

REVIEW OF

Equal Opportunity Act **1984**

REPORT

May 2007



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Dear Minister

REVIEW OF THE EQUAL OPPORTUNITY ACT 1984

Please find attached a document outlining the results of the Commission's Review of the Equal Opportunity Act together with recommendations for amendment to the Act.

I have also included in the Review recommendations in relation to single sex clubs, a matter also referred to me for review by you.

In completing this review, the first in the Act's 20 year history I would like to acknowledge the approximately 680 submissions received from organisations and individuals in response to the Commission's Issues Paper. The many useful suggestions made in these submissions greatly assisted the Review process.

Yours sincerely

A handwritten signature in black ink, appearing to read "Yvonne Henderson".

Yvonne Henderson
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14 May 2007

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equal opportunity act 1984 review

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equal opportunity act 1984 review

REPORT ON THE REVIEW OF THE *EQUAL OPPORTUNITY ACT 1984*

INTRODUCTION

The Western Australian *Equal Opportunity Act (1984)* (“the Act”) recently celebrated the 20th anniversary of its enactment. This provided an opportunity to reflect on the fact that whilst the Act has been amended from time to time to incorporate new grounds of unlawful discrimination, it has never been reviewed to determine whether it is operating in the most effective way possible, taking into account trends and developments in equal opportunity law and changes in community attitudes over the last twenty years.

The Act was intended to meet Australia’s obligations under various International Covenants and Conventions to which Australia is a signatory including:

- *The UN Convention on the Elimination of all forms of Discrimination against Women*
- *The ILO Convention concerning Discrimination in Employment and Occupation*
- *The ILO Convention on Workers with Family Responsibilities*
- *The International Covenant on Civil and Political Rights*
- *The UN Convention on the Elimination on all forms of Racial Discrimination*

When the Act became law in July 1985 it outlawed discrimination on the basis of:

- Sex and sexual harassment
- Pregnancy
- Race
- Religious and political conviction
- Marital status

In 1988, the Act was amended to include unlawful discrimination on the grounds of physical and mental impairment. In 1992, the grounds of family responsibility, family status, age and racial harassment were added. In the same year, the *Spent Convictions Act 1988* also came into force, and discrimination in employment on the ground of a person’s spent conviction became unlawful. Most recently, in

2002, sexual orientation and gender history were added as grounds of unlawful discrimination under the Act.

In 2005 amendments were made to the *Criminal Code* to strengthen provisions relating to racial harassment and incitement to racial harassment. These matters constitute criminal offences and complaints are made to the police for investigation. The government has indicated that it intends to add racial vilification as a ground for complaint under the Act in 2007.

Although the Act was a front-runner in Australian discrimination law when it commenced operation in 1985, other states and territories have since benefited from having legislation with more modern drafting, incorporating more grounds of discrimination and areas of coverage. In particular, legislation in the Commonwealth, Queensland, Victoria, the ACT, Northern Territory, and, most recently, Tasmania, include features that might serve as a useful model for an updated WA *Equal Opportunity Act*.

CONCLUSIONS AND RECOMMENDATIONS

NEW GROUNDS OF DISCRIMINATION

(a) Breastfeeding

The Commission recommends that the Act should be amended to include a new ground of breastfeeding to put the question beyond doubt.

(b) Bullying

The Commission recommends the introduction of a new ground of bullying in the Act.

(c) Place of residence

The Commission does not recommend adding place of residence as a new ground under the Act.

(d) Vilification on any ground

The Commission recommends that vilification laws should be limited to those groups particularly vulnerable to the silencing and intimidating effects of vilification, being the groups who have a history of, or currently are at risk of being vilified or victimised and therefore may be in need of specific protection.

(e) Homosexual/sexual orientation vilification

The Commission recommends that a person should have redress for public acts of vilification on the ground of his or her sexual orientation, which includes, under the Act, heterosexuality, homosexuality, lesbianism, bisexuality, whether actual or imputed, in Western Australia. The Act should be amended to include this ground, in the same terms or similar to racial vilification, an amendment currently being considered by the WA Parliament.

(f) Religious vilification

The Commission has previously recommended in its discussion paper, 'Racial and Religious Vilification', jointly released by the Commission and the Office of Multicultural Interests in August 2004, that the Act be amended to include the ground of religious vilification and the Commission maintains that recommendation.

(g) Impairment vilification

The Commission recommends that the Act should be amended to include impairment vilification as a ground.

(h) Potential pregnancy or child-bearing capacity

The Commission recommends that the Act should be amended either to include

the ground of potential pregnancy, or by inserting a definition of “pregnancy”, which includes a reference to “potential pregnancy”.

(i) Membership or non-membership of an association or organisation of employers and employees, and

(j) Participation in industrial or trade union activity

The Commission recommends that the Act should be amended to include discrimination on the ground of industrial activity, or trade union or employer association membership, including the lack of those attributes or activity, to provide certainty that the Act does cover less favourable treatment on these grounds, which are lawful activities.

(k) Irrelevant criminal record

The Commission believes that if a person’s criminal record does not impact on the inherent requirements of a job, and that person is the best candidate for the job in every other way, then he or she should not be denied equal opportunity because of his or her criminal record.

The Commission accordingly recommends that the Act should be amended to include the ground of irrelevant criminal record.

(l) Profession, occupation, trade, or calling

The Commission recommends the inclusion of discrimination on the ground of social origin defined to include profession, occupation, trade or calling, in the Act.

(m) Physical features

The Commission recommends that where a physical feature is not relevant to the particular area of life concerned, such as, employment, then discrimination against the person should be unlawful. Discrimination on the ground of physical features should become a new ground under the Act.

(n) Gender identity

Western Australia is the only state or territory in Australia that does not recognise gender identity or transsexuality discrimination, and there is evidence of discrimination against persons of indeterminate, or non-birth gender identity, the Commission recommends that the Act be amended to include this ground.

(o) Irrelevant medical record

The Commission recommends that discrimination against a person on the ground of irrelevant medical record including workers’ compensation history should become a ground under the Act in all areas.

CHANGING EXISTING GROUNDS

(a) Sexual harassment

The Commission recommends that the current definition of sexual harassment in the Act should be repealed and replaced with that found in the *Sex Discrimination Act 1984*.

(b) Removing the requirement to prove that pregnancy discrimination is ‘unreasonable’

The Commission recommends that the requirement for a complainant of pregnancy discrimination prove that the discrimination was unreasonable should be removed.

(c) Relatives and associates

The Commission recommends that the Act be amended so that discrimination against a person on all grounds under the Act in respect to that person being a relative or associate of a person belonging to a protected group under the Act be unlawful, including any ground that is added to the Act in future.

(d) Amending racial harassment

The Commission considers that a correction is long overdue and that racial harassment under the Act should now adopt a similar test as is proposed for sexual harassment to remove the additional burden of a complainant having to show disadvantage going beyond the offensive conduct itself.

As in the case of sexual harassment, the Commission recommends that racial harassment should be unlawful in all areas available under the Act.

(e) Changing the test for indirect discrimination

The Commissioner recommends that the proportionality test contained within the definition of indirect discrimination should be removed and the respondent should be the party required to prove that the condition or requirement which is the subject of the complaint, is reasonable. The Commission proposes that the Act should be amended so that the test for indirect discrimination, on all grounds, is in terms identical or similar to the *Sex Discrimination Act 1984* or the *Age Discrimination Act 2004*.

(f) Amending the definition of impairment

Though the Commonwealth *Disability Discrimination Act 1992* has been amended, this is one case in which the Act provides superior protection to people with impairments. The Commission does not recommend any change to the Act.

The Commission also recommends that the Act’s protection against discrimination on the ground of a characteristic appertaining generally to persons with the same ground as the aggrieved person, or on the ground of a characteristic generally imputed to such persons, should not be removed.

(g) Redefining victimisation

The Commission recommends that a reference to section 67 should be inserted into section 5 of the Act, to remove the additional burden on a complainant to prove victimisation to a higher standard than a discrimination complaint.

CHANGING EXISTING AREAS

(a) Voluntary and unpaid workers

The Commission recommends that the definition of ‘employment’ in the Act should be amended to include unpaid and voluntary workers, and people working under an education, vocational, or training arrangement.

(b) Services provided by government

The Commission recommends that the definition of “services” in the Act should be amended to incorporate the regulatory and compliance functions of government.

(c) Extending family responsibility and family status

The Commission recommends that the Act is amended to extend the coverage of the grounds of family responsibility and family status to all areas available under the Act.

(d) Religious and political conviction – access to facilities and land

The Commission has already recommended that all grounds of discrimination protected by the Act should extend to all areas now and in the future covered by the Act. For clarity, the Commission specifically recommends that the ground of religious and political conviction should extend to all the areas currently covered by the other grounds.

CHANGING THE EXCEPTIONS AND EXEMPTIONS

(a) Single-sex clubs

It is important to emphasize that ‘clubs’ that are established to promote the purposes of the Act, or as a special program, will continue to be entitled to operate lawfully, and that voluntary associations and the benefits they provide will continue to be exempt from the operation of the Act, if the Act is amended as the Commission recommends:

The Commission recommends single sex clubs that do not fall into the categories above should no longer be exempted from the Act and recommends that section 22(3) be repealed.

(b) Employment by religious educational institutions

The Commission recommends that sections 73(1) and (2) be amended so that the exception to the duty not to discriminate on religious grounds in employment in religious educational institutions is confined to employees and contract workers with educational or teaching or pastoral responsibilities.

(c) Measures intended to achieve equality

The Commission recommends that the Act be amended so that the exception applies to all grounds and areas.

(d) Impairment and access to places

Section 66J(2) has not been amended in the 17 years since the *Building Regulations* came into force. New Disability Access Standards under the Commonwealth *Disability Discrimination Act 1992* are set to become law, possibly in 2007. The Standards will fix minimum access requirements for buildings across Australia, under a re-drafted *Building Code*. The Act needs to be to reflect these changes to State and Commonwealth laws by substituting the *Building Regulations 1989* for the old By-laws. The Commission so recommends.

(e) Impairment and education

The Commission considers that the intention of the Act is to give special protection to the rights of children with disabilities to participate in education and the long-term, life-long benefits and advantages available in their later lives. The Commission recommends that there be no change to the protections offered to students under the Act.

(f) Acts done under statutory authority

The Commission considers the section is irrelevant and is never likely to be used, apart from the requirement to comply with an order of the Tribunal or a court, which still applies. Save for those particular exceptions relating to court or tribunal orders, the Commission recommends that remaining parts of section 69 should be repealed.

Similarly, section 66ZS of the Act, which deals specifically with acts done under statutory authority as an exception to discrimination on the ground of age, should be repealed.

Instead, a section should be inserted stating that the Act overrides any existing or proposed written law of the State, to the extent of any inconsistency.

(g) Age discrimination and superannuation schemes

Section 66ZL(1)(f) ceased to have effect 12 months after the age discrimination amendments came into force, that is, in January 1994. The Commission recommends that section should be repealed.

REMEDIES AND POWERS

(a) Confidentiality, and remedial terms of settlement

The Commission regards it as the responsibility of the parties to complaints to be entitled to confidentiality if they so choose, and to settle the terms of their own agreement, with its help. The Commission can and does publish anonymised summaries of cases resolved in conciliation in its Annual Report. The Commission does not recommend any variation to these, nor to the current confidentiality provisions.

(b) Role of advocates and organisations in complaints handling

The Commission recommends clarifying the complaints procedure to enable a representative of a disadvantaged group to make a complaint of discrimination on behalf of that group.

The Commission considers that the power to authorise a representative to participate in the progress of a complaint should remain in the discretion of the Commissioner, having regard to need.

(c) Supporting particularly marginalised groups

These matters are properly addressed by the Commissioner's power to hold inquiries under section 80 of the Act.

(d) The Commissioner's powers under the Act

The features of the NSW model of complaint handling include:

- express recognition of complaints lodged by a parent or guardian on behalf of a person who lacks legal capacity;¹
- complaints lodged by agents, including a legal practitioner;²
- complaints lodged by representative bodies, as discussed above;³
- the ability of the Commissioner to assist a person to make a complaint;⁴
- complaints as lodged not having to establish a *prima facie* case (as the Commission is able to seek further information and evidence as part of its investigation);⁵
- referring serious vilification complaints to the Attorney General for proceedings as an offence;⁶

- a single system for attempting to resolve complaints by conciliation (as opposed to the somewhat confusing alternatives of either a compulsory conference under section 87, or ‘conciliation proceedings’ under section 91(2) of the Act);⁷
- the requirement to prepare a written record of any agreement reached, at the request of either party;
- the entitlement of a party to a complaint to seek to have the agreement registered in the SAT, to the extent that the terms could have been the subject of an order by the SAT, and the provisions of the agreement once registered are enforceable;⁸
- a clear rule that no party in conciliation proceedings can be represented by any other person, except by leave of the Commissioner;⁹
- a more transparent process by which complaints can be amended before they are referred to the SAT or dismissed, so that it is clear what allegations were being investigated by the Commissioner;¹⁰
- expanding the options for dismissing complaints to include the following:
 - complaints the nature of which is such that no further action by the Commissioner is warranted;
 - complaints the subject matter of which has been, is being, or should be, dealt with by another body;
 - where the respondent has taken appropriate steps to remedy or redress the conduct complained of;
 - when it is not in the public interest to take any further action in respect of the complaint;
 - or when the Commissioner is satisfied that for any other reason no further action should be taken in respect of the complaint.¹¹
- recognition that the death of a complainant or respondent does not terminate a complaint, and the legal personal representative of a complainant is able to continue with the complaint;¹²
- referral by a party of unresolved complaints to the SAT after 18 months, if the complaint has not been dismissed, referred or otherwise resolved by the Commissioner;¹³
- calculation of time when notice given by post, so that notice is taken to have occurred at time fixed after the date the notice was posted.¹⁴

The Commission recommends that the Act be amended to provide similar procedural guidance as that in the NSW Act set out above, to facilitate the complaint handling process.

OTHER PROPOSED PROVISIONS

(a) Imposing a ‘gender duty’ on public employers

The Commission recommends that government introduce a ‘gender duty’ requirement in the Act, and strengthen the powers of the Director of Equal Opportunity in Public Employment to monitor and enforce compliance by public sector employers in the performance of that duty.

(b) Other statutory duties

Rather than recommend a ‘disability duty’ the Commission prefers to recommend that the Director of Equal Opportunity in Public Employment utilise that office’s power to issue guidelines for the employment of people with disabilities in the public sphere, and to monitor their implementation, with a view to considering whether there should be a statutory requirement similar to the proposed ‘gender duty’ set out above, and mandated compliance with that duty in the future.

The Commission recommends that all government agencies and departments be required to provide details in their annual reports on progress towards equity targets developed by the Office of Equal Employment Opportunity.

(c) Compensation limit

The Commission recommends that, as there is no justification for keeping the limit as it is, it should be removed and that the Tribunal develop appropriate compensation measures commensurate with the full range of options available to superior courts in making civil awards of damages.

(d) Interest on compensation

Discrimination legislation in NSW and Queensland expressly provides for an order for the payment of interest on compensation awarded. While it is arguable that a party can already be ordered to pay interest under section 127 of the Act in its current form, the Commission considers the issue should be made clear by a specific provision allowing the SAT to order the payment of interest, and so recommends.

THE REVIEW

A comprehensive review of the Equal Opportunity Act was announced on 29 March 2006 and the public was invited to make written submissions to the Commission. Approximately 680 individuals and groups made written submissions expressing a wide variety of views and opinions, which this review takes into account in its recommendations.

It is worth noting that while most submissions addressed specific areas of concern, some also addressed whether or not there was a need to extend the regulation at all of individual and corporate behaviour to achieve the aim of equality of opportunity. The Chamber of Commerce and Industry, for example, submitted that before extending the scope of the Act at all, three conditions should be met:

- (a) a demonstrated need for regulation
- (b) a lack of appropriate existing regulation
- (c) evidence that the benefits of regulation outweigh the costs to employers and employees

The CCI suggested that neither the existence of such grounds in other states, nor ‘isolated instances of behaviour by employers that the Commission may not approve of is [not] sufficient to justify new regulation that will impact on all employers and employees.’ The organisation suggested that any increase in complaints of discrimination in employment might be related to a gradual increase in the rate of employment and/or the Commission’s increased community education activity.

Many submissions made recommendations for a wide range of amendments to the Act, including refining definitions of particular grounds such as race and ethnicity, gender identity/gender history and other grounds specifically addressed below.

Some critiqued the effectiveness of the Commission’s conciliation, community education activities, and the adequacy of support services for particularly vulnerable complainants, which are addressed below¹⁵. Several sought a shift of at least an evidentiary onus on respondents, either to provide information within their exclusive control to the Commission that might either tend to validate or dispose of the factual basis for a complaint, such as a complaint of alleged indirect discrimination in employment practices; or (at least in public employment) to demonstrate that appropriate steps had been taken to remedy existing discrimination against a class or group of people historically disadvantaged. These are also addressed below.

NEW GROUNDS OF DISCRIMINATION ARE NEEDED

The first Term of Reference in the Discussion Paper was an open-ended question:

Do the grounds of the Act need widening to cover areas not currently addressed in the Act? In addition to the grounds listed [in the Discussion Paper] some other States include in their legislation complaints which frequently are sent to the EOC and which cannot currently be dealt with [which] include:

(1) bullying, particularly at work

(2) discrimination on the ground of place of residence.

The great majority of submissions raised issues about suggested new grounds and some suggested others, such as discrimination against a person on the ground of employment status, or areas such as the extension of coverage to casual employees.¹⁶ One submission recommended that the Act should be repealed on civil liberties grounds, perceiving that the Act was a ‘persecutor’s charter’.¹⁷ The Men’s Confraternity recommended the insertion of a sunset clause in section 31 of the Act on the ground that women have achieved ‘more than equality’ in most areas of life, though the Act prohibits discrimination against men on the ground of sex, as well as women, and many other grounds of discrimination affecting men, women and children.

The greatest number of submissions received addressed concerns by members of religious groups about a perceived assault on their rights to hold and express religious opinions, particularly insofar as it might be considered appropriate to prohibit religious vilification. These are addressed below in relation to the ground.

Some of these submissions bore a strong resemblance to one another, indicating a degree of organised opposition to changes to existing protection or to any new ground or remedy, especially relating to sexual orientation and gender identity or HIV/AIDS.

Despite the evolution of the Act over 20 years, other States, and the Commonwealth, have grounds in their equivalent discrimination statutes that are not currently covered in Western Australia.

These include, in no particular order:

- Breastfeeding ¹⁸
- Public acts of homosexuality/sexual orientation vilification ¹⁹
- Public acts of religious vilification ²⁰
- Public acts of disability vilification²¹
- Potential pregnancy or child-bearing capacity ²²
- Participation in industrial or trade union activity ²³
- Membership or non-membership of an association or organisation of employers and employees ²⁴
- Irrelevant criminal record ²⁵
- Profession trade or calling ²⁶
- Physical features ²⁷
- Gender identity, including transgender and, transsexuality ²⁸

There are different protections in other states against relatives and associates of persons protected under various grounds. The Victorian *Equal Opportunity Act*, the Queensland *Anti-Discrimination Act*, the ACT *Discrimination Act*, the NT *Anti-Discrimination Act*, and the Tasmanian *Anti-Discrimination Act*, prohibit discrimination against relatives or associates of persons who possess any of the attributes covered under the respective Acts. In Western Australia, discrimination against relatives and associates is unlawful on the grounds of age, impairment, race, and sexual orientation only.

The principal explanation for the lagging behind of the Act in terms of grounds of discrimination compared to the other jurisdictions has more to do with history than a lack of will. Discrimination laws enacted most recently, such as those in Tasmania, NT, ACT, Queensland, and Victoria, built on the early versions of the discrimination statutes similar to the Act, and incorporated new grounds that have achieved recognition and status in more recent times. Western Australia was at the forefront of discrimination law 15 to 20 years ago - and the Act is not seriously deficient as to grounds - but it does need updating particularly in view of changing community awareness of discrimination.

The proposed new grounds are addressed below.

(a) Breastfeeding

One submission, from a person who suggested that the Act should be repealed, described breastfeeding as ‘a natural act as is urinating or defecating’ and opined that it was not unreasonable for persons in charge of premises to regulate where these acts may be performed.²⁹ The vast majority of the submissions that addressed this ground specifically, however, considered that breastfeeding ought to be unequivocally established as a ground of discrimination protected by the Act, either as part of the ‘family responsibilities’ ground³⁰ or in its own right, including the right not to be discriminated against for expressing milk.³¹

At present, if a woman were to lodge a complaint of breastfeeding discrimination under the Act, the only relevant ground would be that of sex or, more precisely, a characteristic that appertains generally to persons of the same sex as the complainant.³²

It is arguable whether breastfeeding is such a characteristic, at least in terms of the standard of proof required under the Act. Consequently, it would be for the State Administrative Tribunal to determine the answer. Breastfeeding is a ground of discrimination in Victoria³³, Northern Territory³⁴, Tasmania³⁵, Queensland³⁶, and the ACT³⁷. The Commonwealth *Sex Discrimination Act 1984* states that breastfeeding is a characteristic appertaining generally to women.³⁸

The Commission recommends that the Act should be amended to include the ground of breastfeeding to put the question beyond doubt.

(b) Bullying

The Discussion Paper specifically referred to ‘bullying’ as a reason for a complaint often made to, but outside the jurisdiction of, the Commission. Bullying that is causally related to a ground of discrimination such as sex, race or disability may amount to discrimination in areas covered by the Act, such as employment and education, either as direct discrimination or as, in effect, subjecting a person belonging to a group with an attribute or characteristic covered by an existing ground to unwanted conduct that has the effect of treating them less favourably in the same or similar circumstances as a person of a different sex, race or ability.

Bullying behaviour *per se* is not linked to a ‘ground’. Bullying is an issue usually dealt with by managers in a workplace as a breach of discipline or of occupational health and safety legislation, adopting definitions preferred by occupational workplace authorities in various states, such as Queensland’s Department of Workplace Health and Safety, which defines workplace bullying as ‘the repeated

less favourable treatment of a person by another or others in the workplace, which may be considered unreasonable and inappropriate workplace practice. It includes behaviour that intimidates, offends, degrades or humiliates a worker.’

Bullying is an occupational health and safety issue, because such unreasonable behaviour puts a person at risk of injury; or a disciplinary matter that requires intervention, including preventing bullying among children at school to maintain a safe environment for learning. However the current legislative and administrative schemes do not provide a ready remedy, such as conciliation, for persons subjected to it.

Advocates for particularly disadvantaged workplace participants stated that underemployment and exclusion and bullying of people with disabilities or CALD characteristics or people of Aboriginal and Torres Strait Islander descent needed to be specifically addressed.³⁹

Several unions strongly supported the introduction of bullying as a ground, identifying research that estimates victims of bullying in Australian workplaces at between 350,000 and 1.5 million individuals, and asserting that the introduction of WorkChoices legislation had removed opportunities for protection or redress⁴⁰ and that there was alleged lack of adequate remedies in the industrial sphere.⁴¹ The Health Department supported the introduction of the ground subject to appropriate exemptions for performance management,⁴² and concerns about the breadth of any definition were expressed by several commentators.⁴³

The Chamber of Commerce and Industry pointed out that the WA Occupational Health and Safety Act covers the area and that Worksafe has now introduced a code of conduct in relation to bullying.⁴⁴ Others thought bullying was best managed by the employer⁴⁵

There appears to be broad support for the inclusion of such a ground, particularly in relation to employment. Inclusion of such a ground would give complainants and respondents to such complaints access to the Commission’s investigation and conciliation functions, and a genuine remedy for victimisation of a person making a complaint. It would be appropriate to adopt a similar definition to that adopted in WorkSafe’s code of conduct.

The Commission recommends the introduction of a new ground of bullying in the Act.

(c) Place of residence

The Discussion Paper raised this issue, but it did not gain widespread support, particularly from employers who may require staff to work in a range of locations.

The Nurses Board did not support this ground stating that employers might require staff to live in close proximity to their workplace so as to be ‘on call’ for emergency or after hours service, which the Commission comments may well be an inherent requirement of a particular job. The Commissioner of the Department of Corrective Services supported the idea in relation to his area of responsibility, stating that this was because ‘. . . [D]iscrimination against residents of socially deprived areas which have high crime rates can lead to further alienation. This would be of particular concern with regard to discrimination in employment, as unemployment plays a significant role in the cycle of disadvantage which generates crime.’ Commissioner Johnson also suggested that the compounding effect of discrimination on a range of grounds should be recognised under the Act.⁴⁶ The Commission agrees but considers that the effect of discrimination on more than one ground should be taken into consideration during its conciliation process, and is or should be taken into account by SAT in the determination of complaints referred to the Tribunal

The Commission does not recommend adding place of residence as a new ground under the Act.

(d) Vilification on any ground

There was a general support for the concept of vilification laws addressing grounds other than race, though by and large submissions from religious groups did not support sexual orientation/gender identity/HIV-AIDS anti-vilification provisions, and most of the ‘religious groups’ with some notable exceptions, did not support the introduction of religious vilification provisions similar to the race vilification provisions, which is addressed below.

One submission suggested extending anti-vilification provisions to any group with a characteristic based on race and another suggested that the ground should encompass other minority groups, provided that ‘The groups identified must have a history of or currently be at risk of being vilified or victimised and therefore be in need of specific protection’.⁴⁷

The Aboriginal Legal Service suggested the Act should be amended to address negative references to Aboriginal and Torres Strait Islander people, short of inciting racial hatred against them, which could be reasonably understood to assert that ATSI peoples are less than equal to persons of any other race. It suggested limited exemptions requiring the prior approval of the Commissioner; or making it compulsory for media broadcasting in Western Australia to comply with a media policy promulgated by the Commissioner.⁴⁸ West Australians for Racial Equality (WARE) recommended a preamble to the Act that acknowledged the

first nation status of Aboriginal and Torres Strait Islander peoples.⁴⁹ A number of groups recommended specific protection for people identified by the grounds of gender identity, sexual orientation and HIV/AIDS.

The Commission recommends that vilification laws should be limited to those groups particularly vulnerable to the silencing and intimidating effects of vilification, being the groups who have a history of or currently are at risk of being vilified or victimised and therefore may be in need of specific protection, and that this form part of the definition of vilification in the Act.

(e) Homosexual/sexual orientation vilification

There were many submissions substantiating, at least on an anecdotal basis, the prevalence of discrimination and harassment and a tendency to homophobia in their daily lives.

One young person submitted a personal story of the effects of such homophobia, bullying and prejudice against him because of his sexual orientation, which affected his educational progress, throughout his primary and secondary education. His experience of tertiary education was much happier because of a positive approach by the University towards the problem of widespread homophobia in the general population which was represented within parts of the university community. He reflected on the difference that had been made to his prospects due to the understanding and support of a particular teacher and Principal, and he made detailed and thoughtful recommendations for the Commissioner's involvement in her community education function in schools.⁵⁰

Many of these submissions supported the introduction of an anti-vilification remedy on the basis of sexual orientation.⁵¹

A very large number of representations by people explicitly basing their preferences on their religious beliefs, on the other hand, strenuously opposed such a new remedy on the grounds of religious belief and activities as well as the value of 'freedom of speech'.

Public acts that incite hatred towards, or serious contempt for persons on the ground of their sexual orientation are unlawful in NSW⁵² (on the ground of homosexuality), Queensland⁵³ and Tasmania.⁵⁴

Along with race, religious belief, gender identity, and disability, a person's sexual orientation is an attribute that can attract public acts of ridicule and contempt, even violence.

The Commission recommends that a person should have redress for public acts of vilification on the ground of his or her sexual orientation, which includes, under

the Act, heterosexuality, homosexuality, lesbianism, bisexuality, whether actual or imputed, in Western Australia. The Act should be amended to include this ground, in terms the same or similar to racial vilification, an amendment presently being considered by the WA Parliament.

(f) Religious vilification

A considerable number of submissions were received from members of religious groups opposed to religious vilification laws. However the Catholic Archdiocese of Perth, the Catholic Bishop of Bunbury and the Uniting Church of Australia all supported the inclusion of protection against vilification on a range of grounds including (in the latter two submissions) religious vilification and (all submissions) vilification of people with HIV/AIDS in the Act. Similarly some other religious bodies' submissions supported these grounds because these are consistent with the objects in the Act and the obligations that Australia has under various International Covenants and Conventions.⁵⁵

By far the greatest number of submissions were made by persons concerned with the maintenance of the exemptions from the duty not to discriminate against other persons by religious bodies, including those established to provide religious education (dealt with elsewhere). Many of these submissions also were concerned that new grounds such as religious vilification, or prohibiting vilification or harassment of persons on the basis of sexual orientation, HIV/AIDS, gender history or transsexualism, might interfere with the right to hold and express religious opinions and beliefs, and 'freedom of speech'.

Many of these submissions referred to instances of successful "prosecutions" in other countries, such as Sweden and Canada, and the relatively recent decision of the Victorian Civil and Administrative Tribunal in relation to the first case of religious vilification determined under the 2002 amendments to the Victorian Equal Opportunity Act (now the Victorian Equal Opportunity and Human Rights Act 2006), discussed below.

There is clearly a strong body of opinion among certain religious bodies and groups that is opposed to any limitation of the rights of persons holding religious beliefs to express views about persons holding different religious beliefs, even if the objects of those opinions feel themselves to be vilified. The unique position of exemptions to protect the religious beliefs and practices of persons and groups established to promote religion is a policy position in all anti-discrimination law but is not absolute, and these principles must be balanced with the objectives of the Act in promoting equality of opportunity and community cohesion.

Of the 392 largely identical submissions that primarily addressed the religious

vilification issue, most also opposed not only such a ground but any suggestion of adding sexual orientation or gender identity as a ground, or providing a remedy for vilification of people affected by this or HIV/AIDS and/or harassment as a ground, and any diminution of the provisions exempting religious education bodies from the duty not to discriminate in employment.

However, in the Commission's view vilification stands out as a uniquely harmful activity, and the Commission considers that it and discrimination or harassment or exemptions for religious bodies should not be conflated.

Several submissions were useful: the submission of the Catholic Archdiocese of Perth, already referred to, and the submission of the WA Office of Christian Schools Australia (WAOCSA) which did not support the introduction of the proposed religious vilification ground and suggested that it is unwarranted and unnecessary. The WAOCSA submission pointed out that if there were any such change the existing exemptions may need to be expanded.

Of the remainder, many were in similar form if not identical to one another, and opposed any change. Most of these referred to a 2004 decision of the Victorian Civil and Administrative Tribunal involving 'the two pastors': *Islamic Council of Victoria v. Catch the Fire Ministries*.⁵⁶ It is apparent that few if any of those who made submissions had read the decision or were aware that the original finding by VCAT rested on the Vice President's finding that the material complained of was not published in good faith by the two individual respondents, who he found to be either unreliable or dishonest witnesses. However that decision has since been reversed on legal grounds by the Victorian Court of Appeal and is to be reheard.⁵⁷ Concerns have been expressed in Victoria about the effectiveness of the remedy which remains contentious in relation to alleged religious vilification which took place in 2002, if the material is again found to have been unlawful.

Several submissions specifically suggested the introduction of protection for those discriminated against or subjected to hate-based behaviour because of religious dress.⁵⁸

The Commission has previously recommended in its discussion paper, *Racial and Religious Vilification* jointly released by the Commission and the Office of Multicultural Interests in August 2004, that the Act be amended to include the ground of religious vilification. Whilst the Act is to be amended in 2007 to make racial vilification unlawful, so far the Government has not committed to introducing religious vilification laws.

The Commission reaffirms its original position and recommends the introduction of a religious vilification provision

(g) Impairment vilification

Several submissions addressed the difficulties experienced by some people with particular impairments which might be the subject of public pillorying, including but not limited to people with mental illnesses, communication problems, or conditions which cause unnecessary public fears such as HIV/AIDS.

Public acts inciting hatred for, or serious contempt of, people with disabilities are unlawful in Tasmania.⁵⁹ HIV/AIDS related vilification is unlawful in NSW.⁶⁰ HIV and AIDS are impairments within the meaning of the Act.⁶¹

The Commission recommends that the Act should be amended to include impairment vilification as a ground.

(h) Potential pregnancy or child-bearing capacity

Many submissions supported the introduction of a specific ground of potential pregnancy or child-bearing capacity. This included the Catholic Archdiocese of Perth and the Department of Health, several unions and many group and individual submissions. Though potential or future pregnancy is probably already covered by the direct and indirect discrimination provisions of the Act it is not explicitly dealt with.⁶²

The Act makes pregnancy discrimination unlawful. Pregnancy is not defined, but the term has been taken to mean an actual pregnancy or, for example, a discriminatory act that occurs during maternity leave but following the birth of a baby. The State Administrative Tribunal has held that maternity leave is a characteristic that appertains generally to pregnancy.⁶³

On the other hand, pregnancies that may occur in the future, or a woman's capacity to have children, are not concepts directly connected to the ground of pregnancy under the Act. Consequently, the Act does not expressly cover discrimination on the ground that a woman may become pregnant. Discrimination of that kind might be characterised as sex discrimination, on the ground that a woman's potential for child-bearing is a characteristic that appertains generally to the female sex, however this would require a determination by the SAT.

Potential pregnancy is a specific ground in the Commonwealth only.⁶⁴ In the ACT⁶⁵, the definition of "pregnancy" includes potential pregnancy, whilst in Tasmania and NT⁶⁶, "pregnancy" is defined as including "child bearing capacity".

The Commission recommends that the Act should be amended either to include the ground of potential pregnancy, or by inserting a definition of "pregnancy", which includes a reference to "potential pregnancy".

- (i) **Membership or non-membership of an association or organisation of employers and employees, and/or**
- (j) **Participation in industrial or trade union activity**

These two potential grounds are considered together for ease of reference.

The AMWU submitted that union members are (at least anecdotally) often treated less favourably in terms of shifts, overtime and job selection; and suggests that it had evidence of one corporate employer whose employee records detail union membership and industrial activity, which it suspects is made available to or disclosed to be used by other companies in their recruitment, and that such employees are ‘blacklisted’ by this and other potential employers. The Union suggests that the Act should be amended to make it ‘a statutory offence’ to discriminate on the grounds of union membership and industrial activity, as do other industrial bodies.⁶⁷

Several submissions remarked on the potential for duplication of the jurisdiction of industrial relations bodies if this ground were added.⁶⁸ Others simply supported the inclusion of a ground prohibiting discrimination on the ground of membership of a group of employers or employees.⁶⁹

Although the Act includes the ground of political conviction discrimination, the WA Supreme Court has held that a belief in or membership of a trade union or employer association, or participation in industrial activity is not necessarily a political conviction or political activity. Rather, the former may be a conviction as to the policies, structure, composition, and role of government.⁷⁰ Where it can be shown, for example, that an employer has discriminated against an employee solely on the ground of his or her industrial activities or union membership, or lack of it, such conduct will not be unlawful under the Act as it presently stands.

This distinction is made clear in the discrimination laws of some other States and Territories, which provide for discrimination on the ground of political conviction (or belief) as well as industrial or trade union activity.⁷¹ There is no evidence that these provisions have been misused for industrial purposes or indeed that they have been much used.

The Commission recommends that the Act should be amended to include discrimination on the ground of industrial activity or trade union or employer association membership, including the lack of those attributes or activity, so that there is certainty that the Act does cover less favourable treatment on these grounds, which are lawful activities.

(k) Irrelevant criminal record

The Chamber of Commerce and Industry defended the rights of employers to consider an applicant's criminal record in recruitment decisions, given the need for confidence and trust in the person faithfully performing their duties, that is, the assessment of a person's overall character, and that this should be permitted, subject to the constraints imposed by the spent convictions legislation.⁷²

A number of submissions raised concerns with an allegedly widespread standard employer practice of requiring police checks and the unnecessarily detrimental effect of convictions that are disclosed much later to the detriment of the individual.⁷³

The Office for Women's Policy pointed out the apparently doubly- discriminatory effect of this kind of discrimination against Aboriginal women who are grossly over-represented in prisons proportionate to their representation in the population of the State,⁷⁴ a point that was also made by the National Indigenous Women's Legal Service and the Department of Indigenous Affairs.⁷⁵

In Western Australia, the *Spent Convictions Act 1988* makes discrimination on the ground of a person's spent conviction unlawful in the area of employment.⁷⁶ Under that Act, a conviction becomes spent after not less than 10 years, either by application to the Commissioner of Police, in the case of lesser offences, or by order of a judge in the District Court, for serious offences. There are many exceptions under the *Spent Convictions Act 1988*, depending on the type of offence and the nature of the employment. In addition, convictions only become spent after an application is granted, not automatically after a period of time, like in some other States. Consequently, the number of spent conviction complaints and enquiries received each year by the Commission is very low.⁷⁷

Discrimination on the ground of a person's spent conviction is also unlawful in the ACT.⁷⁸ In the Northern Territory and Tasmania discrimination on the ground of irrelevant criminal record is prohibited.⁷⁹ Irrelevant criminal record is defined as including a spent record, and extends to a conviction in which the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises.⁸⁰

The Commission believes that if a person's criminal record does not impact on the inherent requirements of a job, and that person is the best candidate for the job in every other way, then he or she should not be denied equal opportunity because of his or her criminal record.⁸¹ There are major obstacles to members of particularly vulnerable groups seeking a 'spent conviction' order even after ten years. Consideration of an irrelevant criminal record should not prevent that person

from entering into employment and reintegrating into community life. Similarly, a person's criminal record should not affect that person's access to education, accommodation, places and services, if the record is irrelevant for that purpose. This is a matter of public policy supported by both some of the Commonwealth's Department of Employment and Workplace Relations (DEWR) programs and some State Justice Department's programs that fund community agencies to work with job seekers who may have a criminal conviction to help them regain their economic independence and the social integration and benefits that accompany it.

The Commission recommends that the Act should be amended to include the ground of irrelevant criminal record.

(l) Profession, occupation, trade or calling

No submissions dealt directly with this proposed new ground of discrimination which currently exists in only one other Australian jurisdiction, the ACT. It may be relevant to the Australian government's obligation under ILO Convention III to prohibit discrimination in employment based on 'social origin'.

The Commission recommends the inclusion of discrimination on the ground of social origin defined to include profession, occupation, trade or calling, in the Act.

(m) Physical features

Few submissions dealt with this ground directly, though it was raised by some as relevant to discrimination against persons changing their gender identity. One submission recommended that requiring proof of physical appearance should be unlawful in all areas subject to reasonable exceptions e.g. the inherent requirements of the particular job.⁸²

In Victoria, it is unlawful to discriminate against a person on the ground of his or her physical features, an amendment introduced in 1994 after a Victorian tram driver's failure to succeed in an impairment discrimination complaint, where he had been denied work because he was obese, though he proved he was able to perform the duties. In the Victorian Act, "physical features" is defined as a person's height, weight, size or other bodily characteristics.⁸³ The Victorian Civil and Administrative Tribunal (VCAT) has held that physical features include tattoos⁸⁴ and facial hair.⁸⁵ A woman who was subjected to harsh treatment in the workplace because of her weight had her complaint upheld by the VCAT.⁸⁶ A number of exceptions apply, including the reasonable and inherent requirements of the job, and any special limitation that a person with a specific physical feature may have.

Many physical features are attributes that cannot be changed, others are not. Often the ‘features’ are characteristics of persons who are treated more harshly because of a ground such as sex (women’s physical appearance is more scrutinised than men’s), age, disability or race.

The Commission recommends that where the physical feature is irrelevant to the particular area of life concerned, for example, employment, then discrimination against the person with the feature should be unlawful, and that discrimination on the ground of physical features should become a new ground under the Act.

(n) Gender identity

Gender identity is not currently a ground under the Act. The issue of gender identity discrimination is already recognised in legislation elsewhere in Australia. In Victoria, the *Equal Opportunity Act* was amended in 2000 to include the ground of gender identity, which means the identification on a bona fide basis by a person of one sex or an intermediate sex as a member of the other sex or a particular sex. This can be achieved by assuming the characteristics of a sex, whether by medical intervention or not, or by living as a member of the other sex.⁸⁷

A submission from the Men’s Australian Network recommended including this ground in the Act, and defining it ‘carefully’ in a way that recognised the person’s sense of self. Another submission recommended that the definition should not have regard to those whose gender had been surgically reassigned but should include persons assumed to have a gender history or persons who have ever identified as a member of the opposite sex, not just gender-reassigned persons.⁸⁸

The Office for Women’s Policy recommended similar provisions to the Victorian Act, including anti-vilification and harassment grounds.⁸⁹ A coalition of interest groups recommended that references to gender history, gender reassigned persons and transgender persons should be amended to include those persons who are ‘intersex,’ that is a person who in general terms identifies themselves as being of indeterminate physical or genetic sex, having characteristics of both, who identifies as being neither male nor female, or lives or seeks to live as neither male nor female. It also recommended a specific right to protection of a person who associates with a person of perceived or actual transgender or intersex identity.⁹⁰

Several others recommended that the ‘gender history’ ground be redefined and that harassment on that ground should be specifically included in the Act. One pointed to recent Australian research (the *Private Lives Report 2007*) that indicates transgender people suffer a high proportion of discrimination that affects their daily activities, including personal insults or abuse, threats of violence or intimidation, and even physical attacks.⁹¹

Since 2001 it has been unlawful under the Act to discriminate against a person on the ground of their gender history. In order to obtain the protection of the Act, a person must first be given a Gender Reassignment Certificate by the Gender Reassignment Board.⁹² The Certificate can only be granted to persons who amongst other requirements have had a recognised gender reassignment procedure. Consequently, this ground of discrimination is available to only a few people in Western Australia, and recognises sex as only either male or female. On the other hand, there are many more Western Australians who have not had a surgical procedure to change their sex but who nevertheless identify with a gender different from that which has been assigned to them from birth. These people struggle with discriminatory attitudes and actions in the community, but have no protection under the Act.

In 2001/2002, the then Commissioner convened the Gender Identity Working Party to report back to her on the prevalence of discrimination in Western Australia against people on the ground of their gender identity. A summary of the Working Party's findings and recommendations was forwarded to the Attorney General in December 2002. The Working Party and the Commissioner both recommended that the Act be amended to include the ground of gender identity. To date this has not occurred.

In NSW transgender discrimination is unlawful, as is gender identity discrimination in Queensland.⁹³ The term 'transgender' has a similar meaning given to the term 'gender identity' in Victoria and Queensland. In the NT, ACT, South Australia and Tasmania, discrimination on the ground of 'transsexuality' is unlawful. A transsexual person is someone who assumes the characteristics of the opposite sex, or identifies or lives as a member of the opposite sex.

The WA Working Party had recommended that a definition similar to that found in Victoria, NSW and Queensland be adopted in Western Australia, except that it should not limit the definition to the characteristics or lifestyle associated with one sex or the other, as some people have a gender identity that is indeterminate or changing, and do not seek to live as a person of a particular sex.

Whatever definition is used, it should do away with the need for the existing ground of gender history, and it should not be a requirement that a person demonstrate that they have a gender reassignment certificate in order to demonstrate their gender identity.

As Western Australia is the only state or territory in Australia that does not recognise gender identity or transsexuality discrimination, and there is evidence of discrimination against persons of indeterminate or non-birth gender identity, the Commission recommends that the Act be amended to include this ground.

(o) Other grounds suggested

There were several proposals for new grounds, such as discrimination against a worker by dismissing that person because another person is willing to do the same work for less remuneration⁹⁴ and amending the ‘marital status’ definition to refer to ‘relationship status.’⁹⁵

There does not seem to be a case for such new grounds at this stage, and the Commission makes no further recommendation for such grounds.

CHANGING EXISTING GROUNDS

Some submissions recommended that ‘harassment’ should be a specific type of discrimination on all grounds,⁹⁶ particularly disability (disability is already specifically covered in the Commonwealth *Disability Discrimination Act 1992*), impairment, age and/or religious and political conviction, which is presently not covered in the Act as a distinct ground of complaint.⁹⁷

It is hard to see how harassment because of a ground protected by the Act would not amount to discrimination under the Act, but it is not covered by specific provisions such as that provided for sexual harassment.

In practice many responsible employers prohibit all discriminatory harassment utilising a modified approach based on ‘sexual’ harassment to cover bullying, teasing, intimidating or humiliating behaviour on grounds covered by anti-discrimination laws.

(a) Sexual harassment

This provision is particularly well known since it was introduced 24 years ago. These provisions were not reviewed and the scope of the coverage has remained unchanged – one submission recommended sexual harassment should be prohibited in all areas of public life including sports, clubs and provision of goods and services.⁹⁸

Until 1993 the provisions under the Act dealing with sexual harassment were identical to those that were in the Commonwealth *Sex Discrimination Act 1984* (SDA). The SDA was enacted a year before the WA *Equal Opportunity Act 1984*, and served as one of the models for the new Western Australian legislation. However, the SDA was amended in 1993 to remove a significant flaw in the definition of sexual harassment, which still remains in the Western Australian Act.

Central to the definition of sexual harassment in the Act is the requirement that the person harassed prove he or she suffered a disadvantage as a result of taking objection to the harassment, or had a reasonable belief that taking objection would result in the disadvantage.⁹⁹ This requirement fails to recognise that experiencing unwelcome sexual advances and behaviour is in itself a disadvantage, something that the former Western Australian Equal Opportunity Tribunal has previously observed.

The current test for sexual harassment in the Act reflects a mentality from more than 25 years ago, when the push to eradicate sexual harassment in the workplace was still in its early days, and resistance to change was strong. Today, there would be few who would insist that a person must demonstrate disadvantage

as a consequence of taking objection to being sexually harassed, when the real disadvantage was in the harassment itself. The SDA did away with this notion years ago and now so must the Act. This change was recommended by a number of submissions¹⁰⁰

The Commission recommends that the current definition of sexual harassment in the Act should be repealed and replaced with that found in the SDA, which states¹⁰¹:

For the purposes of this Division, a person sexually harasses another person (the person harassed) if:

(a) The person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in 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.

In this definition, the harasser is made accountable in the sense that an assessment must be made as to what a reasonable person would have anticipated in the circumstances. The victim of the harassment still needs to demonstrate that the conduct was unwelcome and that offence was taken, but there is no requirement to show ‘disadvantage’ in the sense of retaliation or victimization.

Under the Act, sexual harassment is unlawful only in employment, education, and accommodation, whereas the SDA makes it unlawful in the provision of goods and services, clubs, in education (including between students 16 years of age and over, or harassment of a member of staff by a student who has attained the age of 16 years) and disposal of land.¹⁰²

The Commission recommends that the Act should be amended to make harassment unlawful in all areas. Access to places and vehicles should also be included as an area in which harassment is prohibited.

(b) Removing the requirement to prove that pregnancy discrimination is ‘unreasonable’

Under the Act, in order for pregnancy discrimination to be unlawful, the less favourable treatment must be “unreasonable” in the circumstances.¹⁰³ Again, this was based on the pregnancy discrimination provisions in the SDA at the time of the Act’s enactment when there was significant opposition to the ground. It is the

only ground in which direct discrimination may be held to be ‘reasonable’. The corresponding requirement in the SDA that the less favourable treatment in question be “unreasonable” was removed in 1995. No other state or territory imposes the added limb of unreasonableness in the test for pregnancy discrimination, although in South Australia, pregnancy discrimination is permissible in certain circumstances.¹⁰⁴

In Western Australia, no complaint of pregnancy discrimination has ever been dismissed by the Equal Opportunity Tribunal or the State Administrative Tribunal on the ground that the less favourable treatment was considered reasonable. In the Commission’s view, it is difficult to imagine a case where this would be the correct decision.

The Commission recommends that the requirement that a complainant of pregnancy discrimination prove that the discrimination was unreasonable should be removed.

(c) Relatives and associates

Several submissions related to the grounds of vilification or discrimination on the ground of sexual orientation, religious belief or activity, disability (especially certain illnesses or conditions such as mental illness or HIV/AIDS) and gender identity and its effect on partners, associates and live-in companions.

Currently, it is unlawful under the Act to discriminate on the ground of the race, age, impairment or sexual orientation against a relative or associate of that person. In all other States and Territories except South Australia this kind of discrimination is unlawful on any of the grounds.

The Commission recommends that the Act be amended so that discrimination against a person on all grounds under the Act in respect to that person’s being a relative or associate of a person belonging to a protected group under the Act is unlawful, including any ground that is added to the Act in future.

(d) Amending racial harassment

In 1992 racial harassment was added to the Act. At the same time, the provisions relating to sexual harassment in employment were amended to remove a restriction on when harassment in the workplace was unlawful. Prior to this amendment, sexual harassment in employment was only unlawful either when the harasser harassed his or her own employee, or when the harasser and the victim had the same employer. Harassment was not unlawful when the harasser and the victim were employed by different employers, even if they worked in the same workplace. The Act was amended so that sexual harassment in the workplace became unlawful irrespective of who employed whom.

Unfortunately, the new racial harassment provisions enacted at the same time were expressed in terms identical to the old sexual harassment provisions. This means that racial harassment in employment is still only unlawful when it is either the employer doing the harassing, or when the harasser and the victim share a common employer.

The Commission considers that a correction is long overdue and that racial harassment under the Act should now adopt a similar test as is proposed for sexual harassment at paragraph (a), above, which would remove the additional burden of a complainant having to show disadvantage going beyond the offensive conduct itself.¹⁰⁵

As in the case of sexual harassment, the Commission recommends that racial harassment should be unlawful in all areas available under the Act.

(e) Changing the test for indirect discrimination

One submission recommended that the term ‘indirect’ discrimination should be removed because of its negative connotations to the public – i.e. that it is ‘less serious’ than direct discrimination – when in fact it is potentially much more serious because it affects an entire class of people. It is notoriously difficult to establish the disparate and negative effect of an apparently ‘equal’ requirement or condition on an entire group of people defined by a ground such as sex or race.

For this reason several submissions sought the reversal of the onus of proof in discrimination cases to the respondent, in certain circumstances, particularly but not limited to indirect discrimination. This is relevant when the respondent’s corporate knowledge might not be accessible to a complainant who suspected a discriminatory effect on themselves as a member of a disadvantaged group, such as the impact of recruitment processes.

Some submissions recommended a complete reversal of the presumption of proof, placing the onus on the respondent.¹⁰⁶ Others pointed out the extreme difficulty of some complainants to establish any case of indirect discrimination. One gave a case example of an Aboriginal complainant who complained of a lack of access to housing was unable to establish a comparator, that is, a person who apart from their Aboriginality, was in circumstances no different from their own. For example, a person applying for particular types of housing, with similar levels of disadvantage in literacy, family structure and health problems. The complainant was also unable to provide comparative statistical data because the State Housing Commission either did not keep or did not analyse the data, and it was suggested that either the need for such data should be removed, or the SHC should be obliged to collect and provide relevant data to the Commission in a timely fashion.¹⁰⁷

The Commission's report into public housing and Aboriginal people, *Finding a Place*, released in December 2004, recommended removing from the definition of indirect discrimination the need to establish that a substantially higher proportion of persons with a particular attribute are unable to comply with an imposed requirement or condition, compared to the proportion of persons without that attribute (the "proportionality test"). The Commission also recommended that the onus of proof in respect to the reasonableness of the requirement switch from the complainant to the respondent. The SDA was amended in this way in 1995 and the Commonwealth *Age Discrimination Act 2004* (ADA) takes the same approach.

Indirect discrimination, while difficult to grasp conceptually, can reveal otherwise well camouflaged, yet considerably far-reaching acts of discrimination; systemic, policy-based, management-led practices, supported by government and business at the highest levels. Such practices appear fair in form and intention, but are discriminatory in impact and outcome.¹⁰⁸ Indirect discrimination may continue in the workplace, in education, and in the provision of accommodation, undetected for years. And whereas an act of direct discrimination might affect one person, possibly several, indirect discrimination, in the form of an apparently neutral policy or procedure, can impact adversely on hundreds of people at once.

In precise terms, the Act defines indirect discrimination in the following way:

"For the purposes of this Act, a person (in this subsection referred to as "the discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of the (relevant characteristic) of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition-

- (a) with which a substantially higher proportion of persons not of the same (relevant characteristic) as the aggrieved person comply or are able to comply;*
- (b) which is not reasonable having regard to the circumstances of the case;*
and
- (c) with which the aggrieved person does not or is not able to comply.*

Despite the complexity of the test for indirect discrimination, it is the complainant who carries the burden of proving that a substantially higher proportion of persons of the same relevant characteristic as the complainant are unable to comply with a particular requirement or condition, as well as having to prove that the requirement is unreasonable in the circumstances.

The difficulty this places a complainant under has been acknowledged in other Australian jurisdictions. Before 1996, the test for indirect discrimination in the SDA¹⁰⁹ was in terms similar to that found in the Act.¹¹⁰ The *Sex Discrimination Amendment Act 1995 (Cth)* amended the definition of indirect sex discrimination so that “*the new test does not require a complainant alleging indirect discrimination to satisfy the proportionality test nor prove that a requirement or condition is unreasonable in the circumstances. The new test provides a “reasonableness” defence to the person who it is alleged discriminated against another person.*”

¹¹¹ In other words, under the SDA it is up to the respondent to prove by way of a defence that the requirement or condition *is* reasonable.

The SDA sets out the matters that are to be taken into account in deciding whether a requirement or condition is reasonable. They include the nature and extent of the disadvantage resulting from the imposition of the requirement, the feasibility of overcoming or mitigating that disadvantage, and whether the disadvantage is proportionate to the result sought by the person who imposes the requirement.¹¹²

The recently passed Commonwealth *Age Discrimination Act 2004* (ADA) contains a definition of indirect discrimination that is similar in effect to the one in the SDA.¹¹³ Like the SDA, the ADA does not include a proportionality test, and the respondent has the burden of proving that the condition or requirement is reasonable. The ADA, however, does not provide express guidance as to what matters are to be considered in relation to determining the reasonableness of a particular practice or condition. The test for indirect discrimination under the *ACT Discrimination Act 1991*¹¹⁴ is similar in effect to the SDA and the ADA. The *Racial Discrimination Act 1975 (Cth)* (RDA)¹¹⁵ and the Tasmanian *Anti-Discrimination Act 1998* do not include proportionality tests either, but the burden of proving that the requirement or condition is unreasonable remains with the complainant. The Queensland *Anti-Discrimination Act 1991*, on the other hand, contains a proportionality test but the respondent must prove that the requirement or condition is reasonable.¹¹⁶ The equivalent legislation in the remaining states – New South Wales, Victoria, and South Australia – all contain tests for indirect discrimination that are similar in effect to the Act.

Curiously, the definition of indirect discrimination under the WA *Spent Convictions Act 1988* contains no reference to proportionality, making it the only ground of indirect discrimination in Western Australia where this is the case. Why this has occurred is not known but the Commission considers it unsatisfactory and unfair to have two different tests for indirect discrimination under Western Australian law.

Considering the significant imbalance in resources and expertise that exists

between complainants and respondents in complaints of indirect discrimination, the argument in favour of amending the Act so that it is aligned with the approach adopted in the Commonwealth and some of the States is compelling.

The Commissioner recommends that the proportionality test contained within the definition of indirect discrimination should be removed and that the respondent should be the party required to prove that the condition or requirement, the subject of the complaint, is reasonable. The Commission proposes that the Act should be amended so that the test for indirect discrimination, on all grounds, is in terms identical or similar to the SDA or the ADA.

(f) Amending the definition of impairment – new ground of irrelevant medical record.

There have always been contested cases on what constitutes impairment and when it may lawfully be taken into account by, for example, a potential employer. One submission said that requiring evidence of irrelevant medical conditions on record should be explicitly prohibited under the Act.¹¹⁷ Another suggested that the common practice of requiring information about a potential employee's workers' compensation claims, in order to discriminate against the person on the ground of that history, should be prohibited.¹¹⁸

Currently, the definition of "impairment" under the Act includes impairment "*which presently exists or existed in the past but has now ceased to exist, or which is imputed to the person.*"¹¹⁹ It does not refer to an impairment that may exist in future, or an imputed future impairment.

This means, for example, that a job applicant who is refused employment because he or she comes from a family with a history of heart disease could not lodge a complaint under the Act, if the reason for the refusal is that the applicant may develop heart disease at some stage in the future. If the reason is that the employer has imputed to the applicant an *existing* heart condition, based on the family history, then a complaint can be still be lodged. The distinction between the two scenarios has no rational basis, and should be corrected.

Issues have also arisen when a person who has a previous history of work-caused injury and workers compensation claims has been treated less favourably in employment decisions. It is often assumed that the person cannot do the job or will make compensation claims in future.

As genetic screening becomes a real possibility in many areas of life, not least employment, the need for protection against discrimination on the ground of a future impairment will increase. "Future" disability is included in the relevant definitions in the Commonwealth *Disability Discrimination Act 1992* (DDA)¹²⁰,

in NSW¹²¹, the ACT¹²² and Tasmania.¹²³ It should also form part of the definition of impairment under the Act.

The other main issue in relation to the application of the ground of impairment arises out of the High Court's decision in *Purvis v New South Wales (Department of Education and Training)*.¹²⁴ This case involved an intellectually disabled high school student who was expelled from school after exhibiting disruptive, sometimes violent, behaviour. The behaviour was caused by his impairment. The Human Rights and Equal Opportunity Commission (HREOC) had upheld the student's complaint under the *Disability Discrimination Act* (DDA) and awarded damages, but the Department appealed.

The HREOC decision was overturned by the Federal Court. The student appealed. The Full Federal Court dismissed the appeal and upheld the decision of the Federal Court. It was held that the school expelled the student not because of his disability, but because of his behaviour. As a matter of comparison, the school would have also expelled another student who behaved in the same way, but who did not have the disability.

One of the main issues before the High Court was the correct comparator in the test for direct discrimination. The majority¹²⁵ agreed that the correct comparator should be another student in the same circumstances who was not intellectually disabled but who behaved in the same way as the complainant.

However, the test for direct discrimination in the DDA is significantly different from the test under the Act. Under the definition of disability in the DDA¹²⁶ the relevant comparison is between the complainant and a person who does not have the complainant's disability, in the same circumstances. The DDA, however, does not provide for discrimination based on characteristics appertaining generally to persons with the same disability as the complainant, or characteristics generally imputed to persons with that disability. The *WA Equal Opportunity Act 1984* does.

The logical consequence of this difference is that had the *Purvis* case been decided in accordance with the Act rather than the DDA, it might be argued that the correct comparison was between the complainant and another student who did not have the complainant's disability, but who also did not have the characteristics appertaining generally to the disability, namely, a tendency for disruptive and violent behaviour. The minority judges¹²⁷ referred to the earlier decision of the High Court in *IW v City of Perth*¹²⁸ in support of this interpretation, noting that the Full Court in *Purvis* had earlier observed that the test under the WA Act differed to that in the DDA.¹²⁹

Though the Commonwealth DDA has been amended, this is one case in which the Act provides superior protection to people with impairments. The Commission does not recommend any change to the Act.

The Commission recommends that discrimination against a person on the ground of irrelevant medical record, including workers' compensation history, should become a ground under the Act in all areas.

The Commission also recommends that the Act's protection against discrimination on the ground of a characteristic appertaining generally to persons with the same attribute as the aggrieved person, or on the ground of a characteristic generally imputed to such persons, should not be covered.

g) Redefining 'victimisation'

Section 5 of the Act provides that a reference to the doing of an act on the ground of a particular matter includes a reference to the doing of an act on the ground of two or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act. This section applies to all grounds covered by the Act but does not apply to acts of victimisation.

The effect of this section is that a person complaining of victimisation, as defined under the Act, must establish that the dominant or substantial reason for the doing of the act or acts was to victimise that person. The Commission accepts that acts of victimisation are usually intended to cause disadvantage, whereas acts of discrimination can be unintentional, so it is a more serious claim to allege that one has been victimised. However, the seriousness of victimisation can be addressed through conciliation and, if required, the remedies available to the SAT under the Act.¹³⁰ A complainant should not have to carry the burden of proving victimisation to a higher standard than discrimination.¹³¹

The Commission recommends that a reference to section 67 should be inserted into section 5 of the Act, to remove the additional burden on a complainant to prove victimisation to a higher standard than a discrimination complaint.

CHANGING EXISTING AREAS

The Commission's second Term of Reference asked:

Should all grounds be outlawed in all areas?

The submissions that addressed the scope of coverage of the various grounds of discrimination by and large commented that there seemed to be no justification for not providing coverage of all areas of interest under the Act to all grounds, with the possible exception of vilification which falls into a category of its own. This should make it clear that it includes the provision by clubs of goods and services and access to facilities and places to members, 'associate members' and the public.

The Commission recommends that discrimination on all grounds covered in the Act now and in the future should extend to all areas covered by the Act.

(a) Voluntary and unpaid workers

The definition of employment in the Act does not include volunteers, unpaid workers or vocational placement by an educational or training authority. The Commission receives complaints of discrimination and harassment from unpaid workers, volunteers and high school students, but cannot usually investigate such complaints because they do not come under the area of employment or the other areas of the Act which give the Commission jurisdiction.

It is apparent to the Commission that the arrangement under which these people work for others is, in all important respects, the same as any employment relationship.

Unpaid or volunteer work is recognised as a type of employment in the discrimination laws of Queensland,¹³² South Australia¹³³ and the ACT.¹³⁴

The Commission recommends that the definition of employment in the Act should be amended to include unpaid and voluntary workers, and people doing work under an education, vocational, or training arrangement.

(b) Services provided by Government

One of the main areas of activity in which discrimination is unlawful under the Act is the provision of goods, services, and facilities. The definition of services provided by the Act is not exhaustive. Rather, it is inclusive, and extends to services of the kind provided by government.¹³⁵ It has been held in various courts and tribunals that when a state instrumentality is bound to carry out its statutory functions, or when the nature of the activity is coercive rather than beneficial, the activity cannot typically be described as a service.¹³⁶ It is, however, a question

of fact in each case. Courts and tribunals have also held that some activities that are not of benefit to the recipient can still be characterised as ‘services’ provided by government. For example when the NSW Health Department carried out an inspection of a restaurant and prosecuted the owners for breaching regulations, the NSW Equal Opportunity Tribunal held that the Department was providing a service to the owners in carrying out the inspection.¹³⁷

In another case, the NSW Administrative Decisions Tribunal (ADT) made a finding that the NSW Police were obliged under the *Police Act* to provide “services” within the meaning of the NSW *Anti-Discrimination Act* to an Aboriginal offender whom they had apprehended. The *Police Act* defined the services offered by the police as including the detection and prevention of crime and the protection of persons in NSW from injury. When the officers assaulted and abused the offender, they were in effect refusing to provide him with those services. The decision of the ADT was upheld on appeal by the NSW Supreme Court.¹³⁸

It is apparent that the question of services provided by government bodies acting under statutory authority is not settled. The Commission believes that it should not matter that the “service” in question may be in fact a coercive or regulatory function of government, whatever the source of the authority. The Commission should be able to investigate discriminatory regulatory and compliance functions of government – policing, local government, and other enforcement powers - to the extent that those functions deny a person a benefit or entitlement on discriminatory grounds.

The Commission recommends that the definition of “services” in the Act should be amended to incorporate the regulatory and compliance functions of government.

(c) Extending family responsibility and family status

The grounds of family responsibility and family status were inserted into the Act in 1992. Western Australia was one of the first state or territory governments to make discrimination on the ground of family responsibility unlawful, and remains the only state or territory where family status discrimination is unlawful.

However, unlike the other grounds under the Act, family responsibility and family status discrimination is only unlawful in the areas of employment and education. The Commission is aware through its work that discrimination of this kind also occurs in the provision of goods and services, access to places, and accommodation, especially among parents with children.

It is time the Act was amended to extend the coverage of the grounds of family responsibility and family status to all areas available under the Act. The Commission so recommends.

(d) Religious and political conviction – access to facilities and land

The grounds of religious and political conviction are two of the Act's original grounds. Discrimination on these grounds is unlawful in all areas covered by the Act except in the area of access to places and vehicles and disposal of land. The Commission does not know why these grounds were not included when the Act was enacted, and cannot identify any reason why they should not be. This is particularly so, given that it is unlawful to discriminate on these grounds in the area of goods and services, an area that frequently crosses over the area of access to places, in relation to other grounds.

The Commission has already recommended that all grounds of discrimination protected by the Act should extend to all areas now and in the future covered by the Act. For clarity, the Commission specifically recommends that the ground of religious and political conviction should extend to all the areas currently covered by the other grounds.¹³⁹

CHANGING THE EXCEPTIONS AND EXEMPTIONS

Term of reference 3 asked for submissions on the following:

Is there a need to review the exemptions available under the Act? For example single sex clubs are currently exempt from the Act, as are voluntary bodies.

Most submissions addressed existing exemptions. One submission made a specific recommendation to extend the vicarious liability exception in section 161(2) so that the Commissioner of Police can rely on the statutory defence available in section 161 (2) of the Act – which provides a defence of taking ‘all reasonable steps’ to prevent staff from acting unlawfully – which the Equal Opportunity Tribunal found was not available when the employer was deemed to have acted in person.¹⁴⁰

Though the Commission understands the reasoning behind this recommendation, where an employer is deemed to be personally responsible for an act, this indicates that a higher level of personal responsibility is a policy decision, and does not make that recommended change. This is specifically addressed below.

The balance of the submissions addressed the following exceptions and exemptions.

(a) Single sex clubs

The existence of men’s-only clubs and facilities has long been contentious, but exempt, under the current Act, especially for clubs that are seen to provide facilities for decision-makers and persons of particular status, excluding women, from networks of influence. Among those many submissions that commented on this issue, one made by the Nurses Board asserted that lack of equal access to clubs on the ground of gender was simply no longer acceptable to the community.

Section 22(3) of the Act is an exception that permits a club to discriminate against a person on the ground of sex in respect to an application for membership, or in depriving an existing member of his or her membership.

What this definition does not cover is practices within some clubs that differentiate on the basis of sex by, for example, providing separate and unequal facilities to women than to men – e.g. ‘women’s days’ for playing a sport in a mixed-gender sporting club, or separate and somewhat inferior access to facilities. These practices may be unlawfully discriminatory, or they may be intended to provide a benefit to a group of members, but they are hard to challenge and address. They

are de facto if not de jure ‘clubs within clubs’ and perceive that they are not subject to sex discrimination tests because of their tradition, history, and/or lack of organised opposition or complaint about their implementation.

Considerable debate has occurred in recent times regarding the relevance of, and need for, single sex clubs. The subject can be controversial, as many social traditions are enshrined in the rules and regulations of clubs. In some ways, choosing to become a member of a club or association is a personal choice, rather than a necessity for, for example, employment or education. They are created to serve the interests of people with a common interest or background. That is why the Act declares membership of voluntary associations, and the benefits they provide, as an exception to the operation of the Act.¹⁴¹

On the other hand, many clubs today advertise and offer a range of membership services, activities, and benefits in much the same way as other, profit-orientated, service providers. Many clubs are large-scale enterprises with hundreds sometimes thousands of members, sharing their common interests and pursuits.

The Commission holds the view, however, that in contemporary society, restricting the goods services and facilities a club offers to members of the public on the basis of sex is not justified at all, and should be specifically prohibited in the Act, unless the club is established to further the objects of the Act., or a measure to achieve equality (a special program).

The Commission considers that unless the club is established to promote the interests of a group entitled to protection under the Act, i.e. as a ‘special program’, the membership of a club to persons of only one sex cannot be justified anymore, if it ever was.

The Commission also considers that a club that offers goods, services, and access to places or facilities to members on an unequal basis, without either being a ‘special program’ or designed to address inequality, or pursuant to an exemption, should be clearly prohibited.

Whereas a club may be able to demonstrate that it brings together people with a common ancestry, ethnic background, marital status, or disability in order to advance their common interests and either the purposes of the Act or at least in a manner that does not adversely affect equality of opportunity, there appears to be no such equity related benefit associated with most if not all single sex clubs. If there is, those benefits may be recognised as measures intended to achieve equality, another exception under the Act.¹⁴²

It is important to emphasize that ‘clubs’ that are established to promote the purposes of the Act or as a special program will continue to be entitled to operate lawfully;

and that voluntary associations and the benefits they provide will continue to be exempt from the operation of the Act, if the Act is amended as it now recommends: the Commission recommends single sex clubs that do not fall into the categories above should no longer be exempted from the Act and recommends that section 22(3) be repealed.

(b) Employment by religious educational institutions

As mentioned above, the greatest number of submissions came from persons concerned with the maintenance of the exemptions from the duty not to discriminate against other persons of religious bodies, including those established to provide religious education. On the other hand several other groups, particularly those advocating for people affected by sexual orientation discrimination, or HIV/AIDS and gender history, argued there was no longer community support for such exemptions, but this remains untested.

There is clearly a strong body of opinion among certain religious bodies and groups that is opposed to any change in the religious exemptions and exceptions, which must be balanced with the objectives of the Act in promoting equality of opportunity and community cohesion.

There were 392 submissions that primarily addressed the religious exemptions, the proposal to consider adding sexual orientation, gender identity/history and HIV/AIDS vilification and/or harassment as a ground, and a review of the provisions exempting religious education bodies from the duty not to discriminate in employment.

The Catholic Archdiocese of Perth argued in favour of the exemption contained in section 73 of the Act but suggested a rewording similar to the NSW Anti-Discrimination Act section 56. That Act gives a broad exemption from the operation of anti-discrimination law with respect not only to the ordination or appointments of priests but also members of any religious order; training and education of persons seeking membership; appointment of any person in any capacity by a body established to propagate religion, and any other act or practice of such a body that conforms with its doctrine or is necessary to avoid offending the religious susceptibilities of its adherents. The submission referred to and recommended the adoption of legislation similar to that in other states which make it clear that religious educational institutions can exclude non-co-religionists or persons who do not adhere to the religious teaching from their education service.

It was sought to remove the qualification contained in section 73 (3) of the Act, which limits the benefits of that exclusion so that it did not discriminate against a class of persons which, it was said, makes it uncertain how and who may be

denied enrolment at a religious education institution.

The Uniting Church Social Justice Committee supported the retention of exemptions in the Act for religious organisations and suggests that the Commissioner establish guidelines to ensure the rights of the community and the rights of religious organisations are both met.

Other submissions strongly objected to the continued practice of religious discrimination against employees, especially those not engaged in teaching. It was suggested by several that the exemption should be permissible only where the employee's job was primarily religious education, training or instruction, and that even the necessity of that exemption should be reviewed within five years since it was asserted that there was no longer public support for such broad ranging exemptions for religious bodies.¹⁴³

Section 73 of the Act currently permits educational institutions established for religious purposes to discriminate against employees and applicants for employment, including contract workers, on all grounds, if the discrimination is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.¹⁴⁴

The Commission has received complaints about religious educational institutions from employees (and applicants for employment), in which they claim that they have been refused employment on a range of grounds, particularly because of their marital status or religious conviction. The Commission is concerned that religious schools, universities, and colleges can, and do, discriminate on these grounds, regardless of the nature of the employment or the position held.

For example, in one such complaint received by the Commission, a gardener was dismissed by a school because of his lack of religious conviction. On any view, such discrimination seems clearly unreasonable and should not be exempt from investigation by the Commission. At most, the Commission considers that the exception should extend only to employees and contract workers who have a direct role to play in the teaching and care of students – teachers, chaplains, and related support staff, not grounds or administrative staff, or contract workers engaged to provide goods and services.

The Commission recommends that sections 73(1) and (2) be amended so that the exception from the duty not to discriminate on religious grounds in employment in religious educational institutions is confined to employees and contract workers with educational or teaching or pastoral responsibilities.

(c) Measures intended to achieve equality

These exemptions are limited to programs or policies meant to promote the objects of the Act, and are not certain until and unless they are tested. In its submission, already referred to, the Education Department raised concerns about the lack of clear statutory exceptions for its proposed scholarship program intended to encourage men to become teachers, which was abandoned because of its potential to be discriminatory on the ground of sex.¹⁴⁵ An alternative and arguably better means of protecting those setting up such programs is for them to seek an exemption.

Under the Act, measures intended to ensure that persons with a particular characteristic have equal opportunities, or have access to services to meet their special needs, are an exception and not unlawful discrimination. The exception can be a powerful tool in redressing past discriminatory practices because it enables a person or organisation to act positively in favour of a disadvantaged group, provided it can be demonstrated that the need is there.

The Act provides this exception on all grounds except gender history, religious conviction, and political conviction. The Commission is not aware of the reasons why the exception was not included under these particular grounds.

The Commission recommends that the Act be amended so that the exception for special programs applies to all grounds and areas.

(d) Impairment and access to places

One submission recommended that the Act be amended so that it complements Commonwealth standards set under the *Disability Discrimination Act 1992* (DDA), compliance with which is an absolute defence to a complaint of discrimination. The Disability Services Commission suggested that standards set under the *Disability Discrimination Act 1992* should provide a similar level of protection to persons subject to complaints under the State Act.¹⁴⁶ This raises the possibility of standard-setting by the Commonwealth, and either deemed to have been adopted by the State, or adopted by proclamation; or standards to be set by each State, compliance with which may be a defence to a discrimination complaint on the basis of that State's equal opportunity legislation.

The Commission has considered this proposal, and considers that it is preferable for the State to set its own standards. These may, in some circumstances, be particularly appropriate to its own jurisdiction. It should not delegate this responsibility. Compliance with a minimalist or even ambiguous or discretionary standard should not invoke automatic or absolute protection from a discrimination complaint, though of course it may be a relevant consideration. The Commission does not so recommend.

Section 66J(2) of the Act states that discrimination on the ground of impairment in the area of access to places is not unlawful if it arises out of the fact that premises, or a part of premises, are so constructed as to be inaccessible, or if the owner or occupier of premises fails to ensure that every part of the premises is accessible.

However, the exception does not apply to a building to which the *Uniform Building Amendment By-laws (No.2) 1985* apply, which included most types of public buildings designed and constructed after the introduction of the By-laws in 1985. The By-laws were repealed and replaced by the *Building Regulations 1989*.¹⁴⁷ The *Building Regulations* in turn adopt the *Building Code of Australia*.

Section 66J(2) has not been amended in the 17 years since the *Building Regulations* came into force. New Disability Access Standards under the Commonwealth *Disability Discrimination Act 1992* (DDA) are set to become law, possibly in 2007. The Standards will fix minimum access requirements for buildings across Australia, under a re-drafted *Building Code*.¹⁴⁸

The Act needs to be to reflect these changes to State and Commonwealth laws by substituting the *Building Regulations 1989* for the old By-laws. The Commission so recommends.

(e) Impairment and education

One submission was made that section 66I of the Act should be amended to bring it into line with section 22 of the *Disability Discrimination Act 1992*, to protect persons treated less favourably because they are associated with a person having a disability, and by adding an ‘unjustifiable hardship’ exemption that may enable the exclusion from education of children with impairments, which are made evident post-enrolment.¹⁴⁹ The reason for this arises from the effect of the Purvis decision, described below.

The Act makes discrimination by an educational authority on the ground of a person’s impairment unlawful in relation to an application by that person to be admitted as a student, or in the treatment the student receives once admitted, including the denial of benefits, expulsion, or subjecting the student to any other detriment.¹⁵⁰

The Act provides an exception in respect to a refusal or failure by an authority to accept a person’s application for admission as a student where the person, if admitted, would require services or facilities that are not required by students who do not have the impairment, and the provision of which imposes unjustifiable hardship on the authority.¹⁵¹

That exception does not apply to discrimination against students with impairment

who are already enrolled. An educational authority can therefore only claim the defence of unjustifiable hardship when considering a student's application for admission, but cannot raise it once the student is admitted – or if the student subsequently acquires an impairment.

Such a situation recognises the significance of education in the determination of an individual's life chances and the additional difficulties faced by a student with a disability if required to change educational institutions.

The Commission considers that the intention of the Act was to give special protection to the rights of children with disabilities to participate in education and the long-term, life-long benefits and advantages available in their later lives.

The Commission recommends that there be no change to the protections offered to students under the Act.

(f) Acts done under statutory authority

Section 69 of the Act creates certain exceptions in respect to compliance with any other Western Australian Act in force when the section came into operation, instruments made or approved under other specific Acts, and orders of the Equal Opportunity Tribunal (now State Administrative Tribunal) or a court, including orders setting minimum wages and other terms and conditions of employment.

The section also provides that the exceptions would cease to have effect two years after coming into operation, except to the extent that regulations provide otherwise. No regulations have been made since the exceptions expired, nearly 20 years ago.

The Commission considers the section irrelevant and is never likely to be used, apart from the requirement to comply with an order of the Tribunal or a court, which still applies. Save for those particular exceptions relating to court or tribunal orders, the Commission recommends that remaining parts of section 69 should be repealed.

Similarly, section 66ZS of the Act, which deals specifically with acts done under statutory authority as an exception to discrimination on the ground of age, should be repealed and the Commission so recommends.

Instead, a section should be inserted stating that the Act overrides any existing or proposed written law of the State, to the extent of any inconsistency.

(g) Age discrimination and superannuation schemes

Section 66ZL(1)(f) ceased to have effect 12 months after the age discrimination amendments came into force, that is, in January 1994. The section should be repealed.

REMEDIES AND POWERS

Term of reference 4 asked:

Are the remedies available under the Act sufficient to redress acts of unlawful discrimination?

As might be expected, several issues were raised about the Commissioner's powers and discretions, and the procedures followed on receipt of a complaint and its conciliation:

(a) Confidentiality, and remedial terms of settlement

The AMWU suggested that the primary remedy of a conciliated confidential settlement under the Act might not always serve the interests of the community, because of the lack of public scrutiny of the issue, and recommended increased powers in relation to disclosure in the Commission (and noting that taking complaints to a full hearing does result in the issues becoming one of public record.).

Several others recommended enabling the Commissioner to communicate specific aspects of a complaint to address duty of care and risk management problems, subject to appropriate confidentiality safeguards.¹⁵²

It was argued by others that the Commission should require respondents to commit to securing a change of company policy, and treatment or training for the person whose conduct is complained of as a condition of settling complaints in its process.¹⁵³ There is no current provision for enforcing such conditions unless through civil litigation based on a specific contractual term.

Some others recommended enabling the Commissioner to monitor implementation of settlement agreements, particularly to prevent victimisation.¹⁵⁴ It is difficult to see how this could occur without giving the Commissioner a specific new power to enforce conciliation settlement agreements, rather than leaving this to the parties themselves.

The Commission regards it as the responsibility of the parties to complaints to be entitled to confidentiality if they so choose, and to settle the terms of their own agreement, with its help.

The Commission can and does publish anonymised summaries of cases resolved in conciliation in its Annual Report. The Commission does not recommend any variation to these, nor to the current confidentiality provisions.

(b) Role of advocates and organisations in complaints handling

Several advocacy groups sought an increased role for representatives of complainants in the conciliation process or to make representative complaints.¹⁵⁵ For example, UnionsWA suggested that a complainant's representative have specific powers to progress a complaint through the investigation and conciliation process. West Australians for Racial Equality's (WARE) submission argued for representative bodies to have a clear power to make complaints on behalf of people of migrant, refugee and minority racial, religious and ethnic backgrounds and Office of Multicultural Interests (OMI) made a not dissimilar recommendation in relation to complainants from Culturally and Linguistically Diverse backgrounds (CALD) in order to reflect the likely true rate of racism in the complaints data.

The Executive Director of the Commissioner of Police suggested an amendment to make it specifically unlawful to discriminate against a group of persons on the grounds of sex or family responsibility in employment, ('ability to lodge a class complaint')¹⁵⁶ The Disability Services Commission discussed the great difficulty for people with disabilities and their advocates to pursue discrimination complaints raising important policy and implementation issues.

The Commission recommends clarifying the complaints procedure to enable a representative of a disadvantaged group to make a complaint of discrimination on behalf of that group.

The Commission considers that the power to authorise a representative to participate in the progress of a complaint should remain in the discretion of the Commissioner, having regard to the need.

(c) Supporting particularly marginalised groups

Several groups argued that the Commission provided inadequate support to particularly marginalised groups through its complaints process. The National Network of Indigenous Women's Legal Services Inc argued that particular attention be provided to Indigenous women who are homeless or unsuitably housed to meet large family needs, and to the considerable disadvantage experienced by Indigenous women in prisons.

One person with a mental illness raised the lack of appropriate sensitivity to the context within which persons with mental illness seek to pursue legitimate complaints of discrimination in the delivery of health services.¹⁵⁷ One of two submissions from the Mental Health Coordinating Group auspice by the Department of Health raised issues of systemic discrimination and resulting homelessness of tenants with mental health issues and the existence of an alleged 'black list' of such tenants. The Western Australian Association for Mental Health

discussed both the alleged ‘black list’ of tenants with mental illness which it is alleged prevents such persons from accessing proper accommodation services, as well as the alleged inequity that asylum seekers with mental illness are excluded from the jurisdiction of the Act.¹⁵⁸ Another submission took a contrary view in relation to access to accommodation based on negative perceptions of tenants from disadvantaged groups in comparison with the rights of neighbours of persons from marginalised groups.¹⁵⁹

These matters are properly addressed by the Commissioner’s power to hold inquiries under section 80 of the Act.

(d) Obstacles to participation on an equal basis in conciliation

Other submissions raised concerns about obstacles to participation on an equal basis either through the nature of the complaints investigation and conciliation process itself,¹⁶⁰ or because of the practices of the Commission e.g. in providing legal representation before a tribunal to a complainant after a complaint had failed to settle in conciliation¹⁶¹ or failure adequately to assist a complainant because the individual belonged to a particularly disadvantaged minority group through a range of factors related to one or more protected grounds covered by the Act. Several submissions raised the potential for adverse costs orders in the Tribunal deterring unresolved complaints as a significant obstacle to access to the complaint process.¹⁶²

The National Network of Indigenous Women’s Legal Services Inc. mentioned above highlighted the lack of any appropriate remedy for the growing number of Aboriginal women ending up in prison, and those Indigenous women still unable to access suitable housing for their large or extended families.

The Women’s and Children’s Health Service commented, in a second Health Department submission,¹⁶³ that the three bodies established to address equal opportunity matters – the Commission, the Director of Equal Opportunity in Public Employment, and the Equal Opportunity Tribunal, now State Administrative Tribunal, should be ‘reviewed for efficiencies and service delivery’ and recommended that DEOPE should have power to require government agencies to devise and implement management plans for services and facilities as well as ‘employment’. This is addressed specifically below in relation to the proposed new power to impose a ‘gender duty’ on public sector employers.

The Chamber of Commerce and Industry raised specific objections to the practice of the EOC providing legal assistance to complainants whose complaint is referred to the State Administrative Tribunal for determination as a practice that ‘discriminates against respondents’ who might be as limited in their capacity

to afford full legal representation.¹⁶⁴ This is in fact required under the present terms of the *WA Equal Opportunity Act 1984*, if the complaint has been found to have substance and not settled in conciliation, and the Commission takes this responsibility as consistent with the objects of the Act.

On the other hand, bodies advocating the rights of especially disadvantaged minorities said that a greater emphasis on supporting the complainant through the process might result in better and fairer outcomes, and recommended a greater onus on respondents to address concerns raised by complainants.¹⁶⁵

Several groups asserted that the Commissioner's investigative powers under section 80 were insufficiently often utilised to protect the interests of especially vulnerable or disadvantaged persons, such as people with disabilities seeking equitable access to public transport and taxi services; discrimination in housing against Aboriginal people,¹⁶⁶ and tenants with a history of mental illness,¹⁶⁷ as well as tenants with multiple discriminatory factors such as a combination of disability and CALD characteristics,¹⁶⁸ and those affected by discrimination on the ground of sexual orientation and gender identity in specific areas such as education.¹⁶⁹

Several suggested other powers: that the Commissioner should have the power to issue exemptions from the duty not to discriminate on specified grounds subject to consultation with the public and review; mandatory provisions relating to compliance with equal opportunity in public employment – though the Director of Public Employment considered the powers of that office were adequately protected – and that the duty to consider and plan for equality of opportunity should cover not only employment but government procurement processes¹⁷⁰ and, as previously noted, the provision of goods and services. One submission recommended that the public sector be required to introduce measures aimed at enhancing access to services by Aboriginal and Torres Strait Islander peoples and other minority ethnic and racial groups.¹⁷¹

The Office of Equal Employment Opportunity sought greater powers in 'the Act' to mandate the provision of information by government agencies in their annual reports in relation to progress towards achieving equity outcomes in employment.¹⁷²

Some submissions recommended establishing a positive obligation on not only public but private sector employers to prevent and ameliorate discrimination, and far more use by the Commissioner of investigative powers under section 80 of the Act.

Some of these issues are addressed below in relation to the proposed new statutory duty on public sector agencies to have regard to 'gender equity'.¹⁷³

(e) The Commissioner's powers under the Act

Overall, the Commissioner for Equal Opportunity enjoys a wide range of powers as part of her complaint investigation and conciliation role, and those connected with the functions set out under section 80 of the Act. In combination, these powers enable the Commissioner to carry out her functions under the Act independently, without ministerial review. The Commission does not see a need for significant changes to the structure and functions of the office of Commissioner, rather an update, based on experience gained over the past 20 years.

The suggestions under this heading are therefore directed mainly at ways the complaint handling functions can be improved, particularly in light of recent amendments to the NSW *Anti-Discrimination Act*, which came into effect in May 2005.¹⁷⁴ Until the amendments, the complaint investigating powers and functions of the President of the NSW Anti-Discrimination Board under that Act were in terms similar to those in the WA.

The amended NSW provisions now deal with the process of receiving and investigating complaints with more certainty and precision than the WA Act. The NSW Act also recognises and addresses complaints lodged by representative bodies on behalf of individuals, an amendment which has already been approved for the WA Act as part of the racial vilification amendments, expected in 2007.

The features of the NSW model of complaint handling include:

- express recognition of complaints lodged by a parent or guardian on behalf of a person who lacks legal capacity;¹⁷⁵
- complaints lodged by agents, including a legal practitioner;¹⁷⁶
- complaints lodged by representative bodies, as discussed above;¹⁷⁷
- the ability of the Commissioner to assist a person to make a complaint;¹⁷⁸
- complaints as lodged not having to establish a *prima facie* case (as the Commission is able to seek further information and evidence as part of its investigation);¹⁷⁹
- referring serious vilification complaints to the Attorney General for proceedings as an offence;¹⁸⁰
- a single system for attempting to resolve complaints by conciliation (as opposed to the somewhat confusing alternatives of either a compulsory conference under section 87, or 'conciliation proceedings' under section 91(2) of the Act);¹⁸¹

- the requirement to prepare a written record of any agreement reached, at the request of either party;
- the entitlement of a party to a complaint to seek to have the agreement registered in the SAT, to the extent that the terms could have been the subject of an order by the SAT, and the provisions of the agreement once registered are enforceable;¹⁸²
- a clear rule that no party in conciliation proceedings can be represented by any other person, except by leave of the Commissioner;¹⁸³
- a more transparent process by which complaints can be amended before they are referred to the SAT or dismissed, so that it is clear what allegations were being investigated by the Commissioner;¹⁸⁴
- expanding the options for dismissing complaints to include the following:
 - complaints the nature of which is such that no further action by the Commissioner is warranted;
 - complaints the subject matter of which has been, is being, or should be, dealt with by another body;
 - where the respondent has taken appropriate steps to remedy or redress the conduct complained of;
 - when it is not in the public interest to take any further action in respect of the complaint;
 - or when the Commissioner is satisfied that for any other reason no further action should be taken in respect of the complaint.¹⁸⁵
- recognition that the death of a complainant or respondent does not terminate a complaint, and the legal personal representative of a complainant is able to continue with the complaint;¹⁸⁶
- referral by a party of unresolved complaints to the SAT after 18 months, if the complaint has not been dismissed, referred or otherwise resolved by the Commissioner;¹⁸⁷
- calculation of time when notice given by post, so that notice is taken to have occurred at time fixed after the date the notice was posted;¹⁸⁸

The Commission recommends that the Act be amended to provide similar procedural guidance as that in the NSW Act set out above, to facilitate the complaint handling process.

OTHER PROPOSED PROVISIONS

Several submissions referred to the possibility of extra powers and new definitions of contentious areas of the Act, such as the inclusion of more specific powers for government agencies to introduce gender specific recruitment programs to increase the representation of males in the teaching profession, which were not unambiguously consonant with the current exemptions and exceptions in the Act, already mentioned in relation to measures designed to achieve equality and the exemption process.¹⁸⁹

The Women's Electoral Lobby suggested that informal or anonymous complaints to the Commission should be permitted in addition to the current provisions.¹⁹⁰ This is currently possible and may base an inquiry by the Commissioner under section 80.

(a) Imposing a 'gender duty' on public employers

Several submissions addressed the lack of representation of women in the senior ranks of public sector employment, and the slow pace of improvement and failure to meet anticipated milestones of achievement.

The Office for Women's Policy noted that substantial progress had been made in reducing racism and racial vilification in Western Australia through monitoring policies and programs and their impact on the state's culturally diverse program, outlined in the Framework for Substantive Equality published by the Commission, which is devised to enhance responsibility to CALD and ATSI people in the State's population.

The Director of the Office for Equal Opportunity in Public Employment (DEOPE) had noted there had also been a 'slipping back' in achievement in some areas in January 2006¹⁹¹ and in her Annual Report for the year 2005-2006 reported that the representation of women in the public service was one of the worst in Australia and had to be improved.

Some existing provisions empowering the DEOPE to direct such improvements already exist in the Act. The requirement of section 146 that government agencies report annually (section 146) on their progress, is highly desirable, in the interests of transparency and accountability and should not be removed.

As well, DEOPE has the power under section 31 of *Public Sector Management Act 1994* to issue guidelines from time to time. The Commission recommends that such powers are fully utilised in relation to public employment and that additionally agencies be required to report progress on achieving equity goals in their annual reports.

However there is another possibility that the Commission recommends should be added to the scheme of policy and programs to promote equality between the sexes in public employment.

In the UK the *Sex Discrimination Act 1975* was amended to place a statutory duty on all public authorities, when carrying out their functions, to have due regard to the need to eliminate unlawful discrimination and harassment, and to promote equality of opportunity between men and women. This ‘gender duty’ applies to the whole of the UK public sector and to all of the functions of public authorities including employment, service providers and policy makers. The UK Equal Opportunities Commission has issued a *Gender Equality Duty Code of Practice*, and has indicated that ‘the weight which public authorities give to gender equality should therefore be proportionate to its relevance to a particular function. The greater the relevance of a function to gender equality, the greater regard which should be paid to it . . .’ Compliance with these duties became mandatory from the beginning of April 2007.

The effect of this statutory duty is to focus on the gendered impact of public policies and service provision, including legislation. The UK Equal Opportunity Commission is to publish criteria for the assessment of all such major developments. The duty focuses attention on women’s employment and participation rates across the public sector, including promotion, professional development and occupational segregation.

Strictly speaking, the establishment of a statutory ‘gender duty’ is not a new ground of discrimination, and differs from the general obligation not to discriminate on the grounds of sex or its characteristics. The duty is a positive one – that is, the organisation itself must take action rather than wait for an individual to initiate a complaint, and has a duty to promote equality, not only avoid discrimination.

The Commission recommends that government both introduce a ‘gender duty’ requirement in the Act, and strengthen the powers of the Director of Equal Opportunity in Public Employment to monitor and enforce compliance by public sector employers in the performance of that duty.

(b) Other statutory duties

The Disability Services Commission recommended the inclusion of a positive duty on all employers to provide for equality of opportunity to people with a disability and also recommended a review of the exemption of insurance provision on actuarial grounds, pointing out the negative implications for the employment of people with disabilities.¹⁹²

The Commission prefers to recommend that the Director of Equal Opportunity in Public Employment utilise that office's power to issue guidelines for the employment of people with disabilities in the public sphere, and to monitor their implementation, with a view to considering whether there should be a statutory requirement similar to the proposed 'gender duty' set out above, and mandated compliance with that duty in the future.

(c) Compensation limit

Most commentators considered the compensation limit inappropriate.¹⁹³ There was one suggestion that the Commissioner should be able to award and avoid the costs of subsequent action.¹⁹⁴ A number of submissions suggested specific amendments to the way in which any limit might be expanded to minimise litigation. For example by a multiple of monthly or annual salary loss; setting a maximum; but adding to that incrementally each year; or simply leaving it to the State Administrative Tribunal (SAT) to determine the appropriate level of damages,¹⁹⁵ perhaps explicitly adding the power to the SAT to award punitive damages.¹⁹⁶

The maximum amount of compensation that can be awarded under the Act for a complaint or matter referred to the SAT is currently \$40,000.¹⁹⁷ This limit has not increased since the Act was enacted, over 20 years ago.

Clearly, the maximum amount of compensation is inadequate, if only from the point of view of inflation. The only other jurisdiction in Australia with such a low limit is New South Wales, also \$40,000. For all other States and Territories, and the Commonwealth, there is either no limit, or compensation is pegged at the rate applicable in the equivalent of the District Court, which can award damages far in excess of \$40,000.

The Commission recommends that, as there is no justification for keeping the limit as it is, it should be removed and that the Tribunal develop appropriate compensation measures commensurate with the full range of options available to superior courts in civil awards of damages.

(d) Interest on compensation

Discrimination legislation in NSW and Queensland expressly provides for an order for the payment of interest on compensation awarded.¹⁹⁸ While it is arguable that a party can already be ordered to pay interest under section 127 of the Act in its current form, the Commission considers the issue should be made clear by a specific provision allowing the SAT to order the payment of interest, and so recommends.

APPENDIX 1

SUBMISSIONS FROM ORGANISATIONS

Aboriginal Legal Service of Western Australia
Association of Independent Schools of Western Australia (AISWA)
Anglican Cathedral of the Holy Cross
Anglican Schools Commission
Australian Association of Christian Schools
Australian Christian Lobby
Australian Manufacturing Workers' Union
Australian W.O.M.A.N Network
Binningup Church of Christ
Catholic Archdiocese of Perth
Catholic Diocese of Bunbury
Catholic Secondary Principal's Association
Chamber of Commerce & Industry
Chinese Methodist Church in Australia
Christian Democratic Party
Christian Parent Controlled Schools Ltd
Christian Reformed Churches of Australia - Classis WA
Christian Schools Australia
Department of Corrective Services
Department of Education & Training
Department of Health
Department of Health - Mental Health Network Coordinating Group
Department of Health - State Health Advisory Committee on Family Friendly Initiatives and Women's and Children's Health Service
Department of Indigenous Affairs
Disability Services Commission
Employment Law Centre
Ephraim Ministries
Equal Opportunity Commission WA
Ethnic Disability Advocacy Centre
Festival of Light Australia
Free Reformed Church of Albany (WA)
Free Reformed Church of Darling Downs
Free Reformed Church of Rockingham
Free Reformed School Association (Inc)
Fremantle AL Sub-branch
Gadens Lawyers
Gay and Lesbian Equality (WA) Inc.
Gay and Lesbian Community Services Inc
Geraldton Christian Community Schools Assoc Inc
Gosnells Baptist Church
Grace Christian Reformed Church
John Calvin Christian College

Kingsway Christian College
 Life Ministries
 Liquor, Hospitality & Miscellaneous Union
 Living Waters Anglican Church Sorrento
 Men's Australian Network
 Men's Confraternity Incorporated
 National Civic Council
 National Network of Indigenous Women's Legal Services Inc.
 New Life
 North Metropolitan Area Health Service
 Nurses Board of Western Australia
 Office for Women's Policy
 Office of Equal Employment Opportunity
 Office of Multicultural Interests
 Parent Controlled Christian Education Assoc Inc. (Northern)
 Parent Controlled Christian Education Association Inc.
 Parents and Friends' Federation of WA Inc.
 People with Disabilities (WA)
 People Power
 Perth Bible College
 Perth Inner City Youth Services Inc
 P-FLAG Perth Inc
 Progressive Law Students' Association
 Public Transport Authority
 Rehoboth Christian School
 Shark Bay Herald
 Social and Political Youth Study Club
 St Columba's Presbyterian Church
 State Solicitors Office
 State Supply Commission
 Strathalbyn Christian College
 The Freedom Centre
 The Potter's House Bunbury
 The Traditional Anglican Communion
 UnionsWA
 Uniting Church in Australia - Synod of WA Social Justice
 WA Aids Council
 WA Gender Project
 West Australians for Racial Equality (WARE)
 West Coast College of TAFE
 Western Australia Police
 Western Australian Association for Mental Health (WAAMH)
 Women's Electoral Lobby (WA) Inc.

APPENDIX 2

SUBMISSIONS FROM INDIVIDUALS

Mr & Mrs Rob & Lia Aitken
Mr & Mrs Ray & Kate Allen
Mr & Mrs Terry & Gail Amos
Ms Alyse Anderson
Mr Neil Anderson
Ms Fiona Arisen
Mr & Mrs Harvey & Pat Arnold
Mrs Esther Ashmore
Mr H L Ashton
Mrs M R Aslett
Mr Richard Astell
Mrs Shelly Attiwell
Ms Jenny Bailey
Mr & Mrs Rod & Anne Baines
Mr & Mrs Bob & Judy Barrett
Mr & Mrs Natalie & Matthew Barrett-Lennard
Mr Peter Barron
Ms Dawn Barry
Mr Dudley Bastian
Mr & Mrs J & P Batten
Mr Norman Baty
M/s Eritia Bax
Ms Lyn Bayakly
Mrs Barbara Beckett
M/s D Beckingham
Mr & Mrs Stephen & Janet Bedells
Mr & Mrs David & Esha Begho
M/s M Bell
Ms Dorothy Bennett
Mr & Mrs H W S & M H Bergsma
Ms Fiona Berkelaar
Mr B J Berry
Mr Rodney Bevan
Miss Glenys Blachett
Mr Ian Blackburne
Ms Ava Blackman
M/s B P Bodle
Ms Patricia Bodle
M/s G & G & J & F Boersma
Ms Julie Bogoni
Mr & Mrs Peter & Kathleen Booth
Mr & Mrs Harvey & Helen Bosch
Mr & Mrs Alan & Sharon Bosveld

Ms Diane Bosveld
Mr & Mrs Graham & Marion Bosveld
Mr Kevin Botha
Mr & Mrs Paul & Trish Botha
Mrs Hazel Bothe
Mr & Mrs Susan & John Bowles
Ms Karen Box
M/s T E Boyd
Mr & Mrs Trevor & Kathy Boyd
Mr & Mrs A Braam
M/s E M Bradley
Ms Jasmine Brankovich
Mr Geoffrey Brewin
Ms Maureen Bright
Mr & Mrs Broadbent
Ms Diane Broadway
Mr Brett Brook
Mr & Mrs D & C & D & H & M Broun
Ms Jill Brouwer
Mrs Minny Brouwer
Ms Fiona McKenzie Brown
Mr & Mrs Jack & Alice Bruning
Mrs T Buckley
Ms Mary Burke
M/s W C & B O Burns
Mr Doug Burr
Mr Bob Burton
M/s B Bush
Ms Lilian Butler
Mr & Mrs Lukas & Barbara Butler
Mrs N Butler
Mr Derek Butt
Mr & Mrs Adrian & Thea Byl
Miss Janet Byl
Mr & Mrs Paul & Lisa Byl
Mr Jim Cabrera
Pastor Joe Cacic
Mrs Pat Calwell
Mr Ronald Calwell
Mr David Cameron
Mr John Carr
Mrs Margaret Cartwright
Mr Colin Cassidy
Rev Derek Chamberlain
Mr Gerard Chan
Ms Di Chapman
Ms Margaret Chapman
Dr P S N Chappell

Mr Adrian Cheng
M/s Dorcas Chia
Mrs Goldie Chong
Mr Michael Choong
Mr & Mrs Rod & Kerrie Christensen
Mr Ross Clark
Mr Daniel Clarke
Mr Kevin Cloghan
Mrs Carolyn Cohen
Mr John Cole
Mr Denis Colley
Mr Geoff Combridge
Mr & Mrs Bruce & Terri Connell
Pastor Christian Cortes
Mr Steven Course
Mr Stephen Court
Ms J Cozijnsen
Mr Gerard Cozynsen
Mrs G Craig
Ms Sue Crofton
Mr Kevin Cronin
Mr Brett Crook
M/s John & Valeri Cudmore
Mr Ian Cullen
M/s M A da Silva
Ms Rachel Dalais
Mr M H Dale
Mrs Roslyn Daniels
Ms Susan Daniels
Dr Russell Date
Mrs Helen Davidson
Ms Dorothy Davies
Mr & Mrs Paul & Diane Davies
M/s R O Davies
Mr & Mrs Richard & Frances Davy
Mr Jim Dawson
Mr & Mrs Alan & Heather Dayman
Ms Marijka De Jonge
Mr Stephen de Szoeki
Mr & Mrs Antonie & Alberdina de Vos
Mr & Mrs Bryant & Denise de Vos
Mr & Mrs Jack & Jenny de Vos
M/s T & A & D de Vos
M/s George & June Dear
Mrs Norma Dearlove
Mr Jonathan Deeks
Mr & Mrs Robert & Ingrid Dekker
Mrs O Delaney

Ms Heather Dellaca
Ms Helena Derksen
M/s P & D Devenish
Mr & Mrs Allan & Janine Dewing
M/s M M Dickson
Mr & Mrs Colleen & Brian Digby
Mr David Dijkstra
Mr & Mrs G & M Dijkstra
Ms Jean Docker
Mr Ken Donaldson
M/s M Donaldson
Mr Charles Donovan
Mr Charles Donvan
Mr & Mrs Rene & Narelle Dorgelo
M/s A & B Downing
Mr & Mrs Kevin & Theresa D'Souza
Mrs Elieen Duggan
Ms Georgina Dwyer
M/s L T & C H Dyke
Mr David Dykstra
Mrs Anne Edgar
Mr David Edgar
Ms Barbara Edwards
Mr Mostyn Edwards
Mr & Mrs Wilim & Julia Edwards
Mr Colin Ekert
Ms Jennifer Elliott
Mr & Mrs G T & V Emslie
Mr Brett Endersby
M/s H C Engelke
Mr Peter Evans
Ms Cathie Fabian
Mr & Mrs Rob & Heidi Farhi
Dr Lindsay Ferguson
Mr & Mrs Thomas & Margaret Ferwerda
Mrs Beverley Fisher
Mr Shane Flanagan
M/s WS Fokkema
Mr Victor Folarin
Mr & Mrs Shane & Jane Foreman
Mr John Foy
Mr & Mrs D & D Fraser
Mrs Joyce Frost
Ms Wendy Fry
Ms Jennifer Fryer
Mr & Mrs Kevin & Renie Garnaut
M/s Graham Garnett
M/s P Gaw

Mr John Gay
Mr Martin Geluk
Mr Patrick Gethin
Mr & Mrs Brian & Helen Geytenbeek
Mr Jim Gibbon
Mr Ian Gibson
Ms Lianda Gibson
Dr Peter Gilet
Mr Bruce Gillett
Mr & Mrs Kenneth & Daphne Ginn
Ms Lynette Gomm
Mrs J Gordon
Ms Karin Gottschalk
Mr Frank Gould
M/s K Grace
Mrs Frances Graham
Mr Neil Gray
M/s Peter Greenfield
Ms Christine Greenup
Mr John Greenup
Mr Don Grimble
Mr Patrick Grogan
Ms A Guerts
Mr & Mrs Peter & Christine Hadfield
Ms J Hallett
Mrs Patricia Halligan
Mrs Beverley Hanrahan
Mr Peter Hanrahan
Mr Henry Harding
Ms Ann Harling
Mr Steve Harms
Ms Margaret Harris
Mr & Mrs Margaret & Dunstan Hartley
Mr Ron Hartley
Dr J J Havel
Mr C D Hawkins
Mrs G J Hawkins
Mr & Mrs Hawkins
Ms Thora Hayes
Ms Jan Haynes
Mr Oliver Haynes
M/s Wilhelmus Heggers
Mr & Mrs Craig & Rebecca Heiningner
Ms Carolyn Hellick
Mr Norman Henley
Mr Karl Hennig
M/s T F Hiensch
Mrs Alice Higgins

Mr Andrew Hodge
M/s Robin Hodgson
Mr & Mrs P J & M R Hollett
Ms Leonie Holloway
Mr & Mrs Walter & Leonie Holloway
Mr Richard Holroyd
Mr Chris Hopkins
Mr & Mrs Bruce & Denise Hordyk
Ms Charlene Hordyk
Mr & Mrs Ronald & Jeanet Hordyk
Mrs K Houghton
Mr & Mrs Eddy & Anne Howard
Mr Geoff Howarth
Mrs Joan Howlett
Mr John Howlett
Ms C Hultroop
Mr & Mrs Mark & Natalie Hurworth
Mr Stephen Hurworth
Mr Tony Hussey
Ivatts Family
Ms Esther James
Mrs Maureen James
Mr & Mrs Jenny & Jan Chris Jansen
Ms Cheryl Jean
M/s C Jeffrey
Mrs Laurel Jenkins
Ms Cheryl Jenner
Ms Irene Jennings
Mr & Mrs Scott & Sarah Jessen
Ms Katherine Johnson
Ms June Johnston
Mr & Mrs A J & J S Jones
Ms Gabrielle Jones
M/s Michael and Renita Jones
Mr & Mrs Jones
Mr Jack Joyce
Mr Robert Keall
Mr Brian Keller
Mr & Mrs W Kellett
Dr Robert Kelley
Mr Mike Kemp
M/s Gail Kenyon-Weston
Ms Kirrily Kilbane
Ms Janet Kleeman
Mrs Lawrie Knox-Ciray
Mr & Mrs L & L A Komorowski
M/s Jan Ladhams
Mr James Lambe

Mr Rob Lampard
M/s F L Lathlean
Mrs Heather Laughton-Smith
Mr Graham Lawn
Miss Sue Leckenby
M/s Chin Onn Lee
Mr Fabian Lee
M/s M B Leith
Ms Samantha Leonardis
Ms Christine Levien
Mr & Mrs John & Adriana Lewis
Mr & Mrs Aylwin & Cheryl Lim
Ms Patricia Lindberg
Mr Paul Lannaghan
Ms Lindi George
Mr & Mrs Arthur & Veronica Linley
Ms Tina Linton
Mr Michael Lochore
Mr & Mrs Nicholas & Katherine Lockwood
Mr & Mrs Allan & Avril Long
Ms Eunice Low
M/s Minh Ly
M/s Felicity Macarthur
Mr Iain Macmillan
Mrs Rosie Macukat
Mr & Mrs David & Shirley Main
Prof Ian Malcolm
Mr M R Maloney
Mr Bernard Mara
M/s Jacques Marie
Ms Jenny Maring
M/s Alex & Jeanne Martin
Mr John Massam
M/s E J Masters
Mr Edgar Andrew Matthews
Mr John Matthews
Mr Roland Maxwell
Ms Janelle May
Mrs P May
Mrs Patricia May
Mr Kevin G McAloon
Mr & Mrs Alan & Susan McAskill
Mr John McCallum
Ms Loise McCallum
Mrs F N McGillivray
M/s B McGinnity
Mrs F M McHugh
Ps Phillip McQue

Mr Joseph McSevich
Ms Barbara Meechin
Mrs S F Metcalf
Ms Anne Mettam
Mrs S Mewhor
Ms Michelle Middlemost
Dr Terence Middleton
Ms Robyn Millard
Mr Russell Miller
Mr Stewart Miller
Reverend R G Milne
Reverend T C Milne
Mrs Gail Ann Mitchell
M/s R A Mocatta
Ms Rose Molinari
Mr Mark Mollart
Mr Peter Money
Mr & Mrs Jim & Susan Moore
Ms Donelle Morrison
Ms Cynthia Morton
Mr & Mrs J & S Moseley
Mr & Mrs Dirk & Harma Mostert
M/s T & D Mostert
Mrs Chris Mounsey
Mr & Mrs Owen & Bronya Mulder
Ms Kathryn Mullen
Mr Kevin Mullen
M/s Lee Mullen
Mr & Mrs Fred & Doreen Mullins
Mr David Mulready
Mrs Maureen Mulready
Mr & Mrs R Neale
Ms C Nicholas
Dr Ruth Nicholls
Mr Clive Nichols
Mrs Jacqueline Nieuwkerk
Mr Adam Niven
M/s V & L Norberger
Mr & Mrs Margaret & Robert Normandale
Ms Jelte Numan
Mr Michael O'Connor
M/s A G O'Neill
M/s S G Ong
Ms Sue O'Reilly
Mrs Anita Ossevoort
Mr Tony Overheu
Ms Amber Padco
Mr Graham Padget

Mr Barry Palm
Mr & Mrs C J & P S Pass
Ms Elizabeth Patrick
Mr Ken Patrick
M/s Ujjiniya Pearse
Mr & Mrs Jan & Anne Peletier
Ms Rachel Pandal
Ms Kelly Penhale
Mr Gerard Peters
M/s Joy & N R Phillips
M/s Phillips
Mr & Mrs Richard & Anne Pike
Family H A Pitlo
Mr Mark Pollard
Mr Dean Powell
M/s Balan Puspanayal
Mrs W Quinn
Ms Moira Rayner
Mr & Mrs Rees
Mr & Mrs David & Margaret Reid
Ms Mary-Lyn Reid
Mr R Reynolds
Ms Sue Richards
Ms Richards & Colleagues
Mr & Mrs Graham & Lesley Rickman
Mr & Mrs G & J Robertson
Rev Andrew Robinson
Mr Arnold Robinson
Mr & Mrs Phil & Debbie Rogers
Mr Graham Rose
Mr Michael Rose
Mr & Mrs Garry & Louise Roth
M/s Steve & Karin Roth
Mrs Alison Rowe
Ms Dell Rowley
Mr Peter Rowley
Ms Carolyn Rule
Ms Joan Russell
Ms Joan Russell
Mr Gary Russo
Mr & Mrs Ingolf & Lilli Rutterman
Mr & Mrs Paul & Angie Ryan
Mr Neal Sambell
Ms Shirley Savage
Ms Hazel Saville
Mr & Mrs A & S K Scarano
M/s S K Scarano
Mr & Mrs Dirk & Inge Schat

Mr & Mrs Arnold & Margriet Schiebaan
Mr & Mrs Matt & Kylie Schiebaan
Ms Julie Schmale
Mr & Mrs Steven & Elizabeth Schoof
Mr & Mrs Tim & Nicole Schoof
Ms Christine Schuer
Mr P Sellars
Mr Nigel Sercombe
Mr Mark Sewell
Mr & Mrs Ian & Blythe Shadbolt
Ms Michelle Shave
Mr David Shearer
Ms Bella Sheehan
Mr & Mrs P & C Shelton
Ms Kay Sherali
M/s Adil Shihata
Ms Debora Shiosaki
Ms Janet Sigsworth
Mr Thomas John Simpson
Dr C Slack
Pastor Susan Slack
Ms Ann Slater
Mrs Meg Slater
Mr Terry Sleight
M/s Adriaan & Maria Slobe
Mr & Mrs David & Lewis Smith
Mr & Mrs Gary & Roliza Smith
Mr Tony Smith
Mr & Mrs Greg & Susan Spaanderman
Mr & Mrs Alan & Lesley Spann
Mr Gerard Spoelstra
Ms Patricia Anne Spring
Mr & Mrs Peter & Merle Staer
Mr & Mrs Kevin & Anne Stanton
Mr & Mrs Steven & Rosemary Steineck
Ms Rhonda Stockbridge
Mr & Mrs David & Margaretta Stone
Mr Garry Stone
Ms Hannah Storen
Mrs Heather Storey
Ms Virginia S Stout
Mrs Lee-Anne Street
Ms Beth Streeton
Mr Trevor Streeton
M/s R L Strudham
Ms Margaret Strudwick
Mr Michael Stuart
Mrs V J Studham

Mr & Mrs J & M Styants
Ms L W Sugg
Ms Connie Sullivan
Mr & Mrs J & J & E M Sullivan
Mr A W Sutton
Ms Carol Sutton
Mr & Mrs David & Wendy Swain
Ms Judith Swartz
Mr Dennis Tan
Mr & Mrs Dennis & Doris Tan
M/s Dennis and Doris Tan
Ms Doreen Tan
Mr & Mrs L Tan
Mr & Mrs Peter & Sally Tan
Mr Andrew Tanner
M/s C Taplin
Ms Renae Tapper
Mr Ron Tapper
Mr & Mrs Terrence & Caroline Tarboton
M/s C Taylor
Mr & Mrs Ron & Lyn Taylor
Ms Sharon Tebbit
M/s Tasma Terpstra
M/s Shirley Thame
Mr Edward 't Hart
Mr Ryan 't Hart
Ms Gwen Thom
Mr Don Thomas
Mrs E Thomas
Mr Jim Thomas
Mr M L Thomas
Ms Sandra Thomas
Dr Amanda Tilbury
Mr & Mrs Malcolm & Joan Tims
Ms Gwen Toh
Ms Tracy Toh
Ms Vivian Toh
Mrs N Tucker
Mr Merv Turner
Ms Jessie Grace Tyler
Mr & Mrs Andrew & Jody van Burgel
Mr & Mrs W & A Van Der Heide
Ms Gabrielle Van Der Linde
Mr Jim & Meta Van der Plas
Ms Johanna Van der Plas
Mr & Mrs Gerrit & Gonda Van der Wal
Mr & Mrs Martin & Tina Van Dongen
Mr & Mrs Jack & Teresa Van Duyn

Ms Suzanne Van Haltren
Ms Leanne van Heerwaarden
Mrs Norma van Hoek
Mr J Van Leeuwen
Mr & Mrs Willem & Linda Vanderven
Mr & Mrs Margaret & David Varney
Mr & Mrs Bert & Klazien Vermeulen
Mr Hans Vermeulen
Ms Karina Vermeulen
Ms Margaret Vermeulen
Ms Rose Vermeulen
Mr & Mrs Royce & Shalina Vermeulen
Mr Rick Verwoord
Mr & Mrs R & S Vettoor
Mr John Vidovich
Mr Daniel Visser
Rev Mark A Vivian
Mr Denis Vladich
Mrs Glenice Vladich
M/s J Vladich
Mr Rod Vladich
Mr Peter Wagener
Ms Rhonda Wagener
Ms Monica Walden
M/s Robin Walker
Ms Ruth Walker
Mr Henry Wallwork
Ms Joanne Walsh
Ms Hazel Warner
Mr & Mrs Avriile & Bill Wassermann
Mr Joshua Watkins
Ms Ruth Watson
Mrs Kerry Watterson
Mrs L Watts
M/s M Webb
M/s B Webber
Mrs Lila Westbrook
Mr John Whaite
Mrs J S Whatley
Mr & Mrs A R & G M White
Mr David White
M/s G M White
Mrs Susan White
Ms Linda Whyman
Mr & Mrs John & Janet Wieske
Ms Cathryn Williams
Ms Hannah Williams
Ms Karen Williams

Mr Steven Williams
Mr & Mrs Trevor & Pauline Williams
Dr Peter Willsher
Mrs G C Wilson
Mr Dennis Winstanley
Ms Sarah Wisdom
Mr Steve Wisdom
Mr Robert Withall
Mr Garry Woo
M/s B Wray
Mr R Wyatt
Ms Wendy Yapp
Mr David Yates
Mrs Barbara York
Mr Tony York
Mr Stephen Young
M/s Lee Zeakis
Ms Lucy Zubova

APPENDIX 3

TERMS OF REFERENCE: BACKGROUND TO REVIEW OF EO ACT

The *Western Australian Equal Opportunity Act (1984)* recently celebrated 20 years since its enactment.

The Act was intended to meet Australia's obligations under various International Covenants and Conventions to which Australia is a signatory including:

- The UN Convention on the Elimination of all forms of discrimination against Women
- The ILO Convention concerning discrimination in employment and occupation
- The ILO Convention on workers with family responsibilities
- The International Covenant on civil and political rights
- The UN Convention on the elimination on all forms of racial discrimination

When the Equal Opportunity Act became law in 1985 it outlawed discrimination on the basis of:

- Sex and sexual harassment
- Pregnancy
- Race
- Religious and political conviction
- Marital status

In 1988 the Act was widened to include physical and mental impairment. Racial harassment was also outlawed in this year.

In 1992 the grounds of family responsibility, family status and age were added as grounds of complaint.

In 2002 wide ranging changes were made to the Act outlawing discrimination on the basis of sexual orientation and gender history.

In 1988 it was made unlawful to discriminate on the basis of spent convictions and the Equal Opportunity Commission was given the task of dealing with complaints relating to this.

In 2005 amendments were made to the Criminal Code to strengthen provisions relating to racist harassment and incitement to racial harassment. These matters constitute criminal offences and complaints are made to the police for investigation. The government has indicated that it intends to add racial vilification as a ground for complaint under the Equal Opportunity Act.

Some other States have grounds which are not currently covered by the WA Equal Opportunity Act.

These include:

- Breastfeeding
- Vilification on the ground of homosexuality/sexual orientation
- Religious vilification
- Public acts that vilify or express hatred of or contempt for those infected or believed to be infected with HIV/AIDS.
- Potential pregnancy ie that a women may become pregnant
- Participation in industrial activity
- Membership or non-membership of an association or organisation of employers and employees
- Irrelevant criminal record
- Irrelevant medical record
- Profession trade or calling
- Physical features
- Gender identity

In almost all States various forms of discrimination are outlawed in most areas of public life such as employment, education, the provision of goods and services, accommodation, access to places and vehicles, in clubs, in the provision of insurance and superannuation and in the disposal of land.

However for some grounds in the WA Act discrimination is outlawed in a narrower range of areas than others. For example it is unlawful to discriminate on the grounds of sex or race in the provision of goods and services but not on the ground of family responsibilities. Likewise, in many States and Territories, and in the Commonwealth, it is unlawful to sexually harass a person in a wide range of areas, including the provision of goods and services and clubs. Under the WA Act, these areas are limited to employment, education, and accommodation.

Similarly there are exemption provisions which make behaviour that would be unlawful, lawful in certain circumstances.

For example insurance companies may discriminate in the terms and conditions of the policies they offer provided this is based on actuarial data or statistics.

Similarly educational institutions established for religious purposes are permitted to discriminate (in for example the hiring and firing of staff) if the discrimination is done in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.

In making a submission about the Equal Opportunity Act groups and individuals may wish to consider

Remedies

The Act's primary remedy is to seek a conciliated confidential settlement which both parties agree to.

Examples of matters frequently contained in these agreements are:

- an apology
- an undertaking to change a policy or practice
- training
- compensation for lost wages and/hurt and humiliation
- reinstatement in a position.

Should a matter not settle in the Commission it may be referred to the State Administrative Tribunal.

The Equal Opportunity Act currently has a limit for damages of \$40,000. If a matter involves loss of wages that potentially exceed this limit it is common for these complaints to be referred to the national body – the Human Rights and Equal Opportunity Commission (HREOC) – for conciliation.

Unlike the WA system complaints pursued through HREOC, if not resolved then proceed to the Federal Court and a complainant must engage their own legal representation should they require it.

Potential areas for change

1. Do the grounds of the Act need widening to cover areas not currently addressed by the Act?

In addition to the grounds listed above which some other States include in their legislation complaints which frequently are sent to the EOC and which cannot currently be dealt with include:
(1) bullying, particularly at work
(2) discrimination on the ground of place of residence
2. Should all grounds be outlawed in all areas?
3. Is there a need to review the exemptions available under the Act? For example single sex clubs are currently exempt from the Act, as are voluntary bodies.
4. Are the remedies available under the Act sufficient to redress acts of unlawful discrimination?

Written submissions are invited from groups and individuals on all aspects of the Equal Opportunity Act and should be addressed to:

Equal Opportunity Act Review

Level 2

141 St Georges Terrace

PERTH WA 6000

Written submissions will close on May 31, 2006

ENDNOTES

- ¹ section 87A(1)(b); see also Victorian *Equal Opportunity Act*, section 104
- ² section 87A(1)(d)
- ³ section 87C and Victorian *Racial and Religious Tolerance Act 2001*, section 19(3)
- ⁴ section 88A; in Victoria, the Commission is obligated to assist a complainant, see *Equal Opportunity Act*, section 106
- ⁵ section 89(2)
- ⁶ section 91
- ⁷ section 91A
- ⁸ section 91A; section 115 of the Victorian Act
- ⁹ section 91B
- ¹⁰ section 91C
- ¹¹ section 92
- ¹² section 93
- ¹³ section 93B
- ¹⁴ section 94B
- ¹⁵ A range of suggestions made by many submissions including the Chamber of Commerce & Industry, the Ethnic Disability Advocacy Centre, WEL etc.
- ¹⁶ Liquor Hospitality and Miscellaneous Union
- ¹⁷ Patrick J Gethin
- ¹⁸ Qld, ACT, NT, Tas, Vic, CTH
- ¹⁹ NSW, Tas
- ²⁰ Vic, Qld, Tas,
- ²¹ Tas
- ²² CTH, Vic, Tas, NT, ACT
- ²³ Vic, Qld, Tas
- ²⁴ Vic, NT
- ²⁵ NT, Tas
- ²⁶ ACT
- ²⁷ Vic
- ²⁸ NSW, Vic, Qld, ACT
- ²⁹ Patrick J. Gethin
- ³⁰ Health Department, Dr Neale Fong, 31 May 2006
- ³¹ Ilse O’Ferrall, Director Health Promotion, population Health & Ambulatory Care, Department of Health; Helen Creed, Director of the Office for Women’s Policy Department for Community Development
- ³² EOA sec 8(1)(b)
- ³³ *Equal Opportunity Act 1995* secs 4, 6;
- ³⁴ *Anti-Discrimination Act 1992* secs 19, 20
- ³⁵ *Anti-Discrimination Act 1998* secs 16, 28
- ³⁶ *Anti-Discrimination Act 1991* sec 7
- ³⁷ *Discrimination Act 1991* sec 7
- ³⁸ *Sex Discrimination Act 1984* sec 5(1A)
- ³⁹ Ethnic Disability Advocacy Centre
- ⁴⁰ Jock Ferguson, AMWU State Secretary, citing McCarthy & Mayhew, Safeguarding the Organisation against Violence and Bullying
- ⁴¹ UnionsWA
- ⁴² Dr Neale Fong, 31 May, 2006
- ⁴³ Dr Paul Albert, Department of Education and Training
- ⁴⁴ CCI of WA (Inc)
- ⁴⁵ The Nurses Board submission.
- ⁴⁶ Commissioner Ian Johnson, Department of Corrective Services
- ⁴⁷ Lianda Gibson, who made two detailed submissions
- ⁴⁸ Aboriginal Legal Service Inc. submission
- ⁴⁹ West Australians for Racial Equality
- ⁵⁰ John Vidovich
- ⁵¹ For example, the Uniting Church Assembly’s Social Justice Committee submission

- ⁵² *Anti-Discrimination Act 1977* sec 49ZS-49ZTA (also includes an offence for serious acts)
- ⁵³ *Anti-Discrimination Act 1991* sec 7, 124A, 131A (also includes an offence for serious acts)
- ⁵⁴ *Anti-Discrimination Act 1998* sec 19
- ⁵⁵ Archbishop Hickey, Catholic Archbishop of Perth; Uniting Church Social Justice Committee
- ⁵⁶ *Islamic Council of Victoria v Catch the Fire Ministries* [2004] VCAT 2510
- ⁵⁷ *Catch the Fire Ministries v Islamic Council of Victoria* [2006] VSCA 284, 14 December, 2006
- ⁵⁸ Uniting Church, Social Justice Committee
- ⁵⁹ *Anti-Discrimination Act 1998* secs 19, 55
- ⁶⁰ *Anti-Discrimination Act 1977* sec 49ZXA-49ZXC
- ⁶¹ *Hoddy v Executive Director, Department of Corrective Services* (1992) EOC 92-397
- ⁶² Director of Equal Employment Opportunity
- ⁶³ *Biundo v Cocks Macnish & Tenna Pty Ltd* [2005] WASAT 300
- ⁶⁴ *Sex Discrimination Act 1984* sec 4B, 7
- ⁶⁵ *Discrimination Act 1991* sec 5A, 7
- ⁶⁶ *Anti-Discrimination Act 1998* sec 3, *Anti-Discrimination Act 1992 (NT)* sec 4(1)
- ⁶⁷ AMWU submission, previously cited, page 5, and UnionsWA submission
- ⁶⁸ For example, Ms Noela Taylor, Director of the Office of Equal Employment Opportunity
- ⁶⁹ Uniting Church Social Justice Committee
- ⁷⁰ *Ralph M Lee Pty Ltd & Ors v Fort* (1991) EOC 92-357
- ⁷¹ Victoria – *Equal Opportunity Act 1995* sec 6(c); Queensland – *Anti-Discrimination Act 1991* sec 7 (k); NT – *Anti-Discrimination Act 1992* sec 4(3)
- ⁷² CCI WA Inc submission, previously cited, Page 8. Ms Noela Taylor, Director of the Office of Equal Opportunity in Public Employment also suggested that amendments to the *Spent Convictions Act 1998* would be a more appropriate avenue of addressing the issue of discrimination against persons with criminal convictions.
- ⁷³ Uniting Church Social Justice Committee, Liquor, Hospitality and Miscellaneous Union
- ⁷⁴ Office for Women's Policy
- ⁷⁵ Charles Vinci, Acting Director General Department of Indigenous Affairs
- ⁷⁶ *Spent Convictions Act 1988* Part 3, Division 3
- ⁷⁷ Enquiries in relation to spent conviction discrimination accounted for only 0.3% of all enquiries in 2004/2005. There were no complaints of spent conviction discrimination in 2005/2005.
- ⁷⁸ *Discrimination Act 1991* sec 7, within the meaning of the *Spent Convictions Act 2000*
- ⁷⁹ NT *Anti-Discrimination Act 1992* sec 19(1), Tas *Anti-Discrimination Act 1998* sec 16(q)
- ⁸⁰ NT *Anti-Discrimination Act 1992* sec 19(1) sec 4, Tas *Anti-Discrimination Act 1998* sec 3
- ⁸¹ See the Human Rights & Equal Opportunity Commission's publication, "On the record: guidelines for the prevention of discrimination in employment on the basis of criminal record", Nov 2005, for a comprehensive discussion on this issue, available at www.humanrights/humanrights/criminalrecord
- ⁸² Liquor, Hospitality and Miscellaneous Union
- ⁸³ Victoria – *Equal Opportunity Act 1995* sec 4
- ⁸⁴ *Jamieson v Benalla Golf Club Inc* (2000) EOC 93-016
- ⁸⁵ *Fratras v Drake International Ltd* (2000) EOC 93-038
- ⁸⁶ *Hill v Canterbury Road Lodge Pty Ltd* (2004) EOC 93-340
- ⁸⁷ Victoria – *Equal Opportunity Act 1995* sec 4
- ⁸⁸ Liquor, Hospitality and Miscellaneous Union
- ⁸⁹ Women's Policy, Department for Community Development
- ⁹⁰ Joint submission by Gay and Lesbian Equality (WA) Inc, Gay and Lesbian Community Services Inc, The Freedom Centre; P-FLAG Perth Inc, and Perth Inner City Youth Services Inc.
- ⁹¹ For example, the WA Gender Project and the Australian WOMAN Network, Karin Gottschalk, who made two submissions.
- ⁹² See *Gender Reassignment Act 2000*
- ⁹³ NSW *Anti-Discrimination Act* sec 38A, Part 3A; Qld *Anti-Discrimination Act* sec 4
- ⁹⁴ Teresa van Lieshout, WA leadership Team, People Power
- ⁹⁵ Liquor, Hospitality and Miscellaneous Union
- ⁹⁶ Jo Harrison-Ward, Executive Director Commissioner of Police
- ⁹⁷ Ethnic Disability Advocacy Centre, Liquor Hospitality and Miscellaneous Union
- ⁹⁸ Office of Women's Policy, Department for Community Development.
- ⁹⁹ Secs 24(3), 25(2), 26(2)
- ¹⁰⁰ For example, Uniting Church Social Justice Committee

- ¹⁰¹ SDA sec 28(1)
- ¹⁰² SDA Part 2, Division 3
- ¹⁰³ Sec 10(2)
- ¹⁰⁴ SA *Equal Opportunity Act* section 34(3)
- ¹⁰⁵ Secs 49A(3), 49B(3), and 49C(3) are equivalent to secs 24(3), 25(2), and 26(2)
- ¹⁰⁶ For example, the submission made on behalf of Unions WA, and the Liquor Hospitality and Miscellaneous Union
- ¹⁰⁷ Joanne Walsh
- ¹⁰⁸ *The Secretary of the Department of Foreign Affairs and Trade & Anor v Styles* (1989) EOC 92-265, at 77,636, *Bogle v Metropolitan Health Services Board* (2000) EOC 93-069, at 74,217
- ¹⁰⁹ sec 5(2)
- ¹¹⁰ sec 8(2)
- ¹¹¹ *Replacement Explanatory Memorandum*, Sex Discrimination Amendment Bill 1995, House of Representatives, para.16
- ¹¹² SDA, sec7B(2)
- ¹¹³ ADA, sec 15
- ¹¹⁴ secs 8(1)(b) and 8(2)
- ¹¹⁵ RDA, sec 9(1A)
- ¹¹⁶ Anti-Discrimination Act 1991 sec 205
- ¹¹⁷ Liquor, Hospitality and Miscellaneous Union
- ¹¹⁸ Liquor, Hospitality and Miscellaneous Union
- ¹¹⁹ sec 4
- ¹²⁰ sec 4(1)
- ¹²¹ *Anti-Discrimination Act* sec 49A
- ¹²² *Discrimination Act* sec 5AA
- ¹²³ *Anti-Discrimination Act* sec 3
- ¹²⁴ (2004) EOC 93-305
- ¹²⁵ Gleeson CJ, Gummow, Hayne, and Heydon JJ, Callinan J
- ¹²⁶ section 5
- ¹²⁷ McHugh, Kirby JJ
- ¹²⁸ (1997) EOC 92-892
- ¹²⁹ at 73,174
- ¹³⁰ sec 127
- ¹³¹ See the related comments of the Equal Opportunity Tribunal in the decision of *Eliezer v Total Marine Services Pty Ltd* ET 2000/10 23/12/2003 at page 23-24 (Unreported)
- ¹³² See definition of “work” in *Anti-Discrimination Act* Schedule Dictionary
- ¹³³ *Equal Opportunity Act* sec 5
- ¹³⁴ *Discrimination Act* Dictionary
- ¹³⁵ sec 4(1)
- ¹³⁶ The principal authority on this issue is decision of the High Court in *IW v City of Perth* (1997) 146 ALR 696. The WA EOT also dealt with the issue of “services” in *Soares v Commissioner of State Revenue and State of Western Australia*, EOT 9/1997 (22/08/1997)
- ¹³⁷ *Mahmut & Anor v NSW Department of Health* (1994) EOC 92-646
- ¹³⁸ *Commissioner of Police, NSW Police Service v Estate of Edward John Russel & Ors* [2001] NSWSC 745
- ¹³⁹ Note the discussion about the grounds of family responsibility and family status at Part 3(c), above. These grounds only apply to the areas of employment and education.
- ¹⁴⁰ Giselle di San Marzano, State Solicitor’s Office, citing the decision of the Tribunal in *Ghockson v Commissioner of police* 919960 EOC 92-798
- ¹⁴¹ Section 71 – note, voluntary associations are not “clubs” under the Act
- ¹⁴² Section 31
- ¹⁴³ For example, UnionsWA and the Liquor, Hospitality and Miscellaneous Union; joint submission by Gay and Lesbian Equality (WA) Inc, Gay and Lesbian Community Services Inc, The Freedom Centre; P-FLAG Perth Inc, and Perth Inner City Youth Services Inc
- ¹⁴⁴ Section 73(1) & (2)
- ¹⁴⁵ Dr Paul Albert, Department of Education
- ¹⁴⁶ Ethnic Disability Advocacy Centre
- ¹⁴⁷ See note 4 of the Act, p.182
- ¹⁴⁸ See www.hreoc.gov.au/disability_rights/standards for a comprehensive guide to all the

Disability Standards

¹⁴⁹ Giselle di San Marzano, State Solicitor's Office

¹⁵⁰ Section 66I(1) & (2)

¹⁵¹ Section 66I(4)

¹⁵² Jo Harrison-Ward, Executive Director Commissioner of Police

¹⁵³ AMWU submission, previously cited. Jo Harrison-Ward, Executive Director Commissioner of Police

¹⁵⁴ Anonymous submission

¹⁵⁵ For example, UnionsWA suggested that a complainant's representative have specific powers to progress a complaint through the investigation and conciliation process. WARE's submission argued for representative bodies to make complaints on behalf of people of migrant, refugee and minority racial, religious and ethnic backgrounds.

¹⁵⁶ Jo Harrison-Ward, Executive Director

¹⁵⁷ Karen Williams

¹⁵⁸ Vanessa Rowe, Social Policy and Sector Development, Western Australian Association for Mental Health

¹⁵⁹ Peter Evans, Redcliffe

¹⁶⁰ Ethnic Disability Advocacy Centre

¹⁶¹ Chamber of Commerce and Industry

¹⁶² For example, UnionsWA

¹⁶³ Dr Neale Fong, Department of Health

¹⁶⁴ CCI submission, previously cited, page 6

¹⁶⁵ Ethnic Disability Advocacy Service

¹⁶⁶ Joanne Walsh

¹⁶⁷ WA Association for Mental Health

¹⁶⁸ Ethnic Disability Advocacy Centre

¹⁶⁹ Joint submission by Gay and Lesbian Equality (WA) Inc, Gay and Lesbian Community Services Inc, The Freedom Centre; P-FLAG Perth Inc, and Perth Inner City Youth Services Inc.

¹⁷⁰ For example, UnionsWA submission

¹⁷¹ WARE submission

¹⁷² The Office of Equal Employment Opportunity

¹⁷³ Liquor, Hospitality and Miscellaneous Union

¹⁷⁴ Part 9, Division 2 *Anti-Discrimination Act 1977*

¹⁷⁵ section 87A(1)(b); see also Victorian *Equal Opportunity Act*, section 104

¹⁷⁶ section 87A(1)(d)

¹⁷⁷ section 87C and Victorian *Racial and Religious Tolerance Act 2001*, section 19(3)

¹⁷⁸ section 88A; in Victoria, the Commission is obligated to assist a complainant, see *Equal Opportunity Act*, section 106

¹⁷⁹ section 89(2)

¹⁸⁰ section 91

¹⁸¹ section 91A

¹⁸² section 91A; section 115 of the Victorian Act

¹⁸³ section 91B

¹⁸⁴ section 91C

¹⁸⁵ section 92

¹⁸⁶ section 93

¹⁸⁷ section 93B

¹⁸⁸ section 94B

¹⁸⁹ Dr Paul Albert, Department of Education and Training

¹⁹⁰ Ms. Cheryl Arnold, WEL WA Secretary

¹⁹¹ Office of Women's Policy, citing the monthly report of the Department of Justice for January 2006.

¹⁹² Dr Ruth Shean, Director General Disability Services Commission

¹⁹³ Uniting Church Social Justice Committee

¹⁹⁴ Nurses Board of WA

¹⁹⁵ Director of Equal Employment Opportunity submission

¹⁹⁶ Liquor, Hospitality and Miscellaneous Union

¹⁹⁷ section 127(b)(i)

¹⁹⁸ NSW *Anti-Discrimination Act* section 112; Qld *Anti-Discrimination Act* section 209(1)(g).

