unlawful in the others.

Martin considered the definition of sexual harassment in some detail. As to the subjective and objective elements, he considered recommending the adoption of the Commonwealth definition, but did not do so. He thought that the requirement that a reasonable person in the position of the respondent would have anticipated that the harassed person would be offended, etc., was problematic. He did, however, acknowledge problems with other aspects of the definition, such as the requirement that the remark be repeated. Martin considered that the requirement for a remark to be repeated should be removed, that the Act should be extended to cover offensive and intimidatory written material (whether or not it amounted to a demand for sexual favours), and that there should be a general provision covering 'other conduct of a sexual nature in relation to the other'.

He recommended that s. 87(11)(c) be repealed and replaced with a provision based on the Commonwealth law, except for the removal of the word 'unwelcome', and accordingly, the adoption of s. 28A(2) of the Commonwealth definition.

The lapsed Bill would have amended the definition of sexual harassment along the lines contemplated by Martin, but without adopting the Commonwealth definition (clause 38). The effect of the provision would have been to ensure that such things as written statements or the presentation of pictorial matter could constitute harassment, and to remove the requirement for the repetition of a remark.

The Government sees no reason for a special definition of sexual harassment for South Australia. The Commonwealth definition has been in effect for many years, has been the subject of interpretation and does not appear to give rise to any practical problems. The Government intends to adopt it.

The Government proposes to adopt the Commonwealth *Sex Discrimination Act* definition of 'sexual harassment'.

c) *School students*

Martin considered the question of sexual harassment by older students in schools. The Act does not cover this. It deals only with sexual harassment by an employee of an educational authority towards a student or an applicant to become a student. Martin noted that the Commonwealth *Sex Discrimination Act* covers sexual harassment by students aged 16 and over of other students of that age, or of staff (s. 28F(2) and (3)). It does not cover sexual harassment by younger students, nor harassment by older students of younger students. At present, therefore, if sexual harassment occurs in a school, the remedy will be either a complaint to HREOC if the situation is covered by the Commonwealth Act, or internal school disciplinary processes. If there has been an assault, and the perpetrator is over ten, criminal prosecution is open.

Other States and Territories have taken varying approaches. New South Wales does not cover this type of harassment, whereas Victoria and the ACT cover sexual harassment by a student of any age (s. 91(2) Victoria, s. 60 ACT). Queensland and Tasmania both take a very broad approach, prohibiting sexual harassment by any person, not limited to relationships of power or influence (s. 118 Qld, s. 17 Tasmania) and so cover students of any age. Western Australia does not cover harassment by students. The Northern Territory covers sexual harassment in education, but does not clearly state whether this extends to conduct of students.

Martin thought that the Act should cover sexual harassment by older students of any other student (regardless of age) and of staff. He was concerned, however, to protect children from exposure to the process of the Tribunal and noted that in other court proceedings against a child, legal protections such as suppression of names are provided. He also thought that children should not have to pay monetary damages. He recommended that:

- the Act be extended to cover sexual harassment of a member of staff or a student by a senior student (that is, a student aged 16 or 17);

- the Commissioner, in conjunction with schools, teaching and parent bodies, develop special procedures for investigation and conciliation of complaints against senior students;
- there be no power for the Tribunal to award monetary damages in these cases;
- names should be suppressed in these proceedings; and
- educational authorities should be required by s. 87 to take steps to ensure that students do not subject other students or staff to sexual harassment.

The Government intends to adopt these proposals. In the same way that Martin recommends that the Act should cover harassment of providers by customers, just as it covers the converse, it also seems reasonable that it should cover harassment of staff by students as well as the other way about. It should also cover harassment by one student of another. The Government does not, however, consider that the prohibition on harassment need be limited to senior students. It would propose to cover harassment by a student of any age. Special provision would, however, need to be made to deal with a complaint against a person under 18, including protection from publicity and a general rule against monetary damages. Comment is invited on any aspect of this proposal.

The Government proposes to amend the Act so as to cover sexual harassment by school students or staff. This would also extend to harassment by students of any age in tertiary institutions.

Comment is invited on whether the Act should cover harassment by a school student of any age, as in Victoria and New South Wales, or only harassment by students over a certain age, such as 10 (the age of criminal responsibility) or 16 (as proposed by Martin).

2. Access to premises

The South Australian Act generally prohibits discrimination on the ground of impairment, but specifically excepts the case where premises (or some part of them) are so constructed that they are inaccessible to a disabled person (s. 84). As a result, there is no obligation to consider whether access to such premises could be improved, or to investigate the cost and practicability of doing so. The Commonwealth DDA, by contrast, creates a general obligation to ensure that premises are accessible to disabled persons, except that where the inaccessibility results from the design or construction of the building, failure to provide access is not unlawful if alteration would impose unjustifiable hardship (s. 23). Thus, an occupier needs to consider what can be done to make the premises more accessible. He or she cannot simply rely on the fact that the building was built without regard to disabled access.

Other jurisdictions that deal specifically with this issue are Western Australia, the ACT and Tasmania. The Western Australian exception (s. 66J(2)) is very similar to the South Australian. The ACT provision is more like the Commonwealth in that the exemption only applies if alteration of the premises would impose unjustifiable hardship. Tasmania has a similar rule in s. 48(a).

Martin recommended that State law mirror the DDA. Section 23 provides:

(1) It is unlawful for a person to discriminate against another person on the ground of the other person's disability or a disability of any of that other person's associates:

(a) by refusing to allow the other person access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); or

(b) in the terms or conditions on which the first-mentioned person is prepared to allow the other person access to, or the use of, any such premises; or

(c) in relation to the provision of means of access to such premises; or

(d) by refusing to allow the other person the use of any facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); or

(e) in the terms or conditions on which the first-mentioned person is prepared to allow the other person the use of any such facilities; or

(f) by requiring the other person to leave such premises or cease to use such facilities.

(2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in relation to the provision of access to premises if:

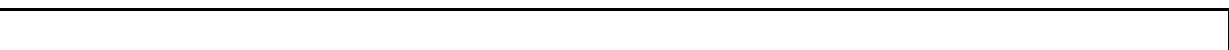
(a) the premises are so designed or constructed as to be inaccessible to a person with a disability; and

(b) any alteration to the premises to provide such access would impose unjustifiable hardship on the person who would have to provide that access.'

Section 11 sets out the factors to be considered in determining whether 'unjustifiable hardship' exists. They include the benefits and detriments to the persons concerned, and the financial circumstances of and the cost to the respondent.

The lapsed Bill would have adopted the substance of this recommendation but without using the words of the Commonwealth provision. Clause 39 would have added a new s. 87B, creating a general obligation to give access to premises that are open to the public, except where to do so would impose unjustifiable hardship. It would have provided criteria for 'unjustifiable hardship' similar to those in the Commonwealth Act.

The Government proposes to adopt Martin's recommendation. In practice, the DDA will already apply generally throughout South Australia, so there is no real change in obligations as a result of the provision. Businesses should already be compliant. The amendment, however, makes clear that the same obligations apply both in State and in Commonwealth law, and opens the avenue of complaint to the State Equal Opportunity Commission as an alternative to HREOC.



The Government proposes to implement the Martin recommendation by mirroring the Commonwealth DDA provision.

4. Indirect discrimination - proof of the requirement being reasonable

At present, in the case of indirect discrimination on any of the grounds covered by the Act, the complainant must establish that the requirement imposed was not reasonable. Martin recommended that, instead, the respondent should bear the burden of showing that it was reasonable. He noted that the Queensland Act so provides (s. 205). The Commonwealth has also since amended the *Sex Discrimination Act* so that there is no requirement to show that a condition or requirement is not reasonable, in order to establish indirect discrimination. Instead, proof of reasonableness operates as a defence to a complaint of indirect discrimination (s. 7B, added 1995). The Act provides:

'7B(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.'

7B(2) 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.'*

This leaves it to the respondent to prove this. Similarly the ACT legislation puts the onus on the respondent (s. 71(2)). Tasmania did not take this approach when legislating in 1998, perhaps because the Tribunal conducts an 'inquiry', which may not necessarily take the form of an adversarial proceeding.

The New South Wales, Victorian and Western Australian provisions operate similarly to the South Australian provisions, in that the complainant must show that the requirement was not reasonable. The Victorian Act further sets out matters to be considered in determining whether a requirement is reasonable. These are:

- '(a) the consequences of failing to comply with the requirement, condition or practice*
- (b) the cost of alternative requirements, conditions or practices,*
- (c) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice.'* (s. 9(2)).

Similarly, the ACT Act requires assessment of :

- '(a) the nature and extent of the resultant disadvantage*
- (b) the feasibility of overcoming or mitigating the disadvantage*
- (c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.'* (s. 8(3)).

Some of these matters, such as the result sought by the person imposing the requirement, are principally within the knowledge of the respondent.

Martin noted that the Australian Law Reform Commission, in its report '*Equality Before the Law: Justice for Women*', recommended that respondents should bear the burden of proving, on the balance of probabilities, that the condition or requirement was reasonable in the circumstances. He also noted that the '*Half-way to Equal Report*' of the Inquiry into Equal Opportunity and Equal Status for Women in Australia, by the House of Representatives Standing Committee on Legal and Constitutional Affairs so recommended.

Some submissions to the Martin Report argued that this would reverse the burden of proof, inconsistently with basic principle. This depends, however, whether it is defined to be a component of the unlawful act that the requirement is not reasonable, or whether the unlawful act is simply defined as the setting of the discriminatory condition, with provision for a defence based on reasonableness. It is not uncommon for statutes to provide specific defences that can be proven by a defendant or respondent, which will exonerate him or her where otherwise liability would arise. For example, this is what is proposed above in respect of a policy against sexual harassment.

The Government proposes to adopt the Martin recommendation. This is because the person who has imposed the requirement is in the best position to know the reasons for it. He or she can therefore, without undue difficulty, demonstrate its reasonableness if it is in fact reasonable. It is harder for the complainant to show that the requirement is not reasonable, because he or she may not know why the requirement was imposed.

The Government proposes that, in the case of indirect discrimination, the respondent should bear the burden of establishing that the requirement was reasonable.

d) Fees

The Act allows the charging of a different fee for a service on the basis of age, if this is done on a 'genuine and reasonable' basis (s. 85K(3)). The provision is probably intended to permit the granting of concessions or the charging of full fees, depending on a person's age. Child and pensioner concessions are obvious examples. The Act does not intend to outlaw these, as long as they are reasonably imposed.

The then Commissioner reported, however, that she had received complaints from elderly people that they had been required to pay higher prices for meals in restaurants, because, in the owner's view, they had the benefit of concessions in other areas. The Act as presently worded can be argued to permit this conduct.

Martin proposed that the Act be amended so that it more clearly reflects the intention of giving concessions based on age-related disadvantage, not the arbitrary charging of different fees based on age.

The Government proposes to amend s. 85K(3) so that its effect is to permit the granting of concessions to persons who may be financially disadvantaged by reason of age.

5. Associates/presumed/past grounds and identity of spouse or partner

Martin recommended that the Act be extended to cover presumed and past attributes, attributes of associates, and the identity of a spouse or partner. All but two States and Territories (New South Wales and Western Australia) now cover past and presumed attributes. All except Western Australia cover 'associates' in respect of all grounds of discrimination. Western Australia covers them only for race. Three (Western Australia, Tasmania and the Northern Territory) cover identity of spouse.

The Government proposes that the Act cover past and presumed attributes. For example, a person who is treated unfavourably on the ground of a characteristic that they once had, but no longer have (such as a past mental illness) should have a remedy. The same should be true for a person who is treated unfavourably on the ground of a characteristic erroneously imputed to them (such as membership of a particular race). This is in keeping with the spirit of the Act.

The Government also proposes that the Act cover discrimination on the ground of the identity of one's spouse. The term spouse would cover both married and de facto spouses. In keeping with the Government's policy of legal equality for same-sex couples, it would also include a same-sex partner.

Further, the Government invites comment on the coverage of associates. If it is unlawful to discriminate against a person on the ground of a particular characteristic, arguably, it should also be unlawful to discriminate against him or her on the ground that a friend, business partner or family member has that characteristic. For instance, if it is unlawful to discriminate against a person on the ground of his or her race, it should also be unlawful to discriminate on the ground of the race of the person's companion.

The Government proposes that the Act be extended to cover discrimination on the ground of the characteristics of a person's relative or associate and the identity of a person's spouse or partner, as well as past and presumed characteristics.

Comment is invited.

6. Commissioner's powers

At the moment, the Commissioner can require the respondent to produce relevant documents (s. 94(2)), and to attend conciliation (s. 95(4)). He or she cannot make these requirements of the complainant, or any other person. Martin proposed that the powers of the Commissioner should be extended so as to permit him or her to make these requirements also of the complainant.

Martin noted that under the Federal Acts, the Commissioner can require information or documents from any person. The same is generally true in all other Australian jurisdictions.

In New South Wales, the President can require both parties to attend conciliation (s. 92). In Victoria, the Commission can require any person to produce documents (s. 108(1A)), and the Chief Conciliator can require any person to attend to discuss a complaint (s. 114(2)). In Queensland, the Commissioner can require any person to provide information or produce documents (s. 156) and can require any person to take part in a conciliation conference (s. 158). In Western Australia, the Commissioner can require any person to provide information or produce documents (s. 86), and can direct the parties or others to attend a conference (s. 87). In Tasmania, the Commissioner can require information or documents from any person (s. 97). It is an offence to fail to comply, and the non-compliance can also be reported to the Tribunal. The Commissioner may also direct any person to take part in a conciliation conference (s. 75). In the ACT, the Commissioner can require a person to provide information or produce documents (s. 108C), and can require attendance at a compulsory conference (s. 82). In the Northern Territory, the Commissioner can direct a person to take part in conciliation (s. 79(1)).

The Government considers both these powers to be desirable, subject to three qualifications. First, the Commissioner should be able to conciliate without bringing the parties into direct contact. Second, the production of documents should be subject to legal professional privilege and the privilege against self-incrimination. Third, the power to require documents should not extend to notes of counselling or therapy undertaken by the complainant, either in a sexual harassment case or any other case, nor to notes made or statements taken by lay advocates for either party in taking instructions to represent that party.

The lapsed Bill would have expanded the Commissioner's powers in this way (clauses 45 and 46).

The Government also proposes that the Commissioner be at liberty to disclose relevant documents to either party where appropriate and necessary to resolve a complaint. The lapsed Bill so provided.

Martin did not propose any other extensions of the Commissioner's powers, and specifically indicated concern at any proposed power to require persons to answer questions. The Government does not propose that the Commissioner be given powers to require answers to questions.

1. The Government proposes the expansion of the Commissioner's powers so that he or she can:

- **require any person to produce relevant documents, subject to the privilege against self-incrimination and legal professional privilege;**
- **disclose relevant documents to either party where appropriate and necessary to resolve a complaint;**
- **require both parties to attend a conciliation conference, but also conciliate without bringing the parties into direct contact.**

2. It is proposed to protect counselling or therapy notes, and lay advocates' notes, so that they cannot be produced to or by the Commissioner without the complainant's consent.

7. Commissioner's role

The present law requires that the Commissioner must:

- both investigate and conciliate complaints, and
- act as advocate for the complainant before the Tribunal.

Other States and Territories do not generally give the Commissioner (or equivalent) the role of representing the complainant before the Tribunal. His or her function is complete when the case is referred to the Tribunal, unless the Tribunal requests that the Commissioner assist it in the enquiry.

In New South Wales and Victoria, the parties are entitled to appear personally or be represented by a legal practitioner, but in general neither party can recover the costs of such representation by the other.

In Queensland, the Tribunal may arrange for a lawyer to assist the Tribunal in the proceedings, and in that case the parties are also entitled to have legal representation if they wish. Otherwise, they can only be represented with the leave of the Tribunal (s. 187). Similarly in Tasmania, Tribunal proceedings are 'an inquiry' and neither party is entitled to be represented by anyone except with leave (s. 85(2)), and in the ACT, there is no entitlement to representation before the Tribunal except with leave (s.95).

The exception is Western Australia, which provides similarly to our Act. It also goes further and permits the Commissioner to provide legal representation or funding to enable the complainant to take or defend an appeal to the Supreme Court.

The Northern Territory does not have a tribunal. A hearing is conducted by the Commissioner if the matter does not settle at conciliation. The parties may be legally represented with leave of the Commissioner (s. 95).

As for Commonwealth matters, if the complaint cannot be settled by conciliation, it is referred to the Federal Court or the Federal Magistrates Court. In those Courts, the parties may appear in person, or be legally represented, or be represented by any other person (unless the Court thinks this is inappropriate) (s. 46PQ(1)). Only a lawyer can charge for representing the complainant (s. 46PQ(2)). There is no provision for representation to be provided by the President.

Martin identified both these requirements as creating conflict of interest. He proposed to reduce the conflict by:

- limiting the investigative role to obtaining the minimum information necessary to decide whether to accept the complaint, and to conciliate it;
- repealing the requirement to assist the complaint before the Tribunal and instead providing an independent solicitor for this purpose.

The lapsed Bill would have limited the Commissioner's investigative role to what was necessary to a) enable the Commissioner to decide whether to act on the complaint, and b) resolve the matter by conciliation (clause 45). It would also have removed the

Commissioner's representative role. Instead, it was proposed to arrange for legal aid to cover these cases.

The Government accepts Martin's analysis that the present law gives rise to conflict of interest for the Commissioner. As to the investigative role, it proposes to adopt Martin's recommendation and thus to provide similarly to the lapsed Bill. As to the representative role, the Government invites comment. It accepts that it is problematic for the Commissioner to act both as conciliator and as advocate for one party. Neutrality of the mediator is the cornerstone of mediation theory and practice. As long as the Commissioner is required to act both as conciliator between the parties, and advocate for one of them against the other, it will be difficult for respondents to have confidence in the integrity of the process.

The Government does, however, believe that an adequate avenue of representation must be provided to complainants.

Martin recommended the engagement of an independent solicitor on a contract basis. He suggested that, because of possible perceptions of conflict if Government-employed solicitors were to be used, it should be a lawyer in private practice. Martin further proposed that the current rule that a complainant not be provided with representation if the Commissioner has declined the complaint, should be retained. He also suggested that the independent solicitor should also be able to determine that the complaint, if frivolous, vexatious, misconceived or lacking in substance, should not be funded.

The Government is attracted to Martin's proposal. There may, however, be other possibilities for the representation of the complainant, and comment is invited.

Comment is invited on how representation of complainants should be delivered independently of the Commissioner.

8. Tribunal

Martin recommended that the Tribunal's jurisdiction be vested in a special division of the District Court. Its basic operation would be unchanged. For instance, neither party would normally be at risk of the other side's costs, the laws of evidence would not apply, and the Court would consist of a judge and lay assessors.

This is similar to the position in New South Wales and Victoria, which do not create special tribunals for equal opportunity matters but provide for them to be heard by the relevant administrative decisions tribunals. These tribunals are not bound by the rules of evidence, may sit with assessors, and generally do not award costs.

Other jurisdictions generally have a specialist tribunal, although the Northern Territory does not use a tribunal but provides for the Commissioner to conduct hearings.

The lapsed Bill would have abolished the Tribunal, and conferred its jurisdiction on the Administrative and Disciplinary Division of the District Court (clause 4, clauses 41-49). This Division deals with appeals from decisions of Government, and with the discipline of certain occupational groups. In this jurisdiction, no costs can be awarded, unless the interests of

justice require it (s. 42H, *District Court Act*). The former Bill would have provided that the rules of evidence would not apply, that the Court should not have regard to technicalities and legal forms, that it could give leave for a party to be represented by any person, and could direct that the proceedings be held in private. Lay assessors would have continued to be used.

The Government is open to adopt Martin's recommendation and abolish the Tribunal as a separate entity. In that case, the Tribunal's functions would be conferred on the Administrative and Disciplinary Division of the District Court. There would be no change to such matters as costs or the application of evidentiary rules. Because the Tribunal now comprises a District Court judge and two assessors, and now sits in the District Court's premises, this proposal is unlikely to make much difference to the parties' experience of the litigation.

Comment is however invited on the merits of either retaining the Tribunal, or vesting its jurisdiction in the Administrative and Disciplinary Division of the District Court.

The Government invites comment on Martin's recommendation that the Act be amended to vest the jurisdiction of the Tribunal in the Administrative and Disciplinary Division of the District Court (ADD).

9. Representative Actions

Martin recommended that parties be able to bring representative actions. The Government agrees that this should be possible. The present Act makes only limited provision for a complaint by one person on behalf of another.

Under the District Court Rules, there is provision for representative actions. If the Tribunal's jurisdiction is conferred on the Administrative and Disciplinary Division of the District Court, there will be no need for any specific legislative provision.

If the Tribunal is retained, it may be useful to make express provision for representative actions in the legislation. The Act already allows one or more aggrieved persons to bring a complaint on their own behalf and on behalf of other aggrieved persons. This requires the consent of those other persons. There cannot be a complaint by one aggrieved person on behalf of a group of unidentified others who are affected by the act, nor a complaint by a person or body not aggrieved, on behalf of either identified aggrieved persons, or a class of aggrieved persons not individually identified.

Such provision exists in the *Human Rights and Equal Opportunity Commission Act*, ss. 46P, 46PB, and 46PC. These sections permit a representative complaint, that is, a complaint by a person or trade union who or which is not aggrieved, on behalf of one or more persons aggrieved. A representative complaint can be lodged if the class members all have complaints against the one person arising out of the same or similar circumstances. The complaints must give rise to a common issue of law or fact. Note that there is no need for the consent of all the class members, nor need they all be identified. Any member of the class may, however, withdraw from the complaint.

The New South Wales Act provides for representative complaints by s. 88. In this model, a 'representative complaint' is one lodged by a representative body (not limited to a trade union). Such a complaint requires the consent of all persons on whose behalf the complaint is lodged (s. 88(1A)), and also requires that the complainant body have a sufficient interest in the complaint. In the case of a vilification complaint, a representative complaint can only be lodged if all persons on whose behalf it is brought actually have the relevant characteristic, or at least, they claim to there is no reason to doubt that they do (s. 88(1D)).

A representative complaint can ordinarily be entertained by the Tribunal only if the class is so numerous that joinder of all members is impracticable, and there is a risk of inconsistent results if the complaints are dealt with separately (s. 103). An exception can be made if justice so requires.

Queensland provides by s. 146 for a representative complaint by a member of a class of persons affected by the respondent's conduct. Such a complaint can be brought if the Commissioner is satisfied that the class is so numerous that joinder of individual members is impracticable, there are common questions of law or fact, the allegations are the same or similar and the respondent has acted on grounds apparently applying to the class as a whole (s. 147(1)). Again, however, these requirements can be waived if the justice of the case so requires (s. 147(2)). A complainant covered by a representative complaint must choose whether to proceed as a party to that complaint or whether to make an individual complaint (s. 151). The Tribunal determines separately whether a complaint that has been brought as a representative complaint should be dealt with in that way before the Tribunal (s. 194). Similar criteria to s. 147 apply.

There is therefore no provision in Queensland for a representative complaint to be brought by a person who is not a member of the class of aggrieved persons. Hence, usually, a representative body could not complain.

In Western Australia, a complaint can be brought by an aggrieved person or persons on behalf of others. A representative complaint can be brought by a trade union, though not by any other body (s. 83). By s. 114, the Tribunal must determine whether any complaint is to be dealt with as a representative complaint. Similar considerations apply as in New South Wales and Queensland.

Tasmania provides for a complaint by an aggrieved person who is a member of a class against whom similar conduct occurred, if the Commissioner is satisfied that a majority of members of the class is likely to consent (s. 60(1)(b)). It also provides for a complaint by a trade union, representing either a single member against whom the conduct was directed, or a class of such members, if the Commissioner is satisfied that a majority of such members is likely to consent (s. 60(1)(c)). A person can also complain by an agent. An organisation that is itself a victim of discrimination can complain, if the Commissioner is satisfied that a majority of members is likely to consent.

The ACT provides for a single investigation of several complaints arising out of the same circumstances or subject matter (s. 77). It also provides for a representative complaint to be brought by one member of a class, if that person's grievance is thought to be substantially similar to those of the other members of the class (s. 78). It does not, however, provide for a person or body not aggrieved to complain on behalf of others who are.

The Northern Territory makes no provision for representative complaints (though a person can complain by an authorised agent).

Martin recommended that the Act be amended to provide for representative actions, subject to appropriate criteria. This would include certainty about the class of persons covered, common issues of fact or law, notice to persons affected, and the right to opt out of the complaint. He further recommended that a representative action should require the Commissioner's approval, and both parties should be entitled to appear and be heard on this. Further, he proposed a right of appeal to the presiding officer of the Tribunal (or court).

The Government proposes to adopt Martin's recommendations, but invites comment.

In particular, if the Tribunal is retained, which of the following representative complaints should be available:

- a) a complaint by a person aggrieved, on behalf of a group of other aggrieved persons, where it is not possible to identify them all individually;
- b) a complaint by a person aggrieved, on behalf of a group of other aggrieved persons who can be identified, without their consent, or with the consent of a majority;
- c) a complaint by a trade union, on behalf of aggrieved members, and if so, whether it should be necessary to show that a majority of aggrieved members consents;
- d) a complaint by any other person or body not aggrieved, on behalf of persons who are aggrieved.

The Government invites comment about:

- a) **the proposed adoption of the Martin recommendations, if the Tribunal is retained, and**
- b) **what types of representative complaints should be permitted.**

10. Commissioner's power to decline a complaint

The Commissioner may, under s. 95(1), decline to recognise a complaint as one upon which action should be taken, if in the Commissioner's opinion the complaint is 'frivolous, vexatious, misconceived or lacking in substance'. Martin left open the possibility of amendment to expand the Commissioner's powers to decline a complaint. Comment is invited on the expansion of these powers.

Declination powers vary among the States and Territories. All jurisdictions make some provision equivalent to s. 95(1) for declination of complaints that are frivolous, vexatious or lacking in substance. Some go further, for example, the ACT provides for declination where:

- a more appropriate remedy is available elsewhere
- the matter complained of is not unlawful under the Act
- the matter has already been adequately dealt with by the Commissioner or Tribunal or by some other authority
- the complainant does not want the complaint investigated
- the Commissioner considers that it is not necessary to pursue the complaint (s. 81(2)).

Similarly, Tasmania provides for declination of a complaint where:

- it does not relate to discrimination or prohibited conduct
- the complainant has begun court or other proceedings that may result in similar remedies, or someone else has done so and the complaint will be adequately dealt with in those proceedings
- there is a more appropriate remedy available elsewhere
- the subject-matter of the complaint has already been or may be dealt with adequately by some other authority (s. 64).

New South Wales gives the President a broad power to decline a complaint where satisfied that it is frivolous, vexatious or lacking in substance, or 'for any other reason the complaint should not be entertained' (s. 90(1)).

Victoria has more limited declination powers, covering the case where the complaint has been adequately dealt with by a tribunal or court, or would be more appropriately dealt with elsewhere (s. 108).

In Queensland, the Commissioner may only decline a complaint where it is frivolous, vexatious, misconceived or lacking in substance (s. 139) or if there are concurrent proceedings elsewhere (s. 140).

In Western Australia, declination is limited to a complaint that is frivolous, vexatious, misconceived, lacking in substance or relates to an act that is not unlawful under the Act (s. 89). Further, a complaint lapses after 21 days notice to the complainant to confirm that he or she still wishes the complaint investigated (s. 83A). The Northern Territory is similar, except for a power to decline a complaint that is 'trivial', or is the subject of concurrent proceedings elsewhere (ss. 67 and 68). There is also a provision for a complaint to lapse after failure to respond within 60 days to a notice (s. 72).

The Government is considering whether to expand the Commissioner's powers to decline a complaint in the following circumstances:

1. *Complaint not pursued*

At the moment, the Act does not permit the Commissioner to decline a complaint because:

- the complainant cannot be contacted, or
- the complainant appears to have ceased pursuing it,

even though, as a result, there is no prospect of resolution. The Government thinks it reasonable that the Commissioner be able to conclude a matter in these cases, and proposes to provide for this. The lapsed Bill would have provided for this by clause 46.

Further, because it is not reasonable for the Commissioner to have to expend resources in searching for a complainant who does not respond to letters or other enquiries, the Government proposes to provide for complaints to lapse if, after a reasonable period, there is no response to a request from the Commissioner. Such a provision is found in the ACT Act, which provides that a complaint becomes 'stale' if the complainant fails to respond to a

request from the Commissioner within three months after it is made (s. 76(1)), and in the Northern Territory Act (where the period is 60 days) (s. 72). Western Australia has a comparable provision (s. 83A), which provides that a complaint lapses after 21 days notice to the complainant to confirm that he or she still wishes the complaint to be investigated.

Related to these, the Government also proposes to permit the Commissioner to decline a complaint if the complainant fails or refuses to co-operate with the Commissioner's reasonable investigation of the complaint.

2. *More appropriate remedy elsewhere*

In some cases, the Equal Opportunity remedy may be only one of several available to the complainant. Where the case is equally appropriately dealt with by either pathway, it is for the complainant to choose the one he or she prefers. In some cases, however, it may be clear that, although the complaint could possibly fit within the Equal Opportunity jurisdiction, it really belongs somewhere else. For example, if a person has been paid an incorrect wage because of a wrong assumption about the person's age (for instance, the person was paid as a junior for a period when he or she was in fact an adult), this could possibly be analysed as age discrimination, in that the person was wrongly presumed to have a characteristic (an age lower than 18), and as a result was treated less favourably than other adult workers. The complaint is however more appropriately dealt with as a wages claim in the industrial jurisdiction. This would be particularly so if there were other aspects to the wage dispute, such as the classification of the worker's duties, or the accuracy of the time-keeping system in the workplace. The Government invites comment on whether, in such cases, it is better if the Commissioner can decline the complaint but refer the complainant to the more appropriate remedy.

Victoria, Tasmania and the ACT each have equivalent provisions. The Federal jurisdiction also permits termination of a complaint if some other more appropriate remedy is reasonably available (HREOC Act, s. 46PH(1)(e)), or if the complaint could be more effectively or conveniently dealt with by another statutory authority (s. 46PH(1)(g)).

3. *'Lacking in substance'*

At present, the Commissioner may decline a complaint that is 'lacking in substance'. An argument can be made that this phrase is ambiguous. It is not clear whether it refers to a complaint that lacks sufficient substance to justify the application of the resources of the Commission, or whether it refers only to a complaint that is wholly devoid of substance.

There is some similarity between this ground and the ground of triviality, which applies in the Federal jurisdiction (HREOC Act, s. 46PH(1)(c)).

The Government invites comment on whether the Commissioner should be able to decline a complaint that may not be absolutely without substance, but is of insufficient substance to justify the application of the Commission's resources. The lapsed Bill would have provided for this by clause 46, which proposed to change this expression to 'lacks sufficient substance'.

4. *Reasonable redress offered*

At present, even if the respondent has offered the complainant what the Commissioner considers to be fair redress, if the complainant does not accept that offer, the Commissioner must represent the complainant before the Tribunal (or, under the proposed amendments, representation will be provided to the complainant). It may happen in some cases that, although the complaint is justified, the form or amount of redress demanded by the complainant is unreasonable. For instance, he or she might be asking a sum of money that is far greater than the Tribunal is likely to award, or he or she might refuse to accept any proposal made by the respondent, for the satisfaction of the day in court. No doubt the complainant is entitled to do these things. The question is whether they should be publicly funded.

As an analogy, a legally-aided person is not entitled to use the grant of aid to pursue a case or a defence that is without legal merit. The Legal Services Commission applies a merits test to determine what matters should be funded, and to what extent. Reasonable offers of settlement can be taken into account.

The Government invites comment on whether the Commissioner should be able to decline further assistance to the complainant after a fair and reasonable resolution has been offered.

There is no directly equivalent power in other States and Territories. New South Wales, however, has a general power to decline a complaint where 'for any other reason the complaint should not be entertained' (s. 90(1)). It is not clear whether this would extend to permit declination in such cases.

5. *Other sufficient reason*

Some jurisdictions provide a more general declination power. As above, New South Wales permits declination where 'for any other reason', the complaint should not be entertained. The ACT provides for declination where 'having regard to the complaint and any other relevant matter before the commissioner, in the opinion of the commissioner it is not necessary to pursue the complaint' (s. 81(2)(h)).

The lapsed Bill would have provided that the Commissioner could decline a complaint 'for any other sufficient reason' (clause 46).

Comment is invited as to whether such a provision should be adopted in South Australia.

The Government proposes to widen the Commissioner's powers so that a complaint can be declined if :

- a) **the complainant cannot be contacted; or**
- b) **the complainant has failed to respond to the Commissioner's requests for information or contact.**

The Government invites comment on whether in those cases lapse provisions such as those in the ACT, NT and Western Australia should apply where the complainant has not responded to the Commissioner's requests.

The Government invites comment on whether the Commissioner should also be able to decline a complaint where:

- c) the complainant fails or refuses to co-operate in the Commissioner's reasonable investigation of the complaint;**
- d) a more appropriate remedy is reasonably available to the complainant elsewhere;**
- e) the complaint, although not devoid of substance, lacks enough substance to justify further investigation;**
- f) the Commissioner considers that fair and reasonable redress has been offered by the respondent; or**
- g) for some other sufficient reason, the Commissioner considers that the complaint has ceased to be one that should be proceeded with.**

Martin also left open the possibility that, when the Commissioner has declined a complaint and the complainant has required the Commissioner to refer it to the Tribunal (as the complainant can do under s. 95(8)(c)), there should be provision for the Tribunal to determine the matter to be done on the papers, that is, without an oral hearing of the case.

The lapsed Bill proposed to provide that:

‘where a complaint is referred to the Court under subsection 8(c) [that is, at the request of the complainant after the Commissioner has declined the complaint] the Court may, after considering written submissions from the Commissioner and the complainant, decline to recognise the complaint as one on which action should be taken and dismiss the complaint without proceeding to a hearing of the matter’ (clause 46).

That is, once the Commissioner has declined the complaint, there would be no entitlement to an oral hearing, but the Court could grant one in its discretion. The complainant could put forward written argument as to why a hearing should be granted.

The Government considers that this is appropriate in most of the cases listed above, but would not be appropriate in the case where the declination is on the ground of an offer of reasonable redress. This is because the Tribunal or court should generally not know what offers have been made by either party, when it comes to consider the case.

The Government proposes to provide, similarly to the lapsed Bill, that the Tribunal (or court) may, in the case of a declined complaint, proceed to deal with the matter on the basis of written submissions, except where the complaint has been declined on the ground of an offer of reasonable redress.

The Government proposes that the Tribunal (or court) should be able, in its discretion, to deal with such referrals on the basis of written submissions, without holding an oral hearing.

10. Repeal of ss. 12 and 101

Martin also suggested repeal of ss. 12 and 101. These have never been proclaimed. They would require the Commissioner to assist the complainant with advice, assistance and research. Martin identified these as giving rise to a conflict of interest for the Commissioner, as well as having resource implications.

The Government proposes that sections 12 and 101 be repealed.

11. Transgender and intersex status

One aspect in which the Act might be thought outdated is the coverage of transgender and intersex status. At present, the Act treats ‘transsexuality’ as a sexuality along with homosexuality, heterosexuality and bisexuality (s. 5). Although this protects transsexual people against discrimination, it does not address the argument that transgender status is something different from sexuality and should be treated as a separate ground of discrimination. It also, arguably, fails to cover the situation of a person who has a biological intersex condition. It is uncertain whether intersex conditions could be covered by the Commonwealth definition of ‘disability’, proposed to be adopted, but even if so, views may differ as to whether this is a satisfactory way of protecting people with this condition from discrimination. Transgender status has been treated as a separate ground of discrimination, for example, in the New South Wales Act, which speaks of discrimination on ‘transgender grounds’ (Part 3A). That Act defines a ‘transgender person’ as a person who:

- identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex,
- has done so in the past, or
- who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex.

This definition is therefore wide enough to cover both transgender and intersex status.

That Act also protects such persons against vilification.

Similarly, Victoria covers ‘gender identity’ (s. 6), which includes identification, on a *bona fide* basis, by a member of one sex as a member of the other sex, or by a person of indeterminate sex as a member of a particular sex, by

- assuming the characteristics of that sex, whether by medical intervention, style of dress or otherwise, or
- living or seeking to live as a member of the other sex (s. 4).

Queensland has also recently legislated to proscribe discrimination on the ground of ‘gender identity’. This term means that the person:

- ‘(a) identifies or has identified as a member of the opposite sex by living or seeking to live as a member of that sex; or
- (b) is of indeterminate sex and seeks to live as a member of a particular sex.’ (s.12).

The Act also now deals with ‘sexuality’, covering heterosexuality, homosexuality or bisexuality, in place of the former ground of ‘lawful sexual activity’.

Comment is invited on whether any amendment to the present South Australian law is needed to protect transgender persons or persons with intersex conditions from discrimination.

The Government invites comment on whether transgender and intersex people are adequately protected by the Act, and if not, what additional provision should be made.

In particular, should the Act be amended by removing ‘transexuality’ from the definition of ‘sexuality’ and instead creating a new ground of discrimination, that of ‘gender identity’?

12. Inter-relationship with other Acts under review

Concurrently with this review, the Government is also reviewing the *Industrial and Employee Relations Act 1994* and the *Occupational Health Safety and Welfare Act 1986*.

Experience suggests that equal opportunity issues more commonly arise in the workplace than in any other area of life. Some issues are inherently more likely to arise in the workplace. For example, sexual harassment is particularly liable to arise at work, because of the power imbalance created by lines of control. Age discrimination may also be more likely to arise in the workplace, because of perceptions about changes in work competency with age. To some extent, the same may be true of disability complaints. There may therefore be overlap between the regulation of the workplace through the *Equal Opportunity Act*, and its regulation by the other Acts under review. Also, some workplace issues may give rise to both *Equal Opportunity Act* and industrial remedies. For example, if an employee is dismissed on the ground of age, he or she could pursue either an unfair dismissal or an *Equal Opportunity Act* remedy.

For either of these reasons, it may be appropriate to reconsider how these three Acts work together and whether any rationalisation is desirable to enhance their interrelationship. The Government invites comment on this topic.

The Government invites comment on the interrelationship of the Equal Opportunity Act, the Industrial and Employee Relations Act and the Occupational Health Safety and Welfare Act.

13. Other matters

During the process of the Martin Review in 1994 and the debate that occurred around the lapsed bill a number of other issues were raised in regard to the operation of the Equal Opportunity Act 1984. Although the Government has no definite position on these matters, comment is invited.

1) Should the Commissioner be required by law to assist complainants to lodge their complaint in writing?

Part 8 Division 1 (c) of the *Equal Opportunity Act* requires that complaints be made in writing. It is the current practice of the Commissioner to assist any complainant, on request, to lodge a written complaint, including provision of interpreting services, if needed, for complainants whose first language is not English. There is, however, no statutory requirement that the Commissioner must do this. Section 12 outlines the responsibilities of the Commissioner in relation to persons who have impairment. It could be argued that Section 12 requires the Commissioner to assist complainants with impairment to lodge their complaints in writing. There is no other requirement in the Act that the Commissioner assist complainants other than those with impairment.

Victoria is the only Australian jurisdiction that has a comparable requirement. The Victorian Act s. 106 provides that ‘the Commissioner must assist a complainant in formulating his or her complaint’. There is no express reference to writing. It is understood that this service is delivered by a designated Access Officer, who does not play a role in handling that complaint.

There is no doubt that it can be helpful to complainants to be assisted in reducing the complaint to writing. Both the Commissioner’s staff, and other services such as the Working Women’s Centre, trade unions and community legal services offer this help, usually free of charge. There may be some who are not eligible for this assistance (for instance, a union may not assist non-members). Some complainants may choose to pay for assistance from a law firm or other advocacy service, but the option of legal representation may be too costly for some complainants. The question is whether the law ought to require the Commissioner to provide this service.

One difficulty with imposing a legal requirement is that it could be perceived to undermine the Commissioner’s neutrality and align the Commissioner with the complainant. This would run counter to other proposals, discussed above, to amend the Act to reduce the appearance of conflict of interest and ensure that the Commissioner remains neutral. Conversely, if the complaint is prepared by an advocacy service independent of the Commissioner, the service is free to frame the complaint in a way that advocates strongly for the client. It is not constrained by a need to remain impartial.

Comment is invited on whether and why the Act should be amended to require the Commissioner to assist complainants to lodge their complaints in writing.

b) Should the requirement that the discriminatory ground be a substantial reason for the alleged discriminatory action be removed?

Part 1 Section 6 (2) the Act 1984 provides that:

‘For the purposes of this Act, a person acts on a particular ground referred to in this Act if the person in fact acts on a number of grounds, one of which is the ground so referred to, and that ground is a substantial reason for the act’.

This provision was considered in the case of *Yfantidis v Jones* (1993) 61 SASR 458. In that case, the respondent had refused the complainant medical services on two grounds, first, her marital status and second, the inability to test the fertility of her partner. The Court said that

's. 6(2) operates where it has been proved that a person had more than one reason for his conduct, that one of those reasons is a ground of discrimination as defined in the Act, and that the reason for the discrimination is a substantial reason for his conduct. The meaning of 'substantial' varies according to context. ... In s. 6(2) it connotes that which is of substance or weight as opposed to that which is illusory or of little moment. It is not intended to denote a ground which predominates over other grounds. The premise for the operation of s. 6(2) is that there was more than one reason for the conduct and at least the discriminatory reason is of some substance. Thus, once there is a finding that discrimination on the ground of marital status was one of the grounds of the decision to refuse the microsurgery and that ground was substantial in the sense I have indicated, the refusal amounts to discrimination within the meaning of the Act.' (page 471).

The Court held that because marital status was a substantial ground, the action was discriminatory, even though there was another, equally important ground of refusal of the service. This establishes that the requirement that it be a 'substantial' reason does not require it to be the main reason or the most important reason. It is enough if it is a reason, and it has substance.

The effect of the requirement, therefore, is to prevent the Commissioner accepting a complaint if, although there was a discriminatory reason for the action, that reason was of little moment or illusory, or without substance or weight.

The Queensland *Anti Discrimination Act 1991* has similar provisions under s.10(4), which provides that:

'If there are two or more reasons why a person treats or proposes to treat another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.'

The Victorian Act under section 8 differentiates between a dominant and substantial reason. The reason for discrimination may not be the dominant reason but if still a substantial reason then the discriminatory Act would be deemed to be against the law. These provisions are similar in their effect to the South Australian law.

No other State or Territory requires the complainant to prove the discriminatory act was a substantial reason for the conduct, nor is this a requirement under the Federal *Sex Discrimination Act* or *Disability Discrimination Act*.

Comment is sought on whether the Act should be amended to remove the requirement that the ground of discrimination must be a substantial reason.

In particular, examples of cases in which the requirement would produce an unjust result or would prevent redress being granted to a genuine complaint, are invited.

c) **Is the independence of the Commissioner compromised by the fact that she or he is responsible to the Minister for the general administration of the Act?**

In all Australian jurisdictions, the role of the Commissioner or President is generally one of independence in the handling of complaints but responsibility to a Minister to see that functions are carried out in accordance with the Act. Annual reports are required and the incumbent can be removed for misconduct or incapacity.

The South Australian Equal Opportunity Commission is part of the Justice Portfolio which is made up of many independent and semi-independent agencies such as the Ombudsman's Office, the Director of Public Prosecutions, the Police Complaints Authority, the Office of the Liquor and Gambling Commissioner, to name but a few. Agencies of the Justice Portfolio, including Equal Opportunity Commission, are committed to understanding the needs of the public, being accountable for the quality and timeliness of their services and for communicating with the South Australian public.

Section 10(1) of the South Australian Act provides

'The Commissioner is responsible to the Minister for the general administration of this Act and, in carrying out that function, is subject to the general control and direction of the Minister.'

The Act requires that the Commissioner make an annual report to the Minister and seek permission to delegate powers or take leave.

The Queensland *Anti Discrimination Act 1991* does not use the terms control or direction. There are, however, a number of references that indicate powers of control in the Minister. They pertain to matters such as inquiries, delegation powers and the general functions of the Commissioner. For example, s. 235(k) says that the Commission has 'such other functions as the Minister determines'. Under s. 237, the Commission is governed by the *Financial Administration and Audit Act 1977*. This imposes various financial-accountability obligations, such as the delivery of annual financial statements to the Auditor-General, and requires an annual report to the Minister.

Similarly, the Tasmanian *Anti-Discrimination Act 1998* requires the Commissioner to report to the Minister on various matters at his or her request but does not give the Minister specific control over his or her actions. The Minister can require a report from the Commissioner at any time about any aspect of the operation of the Act (s. 11).

The Victorian *Equal Opportunity Act 1995* again does not specify any general control and/or direction. The Minister has power to refer a complaint direct to the Tribunal if he or she considers that it raises an important issue of public policy (s. 111(1)), even if the Commission is in the process of dealing with the complaint.

The ACT *Discrimination Act 1991* provides that the Commissioner's appointment may be terminated for misbehaviour or incapacity, and empowers the Minister to require a review of a proposed law and advice on the operation of the Act, but does not otherwise address the question of direction or control.

The Northern Territory *Anti Discrimination Act 2002* again does not specify general control and direction. The functions of the Commissioner can, however, be determined by the Minister under section 13 (1) (s). Also, it requires reports to be made to the Minister in general terms and on specific matters as requested by the Minister. The NSW *Discrimination*

Act 1977 does not vest control and direction of the President in the Minister but allows the Minister to refer matters to the President for investigation and determination.

Similarly in Western Australia the Act does not prescribe general control and direction but sets out a number of areas where the Minister may request reports or require research into specific matters. The Minister also controls matters such as leave.

All States have within their Acts a provision that any commissioner can be dismissed for incompetence and/or misconduct.

The Minister is ultimately responsible to the people of South Australia for all matters that relate to a portfolio held by that Minister. Thus, the Commissioner's accountability to the Minister is her accountability to the South Australian public for the proper administration of the Act. At the same time, it is important that the Minister is not able to direct or influence the outcomes of particular complaints. It is unlikely that the South Australian provision has the latter effect, given that the control is expressly limited to the 'general administration' of the Act. It may, however, be helpful to amend the Act to make this clear. A model can be found in the *Public Trustee Act*, which provides by s. 6:

'(1) The Public Trustee is subject to control and direction by the Minister on matters of policy.

(2) A direction may not be given so as to affect the efficient discharge of the Public Trustee's duties at law or in equity.

(3) The Public Trustee must, at the request of the Minister, report to the Minister on a specified matter.

(4) The Public Trustee must not, in a report to the Minister, divulge information in breach of a confidence placed in the Public Trustee by a client.'

Comment is invited on whether the Act would be enhanced by a provision along similar lines, preventing any interference by the Minister in the determination of a particular complaint and protecting confidential information.

d) Commissioner's powers

i) should the Commissioner have power to investigate a matter on her own initiative, where there has been no complaint?

The Commissioner has no such power at present. Under s. 93A, the Commissioner can, if of the opinion that a person may have acted in contravention of the Act, seek the approval of the Minister to apply to the Tribunal to refer the matter to the Commissioner for investigation. Unless both the Minister and the Tribunal approve, the Commissioner cannot investigate. In practice, there do not appear to have been any such references.

By comparison, the HREOC is given powers under Commonwealth legislation to initiate inquiries. By s. 11(2) of the *Human Rights and Equal Opportunity Commission Act 1986*, it is provided that a function of the Commission is:

‘(h) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and -

(i) where the Commission considers it appropriate to do so - to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and

(ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement - to report to the Minister in relation to the inquiry’

It will be seen that this gives a broad power to report to the Minister on any human rights matter. This is exercised on the initiative of the Commission. There is no need for the approval of the Minister or any other body.

Some other States and Territories have investigation powers. Victoria gives special investigative powers to deal with suspected contraventions of the *Racial and Religious Tolerance Act 2001* (s. 156). Western Australia provides that it is a function of the Commissioner to *‘carry out investigations, research and inquiries relating to discrimination or sexual or racial harassment of the kinds rendered unlawful under this Act’* (s. 80(a)). Tasmania provides that it is a function of the Commissioner to *‘consult and inquire into discrimination and prohibited conduct and the effects of discrimination and prohibited conduct’* (s. 6(c)). The Northern Territory provides that it is a function of the Commissioner to *‘examine practices, alleged practices or proposed practices of a person, at the Commissioner’s own initiative or when required by the Minister, to determine whether they are, or would be, inconsistent with the purposes of this Act, and, when required by the Minister, to report the results of the examination to the Minister’* (s.13(1)(f)).

Comment is invited on whether it would be desirable to give the Commissioner a similar power, either instead of or in addition to the s. 93A power.

Assuming that the s. 93A power is retained, a related question is whether the Tribunal should be able to hear an application by the Commissioner to investigate a matter without notifying the proposed respondent. By ss. (2), the person the subject of the application is a party and must be given a copy of the application.

In practice, there has never been an application, but one can envisage a case where, for example, employees are concerned about discriminatory practices in a workplace but are not unionised and are reluctant to complain. Consequently, the Commissioner might wish to protect the complainants by not alerting the respondent to the investigation.. On the other hand the basic tenets of natural justice may not be well served if each party to a complaint is not given an opportunity to argue their position before a decision is made.

A possible alternative may be to allow the Commissioner to make the request without specifying the name of those affected or other identifying details. Although the Commissioner would not be able to present hearsay evidence, it may be possible to present the evidence of those involved in such a way as to protect their identity.

Comment is invited on whether there is a need for such a provision, and how it might work in practice.

A related question is whether the Commissioner should have to seek the approval of the Minister before applying to the Tribunal. Arguably, the requirement for the Tribunal's approval should suffice. The Tribunal will not approve a reference unless persuaded on the balance of probabilities that there is proper justification for the investigation. The making of an application and the result can be noted in the annual report. Comment is invited.

ii) should the Commissioner have a power to intervene in industrial proceedings?

At present, the Commissioner has no power to intervene in proceedings before the Industrial Commission. The Commissioner made a submission to the Review of the Industrial Relations System in South Australia (the Stevens Review) arguing for a power of intervention to enable her to assist the Commission on matters relating to discrimination and harassment. The Stevens Review includes a discussion of this question and indicates that this would be 'a useful inclusion in the state system'. The Report goes on to say that 'such an inclusion could build upon the existing requirements for equity and fairness provided in the general principles affecting the jurisdiction of the Industrial Commission' (page 130). Recommendation 172 proposes that the Commissioner for Equal Opportunity be consulted at the time of drafting any Bill arising from the Report.

Arguably, a power of intervention would be valuable, as it would permit the Commissioner to lead evidence and make submissions directly on the particular matter before the Commissioner.

This can be compared with the intervention powers of HREOC, such as that given by the *Sex Discrimination Act* s. 48:

'(gb) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve issues of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy or discrimination involving sexual harassment'.

Tasmania provides that the Commissioner has power '*to intervene, with the leave of a court or tribunal, in proceedings before the court or tribunal that involve issues relating to acts of discrimination or prohibited conduct*' (s. 7(b)). This is not restricted to any particular type of proceedings.

Arguably, the main use of such a power would be in Industrial Commission proceedings dealing with awards and enterprise agreements. Intervention in private disputes among citizens may be less appropriate.

Comment is invited on whether an intervention power would be desirable.

5. Invitation to comment

Equal opportunity law affects everyone. The Government wishes to take account of all views and to strike a fair balance among the interests affected by this law. The Government therefore invites comment from any interested person or group on the proposed legislative changes set out above.

The Government is, however, mindful that changes in this area of law are long overdue, and that many of these matters have already been the subject of extensive consultation and public debate both in the context of the Martin Report and the lapsed Bill. The Government therefore wishes to legislate without undue delay.

Comment is therefore invited no later than 12 January 2004 and should be sent to:

Equal Opportunity Act Review
c/o Policy and Legislation Section
Attorney-General's Department
GPO Box 464
ADELAIDE SA 5001

or can be emailed to agd@agd.sa.gov.au.