

Submission

on

South Australian Equal Opportunity Legislation

to the

Equal Opportunity Act Review

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1 Terms of reference

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.*

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'*.

In 2003 the South Australian government issued a Framework Paper that included government recommendations (and matters for consideration) that drew on the Labor Party Platform, the Martin enquiry into equal opportunity reform, the approach of other jurisdictions, and a bill prepared under the previous government.

2 Introduction

Festival of Light Australia is a Christian civic ministry which is concerned among other things to promote the rights and freedoms of individuals and families within a just and equitable society.

Every person, family and association should have an equal opportunity to participate in society, provided that they do not unlawfully inhibit others. They should also have an equal opportunity to hold certain religious and political beliefs, to speak about them and to act upon them. These freedoms flow from:

- mankind's creation as male and female in the image of God;
- marriage and family being part of God's created order;
- fundamental human freedoms of religion, speech, association and contract.

Festival of Light is pleased to make a submission in response to possible changes to the Equal Opportunity Act 1984 (the Act) described in the Framework Paper issued by the South Australian government in 2003.

While there is a need for laws addressing injustice, there is also a need to maintain proper standards of justice, to protect innocent people falsely accused of illegal behaviour.

This submission considers the extent to which equal opportunity laws (and proposals to extend such laws) have the potential to enhance or diminish the provision of justice and suggests an alternative measure which could improve justice provision in South Australia.

3 The history of justice in South Australia

3.1 South Australia's heritage of freedom

The Framework Paper recognises that freedom to speak or act has historically been restrained by laws against libel, sedition and assault (p 4). Our State has a long history of pioneering freedoms. In 1857, for example, Morris Marks, a Jew, entered the first Parliament of South Australia, at a time when no person of Jewish faith was allowed to enter the British Parliament.¹

In 1895 South Australia became the first Australian colony to give women (including Aboriginal women) the right to vote. In that year South Australia also became the first place in the world to allow women to stand for Parliament. South Australian Aboriginal women voted in the constitutional referendums of 1898 and 1899.² In 1879 Australia's first state secondary school for girls was opened in South Australia.

These advances in equal opportunity arose from a conviction of the value of freedom that has been particularly a feature of South Australia. In fact part of the purpose of the founding of the colony was to provide the free exercise of the Christian faith that was denied elsewhere. In Britain, Christians who did not conform to the Church of England experienced serious social disadvantage. But in South Australia it was agreed that no one should be disfavoured in public life on the basis of religious belief.

The purpose of the colony is clear in the writings of George Fife Angas. As one of South Australia's founders, he served as a member of the Board of Directors of the South Australia Company and became known as the father of South Australia's religious liberties. He stated:

*My great object was, in the first instance, to provide a place of refuge for pious Dissenters of Great Britain, who could in their new home discharge their consciences before God in civil and religious duties without any disabilities....*³

Freedom is also emphasised in The Proclamation issued by Governor John Hindmarsh in 1836. In this founding document, the pioneer colonists were charged *to prove themselves worthy to be the Founders of a great and free Colony*⁴

Freedom was a paramount consideration at the formation of South Australia, as stated in The Proclamation issued by Governor Hindmarsh, and composed by him and others including Robert Gouger (the Colonial Secretary and Chief Magistrate) wrote in his diary of 28 December 1836 that:

*We then held a Council in my tent, for the purpose of agreeing upon a Proclamation requiring all to obey the laws, and declaring the Aborigines to have equal rights, and an equal claim upon the protection of the Government with the white colonists.*⁵

Many other jurisdictions did not enjoy freedom of expression, freedom of association, freedom of contract, freedom of religion, the presumption of innocence, the rule of law, trial by jury in open court, the separation of powers, and the recognition of the value of the individual that were particularly found in South Australia.

In 1839 these freedoms attracted a group of more than 500 Lutherans who fled religious repression in Prussia. Under the leadership of Pastor Kavel they were attracted to the freedom of choice enjoyed in South Australia. On arrival Pastor Kavel stated: *We have found what we have been seeking for many years - religious liberty*⁶

Many of those freedoms have been undermined to a certain extent by several developments in law. So it is important that upon careful consideration be given to any proposed legal reforms, in case those freedoms become further undermined.

3.2 Difficulties in the delivery of justice

Great wisdom is required as governments seek to strike a balance between individual freedoms and the common good, in the delivery of justice. An individual upset by a particular matter may want to “have his day in court”, but our legal system could collapse under the weight of a multitude of relatively minor complaints which could be conciliated in simpler, less expensive ways.

The equal opportunity system was developed to deal less formally with some cases of perceived injustice where people are being harassed or victimised unreasonably, or because of factors outside their control such as race or sex.

3.3 The false premise of the “equal opportunity” approach to justice

The Framework Paper (p 7) appears to justify the equal opportunity approach to justice on the basis that some people may be discouraged by high legal costs from taking court action against victimisation. But the equal opportunity approach produces many difficulties.

The underlying assumption of the Equal Opportunity Act, that discrimination is always unacceptable, is false. Freedom to discriminate is often necessary and desirable.

Discrimination has a long and distinguished history as a virtue. Dictionary definitions of *discrimination* refer to the act of perceiving or making fine distinctions or differences. The word derives from the Latin *discriminare* meaning “distinction” and *discernere* meaning “discern”.⁷

Discrimination plays a vital role in competitive sport. When a team is selected for a series of cricket matches, the selection board discriminates in favour of players with great sporting ability.

Discrimination is also an important element of education, both in helping students learn to be discriminating and in discriminating between students in examinations and assessments. Kaleen High School in the Australian Capital Territory promotes its physical education program saying that “students are encouraged to become informed and therefore discerning and discriminating about their personal health and well being.”⁸ A patient facing an operation relies on a university medical faculty somewhere having discriminated in favour of students with surgical ability.

To be described as having *discriminating* tastes is a compliment. Boutiques such as Alectra offer “fashions to satisfy your discriminating taste.”⁹ VIP Tours at Alice Springs has had great success in promoting tours for “discriminating” people, “who can afford a four, five star package, the professional people...”¹⁰ Adelaide’s Oxford Dining Room is promoted as a “sensational restaurant” for “discriminating diners.”¹¹

One of the hallmarks of an advanced society is the specialisation of its workforce. Individuals achieve success by identifying and cultivating their personal abilities, skills and interests. This requires careful discernment and discrimination of each person’s unique qualities. Thus discrimination makes a desirable, important and positive contribution to modern society.

3.4 Discrimination as a vice

Why then in modern law, is discrimination often presented as a vice?

The view of discrimination as wrong has been fostered by a rash of anti-discrimination conventions sponsored by the United Nations.¹² The underlying motivation for such conventions is seen, for example, in the preamble to the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, 1979 (commonly abbreviated as CEDAW). The preamble affirms the so-called “principle of the inadmissibility of discrimination ... of any kind.”

This *principle of nondiscrimination*, as it might be called, is asserted as a kind of ultimate truth. It is essentially a religious statement that we are apparently expected to accept without reasons, as an article of faith.

How does the supposedly universal United Nations principle of *nondiscrimination* work in practice?

The outworking of “nondiscrimination” in Australia can be seen in the numerous state and federal anti-discrimination laws, such as South Australia’s *Equal Opportunity Act 1984*. This Act is inconsistent and self-contradictory. On one hand it prohibits discrimination on the many grounds: sex, sexuality, marital status, pregnancy, race, impairment or age. On the other hand it allows discrimination on many of the same grounds through affirmative action schemes. It is rather like the famous slogan: “All men are equal but some are more equal than others!”¹³

In relation to employment, discrimination on the ground of sex is both prohibited and allowed. Discrimination is prohibited generally and allowed when there is a “genuine occupational requirement” for a particular sex. How can we know which rule applies in a particular case?

In contradiction of the general ban on sexual discrimination, the Act specifically allows sexual discrimination in a variety of situations where the ban is acknowledged as undesirable or unworkable. These situations include competitive sport, clubs and schools, and the provision of accommodation and services for one sex only.

Another inconsistency is evident in the disposal of land. A living person is not allowed to discriminate on the basis of sex but a deceased person can do so through a will.

Insurance policies and superannuation schemes may discriminate on the basis of sex when actuarial data provide evidence of differences between the sexes.

How is a law to be unambiguously interpreted and consistently applied when the action involved, namely discrimination, is both prohibited and permitted in the same legislation? This is arbitrary control - not the rule of law that has been a precious part of our common law heritage. The inconsistencies and contradictions show that the assumed principle of nondiscrimination is not universal and not practical.

In his book *The Rule of Law*, Geoffrey Walker quotes a House of Commons petition to King James I in 1610: "Amongst the many other points of happiness and freedom, which your Majesty's subjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is none which they have accounted more dear and precious than this, to be guided and governed by *certain rule of law* ..., and not by any uncertain or arbitrary form of government..."¹⁴

Since the supposed principle of nondiscrimination results in uncertain and arbitrary government, this principle should be rejected as an unsatisfactory basis for law.

3.5 Between a mediation and a court system

There are further difficulties with the equal opportunity or anti-discrimination system of law in the SA Equal Opportunity Act 1984. In concept, this approach to justice is somewhere between a mediation system and a court system.

The Equal Opportunity Tribunal can attempt to conciliate (according to s 27.1) but can also operate as a quasi court - being able to cross examine witnesses (s 24.1.b), require any person to make oath or affirmation to answer truthfully all questions put by the Tribunal (s 25.2.d) and require any person appearing before the Tribunal to answer any relevant questions put by any member of the Tribunal, or by any other person appearing before the Tribunal (s 25.2.e) unless the answers would be self-incriminating (s 25.3).

But the equal opportunity approach is unequal. It extends considerable support to the complainant in terms of legal advice and advocacy, thereby lacking the even-handed approach of a mediation forum or a court:

... the Commissioner must, on the request of the complainant, assist the complainant, personally or by counsel or other representative, in the presentation of the complainant's case to the Tribunal... (s 95.9).

Justice requires governments to take an even-handed approach that provides equal support to complainant and respondent rather than taking sides. But even under the proposed reform of the Act (Framework Paper p 7), the SA government is advocating a one-sided approach: *There would be no cost risk in taking equal opportunity action. It also offers the complainant the benefit of free advocacy...* The Framework Paper also describes the government's belief that *... an adequate avenue of representation must be provided to complainants (p 41) - but not to respondents. Further, respondents may incur considerable costs.*

Moreover the Tribunal *is not bound by the rules of evidence (s 23.2) and its hearings can direct that any proceedings or a part of proceedings be held in private. (s 23.4).* Even under the reforms envisaged by the government there *... would be no change to such matters as costs or the application of evidentiary rules (p.42).*

Secret court hearings, with charges based on rumours or second-hand reports, are not compatible with open justice. As in the old saying, *Justice must not only be done it must be seen to be done*. Complaints before the SA Equal Opportunity Tribunal are almost always heard in private and are not reported in the media.

The SA Equal Opportunity Act provides a typical example of the tribunal approach to enforcement. Anyone aggrieved by an allegedly discriminatory act may make a complaint to the Commissioner for Equal Opportunity, who is not impartial but is required to campaign for the so-called principle of nondiscrimination. This is clear from the Act which states: “The Commissioner must foster and encourage amongst members of the public informed and unprejudiced attitudes with a view to eliminating discrimination on the ground of sex, sexuality, marital status, race, impairment or age.”¹⁵

On receipt of a complaint, the Commissioner is required to become an advocate for the complainant, unless the complaint is considered “frivolous, vexatious, misconceived or lacking in substance”.¹⁶ The Commissioner must prepare a written summary of the particulars of the complaint and serve it on the respondent named in the complaint.¹⁷ The Commissioner may conduct an investigation into the alleged breach with the power to demand relevant documents from the respondent, who must comply or face a penalty of \$2000 or 6 months jail.¹⁸ The Commissioner may try to resolve the matter by conciliation but if unsuccessful must refer the matter to the Equal Opportunity Tribunal for hearing and determination.

Where a complaint is referred to the Tribunal the Commissioner must, if requested, assist the complainant present the case to the Tribunal.¹⁹ If Tribunal determines that the respondent is found to have breached the Act, the Tribunal may, among other things, order the respondent to pay unlimited compensation for loss or damage including injury to his or her feelings.²⁰

The effect of this inquisitorial process is to treat the respondent as guilty unless proved innocent - a reversal of the common law system of justice. At every stage the complainant is supported by the full resources of the Commissioner, while the respondent is left to fend for himself as best he can. Given the ambiguities and inconsistencies of the law and the unlimited damages able to be awarded by the Tribunal, the respondent may well feel intimidated by the process.

For all these reasons, the SA Equal Opportunity Act is an unsatisfactory law. It should not be extended by adding further grounds for complaint. Rather, it should be repealed and replaced with a more just and open system.

3.6 Examples of “equal opportunity” injustice

Equal Opportunity and Anti-Discrimination Tribunal hearings are confidential, so full details of complaints and their outcomes (apart from sanitised summaries in annual reports) are usually only known by those intimately involved in the process. One example of injustice resulting from the operation of the SA Equal Opportunity Commission arose from a complaint about an employer’s dress standards:

*The firm received a complaint of discrimination on the basis of sex. The complaint, that female employees were required to wear uniforms but male employees were only required to wear business suits - was not made by an employee, since employees were happy with the arrangement. It was made by a woman employed by the Equal Opportunity Commission who had visited the firm and observed what she believed to be “double standards” of dress code. The complaint was trivial; none of the firm’s employees was aggrieved - but the firm had to spend money on legal representation to have the complaint dismissed.*²¹

The most recent report of the SA Equal Opportunity Commission (EOC) describes four cases determined by the Equal Opportunity Tribunal in 2002-3.²² Three of the complaints were dismissed - but at some cost to the respondent companies.

The one complaint which was upheld (to some degree) was not clear-cut. A woman who was dismissed from a clerical job after a three month probation period complained that her dismissal was unfairly based on physical impairment. However the evidence suggested that her employer had found that “she was too direct with clients and her forceful nature impacted adversely on other workers in the office”. She was also a smoker, had a hacking cough, and had not been open in her job application about a back problem.

The employer, no doubt wishing to soften the blow, unwisely told the woman that her employment would not continue beyond the probation period because of her health - but other issues such as customer and staff relations may have been a more significant factor.

At issue is the employers’ freedom of contract. Employers as a group are most reluctant to dismiss good employees who have a physical impairment. They often go out of their way to assist such employees so that they can continue. But staff who disrupt the harmony of the workplace, with or without a physical impairment, are a liability. Why was this firm forced to spend time and money to defend an action which had been done in the best interests of the firm and the rest of its staff, and to pay compensation for so doing?

But there is more! The report cites applications by the Salvation Army and the SA Police for Equal Opportunity Act exemptions. The Salvation Army wanted to be able to employ only women to work at a refuge for victims of domestic violence and to offer only indigenous people a traineeship to work with indigenous clients. The SA Police wanted to be able to employ only female officers to work with (mainly female) victims of sexual assault.²³

The “common sense” exemptions were granted - but why were these bodies forced to spend time and money on seeking exemptions from the Act?

These examples in the EOC report suggest that the SA Equal Opportunity Act is imposing an unnecessary bureaucratic burden on citizens, organisations and businesses that interferes with freedom and efficiency.

Another disturbing section of the report is the item on the last page, headed “Diversity”: *If we could shrink the earth’s population to a village of precisely 100 people, with all the existing human ratios remaining the same, it would look something like the following: ...89 heterosexuals; 11 homosexuals....*²⁴

This bald statement - that 11% of the world’s population is homosexual - is not supported by any reputable, large-sample randomised survey of adults. The 2003 *Sex in Australia* survey²⁵ found that only 1.6 % of men identified as homosexual and 0.9% as bisexual. For women, 0.8% identified as exclusively lesbian and 1.4% as bisexual. Overseas surveys indicate similar percentages - nowhere near 11%. The publication of such demonstrably wrong “information” suggests that the Equal Opportunity Commission is blinded by its own prejudices.

It is the “gay lobby” which is promoting the false “10-11%” figure in order to inflate its numbers and influence. The use of this false figure suggests that the SA Equal Opportunity Commission is unreasonably biased towards this lobby group, and could display bias in cases involving complaints of discrimination against homosexuals. The report does not engender confidence in the Commission or in equal opportunity law.

The promotion of false claims about the prevalence of homosexuals in society by a government agency is particularly alarming when combined with the Justice Resolution 107 passed by the ALP Convention of October 2002. As the Framework Paper notes (p 2), this requires the government to consider legislation like the NSW Anti-Discrimination Act, which makes “vilification of gay men, lesbians, bisexuals and transgender people... unlawful”.

This particular law was passed in 1993. Within a few years, two disturbing reports indicated how alleged breaches of the law, heard in private, with participants sworn to maintain confidentiality were seriously

undermining fundamental freedom of speech. One case was a letter to the editor setting out various health and other risks of the homosexual lifestyle, written by a medical doctor and published in a NSW newspaper.²⁶

A gay and lesbian group made a written complaint of vilification, against the doctor and the newspaper editor, to the NSW Anti-Discrimination Board. The Board thereafter acted as advocate for the homosexual group. The Board ordered the doctor and the editor to appear before it and prove their innocence. The editor was represented by a lawyer. The doctor represented himself.

The doctor produced articles in medical and scientific journals to support the facts cited in his letter. The Board responded by saying that the doctor should have included all these references in his letter. The doctor responded that if he had done so, no newspaper would have published his letter because it would have been too long and complicated.

The Board reserved its judgement and eventually decided to dismiss the complaint. But the doctor did not receive any compensation for the cost of his time and inconvenience. The newspaper owners did not receive any compensation for their legal costs. The complainants were not required to pay anything, even though their complaint was proved to be without foundation.

One outcome appears to have been that NSW newspaper editors no longer publish letters outlining the risks of the homosexual lifestyle. The costs in time, legal fees and inconvenience, of defending the newspaper against unfounded complaints of vilification may well have been a major factor in such a policy decision. The biggest ultimate cost has been a significant loss of freedom of speech.

The second case also involved a complaint by a gay and lesbian group, against the publication in a magazine of a motion passed by a community group protesting at the promotion of the homosexual lifestyle which the motion stated was a health hazard and over-represented in cases of child sex abuse. Lawyers were engaged to act for the defendants, but although the case was settled, confidentiality provisions have prevented any outsider from knowing any details of the Board's final determination.

Another example of injustice from anti-discrimination or equal opportunity law occurred in the US in 1999. A complaint of unfair discrimination on the ground of disability was made against Federal Express, a delivery firm with a large fleet of trucks. The firm had refused to employ drivers who were blind in one eye. The *Washington Times* noted that although the complaint was ultimately dismissed, "Federal Express was introduced to a round of unnecessary and counter-productive costs..."²⁷

In Canada, Hugh Owens was fined thousands of dollars after a gay and lesbian group complained he had vilified homosexuals. Owens had published a newspaper advertisement listing two Old Testament and two New Testament passages on homosexuality, with a symbol implying that the Bible prohibits the practice. His appeal against the finding was unsuccessful. On 11 December 2002 the Queen's Bench of the Judicial Centre of Saskatoon upheld the finding of a Board of Enquiry that the appellant Hugh Owens "exposed homosexuals to hatred or ridicule" when he published an advertisement in the Saskatoon *Star-Phoenix* newspaper, in violation of *The Saskatchewan Human Rights Code*. The judgement noted that the *Star-Phoenix* newspaper was also in violation of the Code.²⁸

This Canadian ruling strikes a heavy blow against freedom of speech and raises the question of whether the Bible itself - the basis of much of our law - could eventually be prohibited in some Western nations on the ground of alleged "vilification". It is noteworthy that homosexual parades such as the Sydney Gay and Lesbian Mardi Gras often ridicule or vilify other individuals and groups such as orthodox Christians, but anti-discrimination laws offer no protection in these cases.

The most disturbing example of potential injustice from equal opportunity law comes from Victoria, where a complaint of religious vilification is still being determined in a hearing by Judge Michael Higgins

of the Victorian Civil and Administrative Tribunal, two years after it was first lodged with the Victorian Equal Opportunity Commission.

Cross-examination of the complainants - three Australian-born Muslim converts - has revealed that the complaint was triggered by a woman who was both a member of the Islamic Council of Victoria and worked for the Equal Opportunity Commission. This woman apparently arranged for the three Muslims to attend a seminar, to help Christians understand Islam and held in a Melbourne church, and take notes on which later complaints were based. When one complainant initially said she had other commitments and did not want to go to the seminar, the woman on the Equal Opportunity Commission insisted that her attendance was very important.

The Muslims had Australian names and did not tell conference organisers about their Muslim faith. They attended different parts of the seminar at different times - none attended the introductory session which placed later remarks in context. Cross examination revealed that none of the complainants had a detailed knowledge of the Quran, the holy book of Islam - unlike the seminar leader Pastor Scot, a former university lecturer in mathematics born in Pakistan, who is highly qualified in Islamic studies. Pastor Scot, a quietly spoken, gentle man, translated and explained verses in the Quran and the Hadith (sayings of Mohammed) relating to *jihad* and other aspects of Muslim belief. He also explained that most Muslims are unaware of the detailed content of the Quran. He said they can recite parts in Arabic but do not understand the meaning. Pastor Scot urged Christians to reach out to Muslims, to invite them to their homes for meals and friendship, and to show them love.

At one point in the proceedings the judge remarked that although his reading of early parts of the transcript of the seminar audiotapes suggested possible vilification, as he read on he changed his mind because the context was one of developing friendly relationships with Muslims, not inciting hatred.²⁹ He urged the parties to settle, but although counsel for Pastor Scot and fellow defendant Pastor Nalliah indicated willingness to do so, counsel for the Islamic Council of Victoria said conciliation was not possible.

The Victorian Racial and Religious Tolerance Act provides for an exemption in cases where there is a genuine artistic, scientific or religious purpose, but the Equal Opportunity Commission has apparently chosen not to consider this Christian seminar taught by a qualified pastor in a church as having a “genuine religious purpose”, even though complaints about alleged religious vilification in paintings and plays are routinely rejected because of their “genuine artistic purpose”. It is possible that Judge Higgins will make a ruling on this matter later in the year - at great cost to the pastors, whatever the outcome.

The two pastors have indicated that they could have avoided the enormous legal costs accumulated so far (over \$100,000) by agreeing early on to apologise, even though they believed they had done nothing wrong. Pastor Scot told *Festival Focus Queensland* : “We have told the truth, in love. This is a watershed case. At stake is the right of every Australian to examine different religious beliefs and speak freely about them. We must make a stand for truth, because ‘the truth will set you free’.”³⁰

It is possible that Judge Higgins may ultimately dismiss the complaint against the two pastors, but the dismissal would come at a terribly high cost which would not be recoverable from the complainants.

Judge Higgins as a judge, was appointed as an impartial adjudicator. But the Equal Opportunity commissioners who initially hear all cases in South Australia, are appointed to campaign actively for “nondiscrimination” (see 3.5 above) which is often understood to mean “political correctness”. This requirement for advocacy is a serious weakness in equal opportunity legislation, undermining its potential to deliver true justice.

3.7 A better way - mediation for attempted conciliation

Injustices such as defamation, assault, sedition and racial vilification are capable of remedy through the court system where traditional rules of open justice apply.

Cases of perceived lesser injustice could be dealt with by an alternative measure without recourse to anti-discrimination provisions or to the courts, as follows. An aggrieved person could apply to a Mediation Commission for attempted conciliation.

A Mediation Commissioner could have the discretion to dismiss the matter as trivial, or bring it to mediation for attempted conciliation (a finite time being specified). The Commission could require both parties to attend and cooperate and could offer equal assistance and support prior to the meeting.

If either party refuses to attend the meeting, or if the mediator is dissatisfied with the cooperation of either party at the meeting (which would be recorded on video) the Commissioner could bring an action against the belligerent party, under an offence of *failing to cooperate with the Mediation Commission* that could be publicised in the media and punishable by a substantial fine.

When both parties have participated to the satisfaction of the mediator (regardless of whether the meeting achieves conciliation) the matter could be closed as far as the Commission is concerned.

In this way, as facilitated by the mediator, the aggrieved person would have expressed his or her perception of the alleged injustice, while the respondent would have explained his or her position on the matter. If the aggrieved person is still dissatisfied with the outcome and has suffered objective damage, civil action through the courts remains an option.

Community mediation service organisations currently help to resolve conflict over local community matters (such as abusive behaviour and harassment, and disputes over neighbourhood issues). Such assistance with conflict resolution and mediation is even-handed, favouring neither complainant nor respondent. Recourse to such services helps resolve disputes without them escalating into costly legal battles.

Recommendation 1

The SA Equal Opportunity Act should be repealed and replaced with legislation to establish a Mediation Commission as described above.

4 Proposals and suggestions in the Framework Paper

4.1 Racial vilification and victimisation

In the Framework Paper (p 8) the government proposes that there should be an equal opportunity remedy for racial victimisation (the civil wrong pertaining to racist behaviour). The Framework Paper (p 8) states that *merely speaking against a particular practice does not amount to vilification or victimization in the legal sense.*

However the Victorian complaint against Pastor Daniel Scot and Pastor Danny Nalliah under the Racial and Religious Tolerance Act was essentially a complaint against criticisms of teachings in the Quran and the Hadith. Supposed safeguards to protect “merely speaking against a particular practice”, written into the Victorian Racial and Religious Tolerance Act, have proved to be no safeguards at all (see above under 3.6). Indeed, the advocacy for “political correctness” which undergirds the SA Equal Opportunity Act could well lead to a significant number of unfair SA complaints.

There is already a fair remedy for racial vilification under the South Australian Racial Vilification Act 1996. This Act defines the offence of racial vilification in Section 4 thus (*italics added*):

A person must not, by a *public act*, *incite hatred* towards, *serious contempt* for, or *severe ridicule* of, a person or group of persons on 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.

Maximum penalty: If the offender is a body corporate: \$25,000. If the offender is a natural person: \$5,000, or imprisonment for 3 years, or both.

This is a carefully crafted offence requiring the prosecution to establish several facts:

- that the act was public, not private;
- that the defendant had evil intent (*mens rea*) by inciting hatred, severe contempt or severe ridicule; and
- that the act involved a threat of physical harm to person or property.

Public debate, and therefore freedom of expression, is unaffected even if it involves strong criticism, contempt or ridicule not involving physical threats, or even verbal abuse. An offence is committed only if public order is at risk by a threat of physical harm to person or property.

A prosecution for an offence against this Act requires the consent of the Director of Public Prosecutions, who presumably must first be convinced that a *prima facie* case exists. Furthermore, any prosecution under this Act would be dealt with by a court, not a tribunal, and the normal rules of evidence, such as the presumption of innocence and the inadmissibility of hearsay would apply.

This South Australian legislation therefore preserves the fundamental democratic right of freedom of expression.

Recommendation 2

The SA Racial Vilification Act 1996 should remain the main remedy for racial vilification complaints. Racial "victimisation" complaints could be addressed by a Mediation Commission as described under 3.7 above, as a fairer process than that provided by the SA Equal Opportunity Act.

4.2 Other vilification

The Framework Paper (pp 8-9) raises the possibility of expanding the Act to include vilification and victimisation on the grounds of sexuality, gender identity, disability and HIV/AIDS infection. These would become grounds of unlawful action that could result in a payment of up to \$40,000 in compensation (p 6).

South Australian criminal law already makes it an offence to threaten or to assault someone, or to damage their property. So there is no logical reason why a person who threatens another because of their sexuality or HIV infection should be treated any differently from a person who threatens another for any other reason.

The Framework Paper (p 8) asserts that certain actions would not be victimisation or vilification in the legal sense, but that position may not be shared by the Equal Opportunity Commissioner who has already demonstrated some bias towards the homosexual lobby (see 3.6 above). Other cases outlined under

section 3.6 indicate the impact of laws against homosexual vilification in stifling free speech, quite apart from cost burdens imposed on all respondents under equal opportunity legislation.

A recent disturbing attempt to stifle free speech occurred in November 2003 in the UK. British police went as far as investigating “at length” comments made to a journalist by the Bishop of Chester in north west England, as a possible breach of public order.

BBC News reported that the Cheshire constabulary questioned the Bishop of Chester (Rt Rev Peter Forster) on 7/11/2003 following a complaint against his recommendation that homosexual persons be encouraged to gain medical help reorient their sexuality. A homosexual group alleged that Bishop Forster’s comments were “offensive and inflammatory”.³¹

Although police later decided not to lay charges against the bishop, the fact that a leader of the established Church of England was investigated at all for teaching orthodox Christian doctrine should alarm all those who wish to preserve our freedoms of speech and religion.

Freedom of speech and freedom of religion are undermined through a culture of political correctness - a culture supported by laws against vilification and victimisation. That culture generates a climate of fear and timidity in relation to free expression, especially in public meetings or in published materials.

Recommendation 3

The SA government should not proceed to implement any “anti-vilification” provisions in the Equal Opportunity Act, as such laws elsewhere have demonstrably undermined the important freedoms of speech and religion.

4.3 Time limits

The Framework Paper (pp 9-10) proposes an extension of the time limits in relation to equal opportunity complaints. The proposed reform to the Act does not appear to provide for speedier resolution, but rather could unfairly disadvantage the respondent and benefit the complainant, who would be given longer to lodge a complaint and gain extensions.

Recommendation 4

The government should reject the proposal to extend time limits for lodging complaints, because this could unfairly disadvantage respondents who are already disadvantaged by the terms of the legislation.

4.4 Definition of ‘disability’

The Framework Paper (pp10-11) proposes to extend disability discrimination. The proposal, as part of the equal opportunity, extends the possibility for vexatious complaints as detailed above under 3.6 in the case involving Federal Express, and therefore may result in unwarranted actions.

Recommendation 5

The proposal to extend disability discrimination should not proceed as it would increase the likelihood of unwarranted complaints.

4.5 Other proposals

The Framework Paper (pp 11-24) makes many other proposals which would have the effect of increasing unwarranted complaints against employers already over-burdened by the requirements of the Equal Opportunity Act. These proposals should be rejected because they would not promote justice and fairness in the community and could undermine freedoms of contract and association. They could all be dealt with far more appropriately under legislation for a Mediation Commission as described under 3.7 above.

In particular, the proposal to include the refusal to allow public breastfeeding as an effective offence under the Equal Opportunity Act is flawed. Appropriate clothing or a shawl can ensure that breastfeeding is discreet at all times, so that no offence is ever caused.³²

Problems have arisen in the past where women have (sometimes deliberately) exposed their breasts while breastfeeding in public, offending some passers-by. These problems are more appropriately dealt with by mediation rather than equal opportunity legislation.

Recommendation 6

Framework Paper proposals for extending equal opportunity law to cover complaints about vicarious liability, family/caring responsibilities, breastfeeding, locational disadvantage, potential pregnancy, political belief or activity, industrial activity, allegedly irrelevant criminal record or dealings with police, allegedly irrelevant medical record, occupation or trade, physical features and independent contractors should all be rejected as they would place further unfair burdens on employers and would further undermine the freedoms of contract and association. Complaints of this nature would be far better addressed by a Mediation Commission without the inherent bias against respondents built into the Equal Opportunity Act.

4.6 Same sex relationships and religion

The Framework Paper (p 24) describes the government as committed to ensuring that same-sex relationships are recognised in the same way as heterosexual relationships in terms of the provision of the Act. The Framework Paper seeks comment on whether an institution that is not itself a religious institution, but which is administered by a religious institution should be able to continue lawfully to discriminate on the ground of sexuality, based on the precepts of the religion.

If religious organisations and the institutions they operate are denied the legal right to choose staff whose sexuality and spirituality are approved by the organisation, the purpose of the institution is undermined. As the Framework Paper notes, there is an argument that many religious organisations could make no distinction between their religious purposes and those in the institutions they operate. A hospital, for example, established by a religious organisation, may consider health care to be a means by which it gives effect to its religious aims. A school, operated by a religious organisation (or established as a religious institution) may consider education to be a means by which it gives effect to its religious aims. The reliance on private health care, aged care and nursing homes shows how greatly the community values *freedom of choice* in relation to those services.

In recent years the massive shift of pupils from public to private education clearly demonstrates how much parents and the community value freedom of religion, association and contract in the area of education.

In particular this shift demonstrates how parents, religious organisations and independent schools value the capacity to discriminate in the choice of staff, and in all other decisions relating to their aims and conduct.

A further question arises as to whether support staff in colleges and schools (along with teaching staff) can continue to be chosen in accord with the values held by the institution. This is a very important concern, since non-teaching staff make a key contribution to the work of the institution.

In a Christian school, the involvement of librarians, receptionists, teacher assistants, caretakers and cleaners is a very important part of the whole influence on children. In primary schools, lonely children from dysfunctional backgrounds may interact positively with non-teaching staff, who can sometimes exercise a pastoral role. So it is paramount that schools retain the freedom to uphold their convictions in the choice of all staff, whether they be in a teaching or support role.

The approach taken by the Queensland government in November 2002 (and canvassed as a possibility for South Australia) has diminished freedom in Christian schools. The government of Queensland has agreed that staff may be required to conduct themselves in a manner consistent with the school's religious beliefs during work hours only. But there are enormous difficulties with effectively requiring staff to pretend to uphold or adhere to values and behaviours during work hours. Nor is the "out of hours" behaviour of staff irrelevant to their work and the ethos of the school, as is presumed by the Queensland approach. The values taught by the school would be undermined if children knew that staff engaged in conduct outside work hours in conflict with school values.

The Framework Paper raises the matter of government funding of religious institutions as though this justifies government control. However the funding is really by taxpayers - over a third of whom choose to send their children to religious or independent schools, in the best interests of their children.

Governments arise only as individuals, families, associations, and local communities enter into a wider social contract, from which governments emerge. Further, many institutions provided a valued community service for centuries prior to government funding. Governments, recognising the good work of such institutions, have later provided subsidies as a very cost-effective way of providing an essential service. This fact provides no justification for seeking to shape the culture of those institutions - a culture which is a key factor contributing to the high value of the service. To stifle the culture through equal opportunity legislation could "kill the goose that laid the golden egg".

Unfair treatment of Catholic schools by government provoked the famous Goulburn school strike of 1962, when 1,000 students at the town's Catholic schools arrived to be educated at the already overcrowded state schools - to indicate to government the importance of justice for all schools, and hence the value of independent education.³³

Recommendation 7

Organisations that are religious institutions (or administered thereby) should retain the capacity to discriminate lawfully on the ground of sexuality, since that capacity upholds freedom of religion and freedom of association, and recognises the way in which religious aims are given effect through bodies administered by religious organisations.

Reform of anti-discrimination law in Queensland should not be replicated in South Australia, since that reform has undermined the legal ability of religious schools to maintain their distinctive ethos and determine how children are educated.

4.7 Same sex relationships and associations

The Framework Paper (p 25) proposes to amend the Act so that no association may discriminate on the ground of sexuality, either in admission or in relation to conditions or classes of membership. This proposal undermines the important freedom of association - the choice of people to group together as they see fit. Homosexual groups such as gay and lesbian associations value the freedom to associate as much as other groups. There has been no public clamour for this proposed change of law.

Recommendation 8

The Act should not be amended to prevent associations from discriminating on the basis of sexuality as this is an unfair erosion of the freedom of association.

4.8 Dress or appearance

The Framework Paper (p 26) considers whether to retain Section 29(4) that permits discrimination on the basis of dress or appearance which is characteristic of (or is an expression of) the person's sexuality within the employment context.

There was community outrage in Port Augusta in 1996 when a male teacher of students in year 8 and 9 decided to dress as a woman, requiring use of the title "Miss".³⁴

Parents and community leaders such as Mayor Joy Baluch were upset. They said that appearing in the classroom in women's clothing was "a subtle psychological abuse" of students. Pastor Bob Denton, a local minister, described the situation as disgraceful, and asked, "How on earth can the authorities allow that kind of role model in a school?".³⁵ Their outrage was understandable, given concerns expressed more recently about the damage done by sex-change operations.³⁶

Transgendered people or "transsexuals" suffer from what is called *gender dysphoria*. They are not happy with the gender of the body they were born with. They believe they would feel better if they dressed as members of the opposite sex, or had body parts cut off or stitched on.

The roots of gender dysphoria often lie in early childhood disturbance or misperception. Surgery does not reliably solve these problems - a follow-up study by Dr Jon Meyer of the Johns Hopkins medical school in Baltimore, US, of all patients who had undergone sexual reassignment surgery since 1960 led to Johns Hopkins discontinuing such operations in 1979 because they provided no measurable benefit.

High profile "sex change" tennis star Renée Richards now says, "I would have been better off staying the way I was. Today there are better choices for dealing with the compulsion to cross dress and the depression that comes with gender confusion."

Joseph Cluse and Gordon Babcock both suffered from gender dysphoria which they attribute to acute psychological wounding in very early childhood. Counselling and prayer have, over time, led to healing.³⁷

The particular problem with the cross-dressing teacher at Port Augusta was the message it sent to students, some of whom may have been suffering gender confusion themselves, that cross dressing and possibly surgery are positive options for gender problems. As Johns Hopkins medical school and Alan Finch (whose story was told on ABC TV's *Australian Story* on 2/9/03) found, this message is a dangerous lie.

Schools and other bodies should retain the right to discriminate against cross-dressing staff in the best interests of their students.

Recommendation 9

There should be no removal of the power to discriminate reasonably on the basis of dress or appearance that is characteristic of (or is an expression of) the person's sexuality within the employment context, since such a removal may lead to greater injustice and would undermine the freedoms of association and contract.

4.9 Other proposals and suggestions

The Framework Paper (p 27ff) invites comment on a number of other matters including adequacy of support and advocacy services, complaint handling, sexual harassment, access to premises, indirect discrimination, fees, past and presumed associates and identity of spouse or partner.

All of these matters are covered by the discussion leading up to **Recommendation 1** (3.7 above):

The SA Equal Opportunity Act should be repealed and replaced with legislation to establish a Mediation Commission.

4.10 Commissioner's powers and role

The Framework Paper (pp 38-39) describes the government as proposing to expand (in certain circumstances) the Commissioner's powers to require any person to produce relevant documents, disclose relevant documents, and require both parties to attend a conciliation conference, but attempt to conciliate without bringing the parties into direct contact. The proposal would protect the case notes of counsellors and others so they cannot be produced to or by the Commissioner without the complainant's consent.

As discussed in 3.5 above, the powers of the Commissioner are excessive and should be curtailed, not extended - indeed the Equal Opportunity Commission should be abolished in favour of a Mediation Commission.

Recommendation 10

*The Commissioner's powers should not be extended, but reduced to abolish the role of advocate for the complainant. The Commissioner's position should be abolished by repealing the Equal Opportunity Act and replacing it with Mediation Commission Act (see **Recommendation 1** above).*

4.11 Tribunal

The Framework Paper (pp 41-42) invites comment on whether the jurisdiction of the Tribunal should be vested in the Administrative and Disciplinary Division of the District Court. This possible shift of jurisdiction may lead to confusion, since the Tribunal is not a court and does not abide by traditional rules of justice.

Recommendation 11

*The jurisdiction of the Tribunal should be not be vested in the Administrative and Disciplinary Division of the District Court. See **Recommendation 1** above.*

4.12 Representative actions

The Framework Paper (pp 42-44) invites comment on whether parties should be able to bring representative actions, as can occur in the District Court, and as may occur according to the Act under limited conditions.

The concept of representative action especially relates to situations in which a class of people is affected, where it would be impractical for all members to pursue individual complaints, or when multiple complaints may result in lack of consistency of adjudication.

However if one person is discriminated against unlawfully on the basis of a certain attribute, this does not mean that others sharing that attribute are necessarily also discriminated against unlawfully.

Conformity to precedent is an established principle of justice that should apply in the situation whereby several complaints arise (when several people are subject to a similar event).

The problem with allowing “class actions” is that the “complaint industry” would be unfairly encouraged; relatively trivial complaints (a recurring problem with equal opportunity laws) could be “puffed up” through class action; “ambulance chasing” by some lawyers could increase. The purpose of equal opportunity law is to deal with relatively minor matters by bringing the parties to conciliation in face-to-face meetings. This is not appropriate with class actions.

Recommendation 12

The Act should not allow parties to bring representative action as a “class action” unless the alleged discrimination impacted in person upon all members of that class and who could otherwise bring separate complaints.

4.13 Commissioner’s power to decline a complaint; repeal of unproclaimed sections

The Framework Paper (p.44-48) describes the government as proposing to expand the Commissioner’s powers to decline a complaint under certain circumstances - eg if the complainant cannot be contacted or fails to respond to the Commissioner’s requests for information or contact. This proposal has merit. However the proposal to allow a Tribunal determination “on the papers” without an oral hearing should be rejected. Complainants and respondents should always be allowed to be present.

The Framework Paper (pp 48-49) describes the proposal to repeal unproclaimed sections 12 and 101 that would require the Commissioner to assist the complainant with advice, assistance and research. These sections requiring bias on the part of the Commissioner should indeed be repealed - along with the rest of the flawed Equal Opportunity Act.

Recommendation 13

*The Commissioner should be allowed to decline complaints where the complainant cannot be contacted or fails to respond and unproclaimed sections 12 and 101 should be repealed - along with the entire Equal Opportunity Act (see **Recommendation 1** above).*

4.14 Transgender and intersex status

The Framework Paper (p.49-50) invites comment on whether “transgender and intersex people” are adequately protected by the Act, and asks whether “transsexuality” should be removed from the definition of sexuality and instead a new ground of discrimination (that of “gender identity”) be established. Such a possibility is suggested in response to “the argument that transgender status is something different from sexuality and should be treated as a separate round of discrimination”.

The Framework Paper thus reflects the ignorance about gender dysphoria, sadly common in “politically correct” circles today. As discussed in 4.8 above, gender dysphoria is a condition where the patient feels unhappy with the biological gender embedded in their chromosomes from conception. The condition usually arises from problems during childhood; it is best treated by counselling rather than by hormones, cross-dressing or surgery. It is a psychological condition, quite different from the biological and extremely rare “intersex” condition - where there is no evidence that any new law is needed.

Recommendation 14

The term “gender dysphoria” rather than “transgender” or “transexual” or “sexual identity” more accurately describes the condition affecting those who sometimes claim to suffer from discrimination in this area. The term “gender dysphoria” should be used in any relevant legislation.

4.15 Other matters, including other powers of the Commissioner

As discussed earlier in 3.5 - 3.7, the foundation of the Equal Opportunity Act, with the biased advocacy role and powers given to the Commissioner, is deeply flawed.

The Framework Paper questions whether:

- the biased advocacy role of the Commissioner should be further entrenched in law;
- less substantial and more trivial complaints should be allowed; whether the Commissioner’s powers should be further boosted by no longer requiring submission to the Minister;
- the Commissioner should be allowed to investigate a matter on her own initiative where there has been no complaint; and
- the Commissioner should be allowed to investigate a matter without notifying the proposed respondent.

All these proposals contravene traditional principles of justice and involve giving much greater unqualified power to the Commissioner, despite Lord Acton’s warning: *All power corrupts - and absolute power corrupts absolutely.*

Recommendation 15

The Commissioner’s powers should not be increased in any way.

5 Conclusion

The Equal Opportunity Act contravenes traditional justice principles and is thus fundamentally flawed. It promotes a “politically correct complaint industry” which unfairly undermines the important freedoms of speech, religion, association and contract.

The most recent report of the South Australian Equal Opportunity Commission demonstrates the unfair burdens it places on businesses and other groups, undermining their efficiency and profitability. The EOC report also suggests a pro-homosexual lobby bias by the Commissioner for Equal Opportunity.

The Equal Opportunity Commission should be replaced by an impartial Mediation Commission to promote conciliation, with uncooperative parties subject to unfavourable publicity.

The Equal Opportunity Act should not be amended to allow “vilification” complaints, since such legislation elsewhere has greatly eroded free speech.

The Equal Opportunity Act should not be amended to increase the grounds where complaints may be made, since these would be more appropriately addressed by a mediation process.

The powers of the Equal Opportunity Commissioner should be curtailed, and certainly not extended, in order to minimise the possibility of bias and corruption.

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