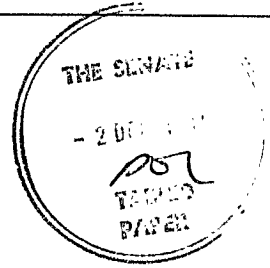


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**Senate Legal and Constitutional
References Committee**

**Inquiry into
Sexuality Discrimination**

December 1997

The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional References Committee

**Inquiry into
Sexuality Discrimination**

December 1997

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SUMMARY OF RECOMMENDATIONS

CHAPTER ONE

Recommendation 1

That the term lesbian be included in the *Sexuality Discrimination Bill*, as follows:

Clause 5, Definitions

'homosexuality'

'homosexuality' means the identity of being gay, lesbian or homosexual.'

Recommendation 2

All organisations receiving Commonwealth funding must provide access to services on equal terms to bisexual persons and to transgender persons.

Recommendation 3

That 'asexuality' be added to the definition of sexuality in the *Sexuality Discrimination Bill*.

Clause 5, Definitions

'Sexuality means heterosexuality, homosexuality, bisexuality and asexuality'.

Recommendation 4

That 'heterosexuality' remain part of the definition of 'sexuality'

Recommendation 5

That a more precise definition of transgender be developed for the *Sexuality Discrimination Bill 1995* to exclude from coverage persons who do not identify as and seek to live as a member of the sex opposite to their biological sex.

The suggested change is:

Clause 5, Definitions

'transgender person'

'A transgender person means a person originally of one sex who:

- (a) identifies and lives or seeks to live as a member of the other sex and
- (b) assumes the characteristics of the other sex on a full time basis or as much as is reasonable in the circumstances; and
- (c) includes a transsexual

Recommendation 6

That the *Sexuality Discrimination Bill 1995* define the word 'transsexual' to mean a person who is undergoing or who has completed sexual re-assignment surgery.

The suggested change is:

Clause 5 Definitions

'Transsexual person'

'transsexual person means a person who:

- (a) has undergone, or is in the process of undergoing, a surgical re-assignment procedure, and
- (b) who identifies and lives or seeks to live as a member of the sex to which he or she has been reassigned or seeks to be re-assigned.

Recommendation 7

That the name of the bill be changed to : *Sexuality and Gender Status Discrimination Bill 1997*.

CHAPTER TWO

Recommendation 1.

That harassment of people on the grounds of their sexuality or their transgender status (or perceived sexuality or transgender status) be proscribed.

Add to Clause 6 of the *Sexuality Discrimination Bill 1995*:

Clause 6

(5)(a) discrimination includes harassment, which is an act reasonably likely, in all the circumstances, to offend,insult, humiliate or intimidate a person or an associate or relative of the person.

(5)(b) harassment of a person on the ground of transgender status includes harassment of a person by refusing to acknowledge that he or she wishes to be known as a member of a specific gender and has made this preference clear.

Recommendation 2

That the current provisions in the *Sexuality Discrimination Bill* regarding vilification be retained. However, the Committee believes it is appropriate that there be a review of the operation of the vilification provisions, to be completed no later than two years from the commencement of the Act, with a view to determining if the provisions should be retained, modified or repealed;

Clause 26

Add

(4) A review of this section is to be completed, either by the Human Rights and Equal Opportunity Commission or by an appropriately qualified organisation or review panel, within two years from the commencement of the Act, with a view to determining if the provisions regarding vilification/incitement to hatred should be retained, modified or repealed.

CHAPTER FOUR**Recommendation 1**

That bisexuality be retained as a distinct sexuality in the definition of 'sexuality' in Clause 5 of the *Sexuality Discrimination Bill 1995*.

Recommendation 2

That in the *Sexuality Discrimination Bill 1995* subparagraph (b) of the current definition of 'associate' be amended as follows:

Clause 5, Definitions

'associate, (a)

(b) another person who is a partner of, or who is wholly or mainly dependent on a partner or on a member of the household of, the person;

Recommendation 3

That Clause 6 of the *Sexuality Discrimination Bill 1995* retain the reference to 'perceived' sexuality' of the 'aggrieved person' and his or her relative or associate (6(1), and to an 'aggrieved person or a relative or associate' being discriminated against because of being 'transgender' or because of being 'thought to be transgender' (6(3)).

Recommendation 4

That past or future status of transgender persons also be protected in the *Sexuality Discrimination Bill 1995*, as follows:

Clause 5, Definitions

transgender status: 'a reference to transgender status includes a reference to past or future status or perceived status'

Recommendation 5

That transgender persons who have clearly identified as a man or a woman be acknowledged as such

The *Sexuality Discrimination Bill 1995* has accommodated this change at new Clause 6(5).

Recommendation 6

That the *Sexuality Discrimination Bill 1995* add refusal to accept bisexuality as a distinct sexuality as a ground of discrimination, as follows:

Clause 6(5)(c) Harassment of a person on the grounds of bisexuality includes a refusal to accept bisexuality as a distinct sexuality.

Recommendation 7

That Clause 30 (1) and 30(2) of the *Sexuality Discrimination Bill* be amended to read:
30(1) (f) and 30 (2) (f): 'if the discrimination is based on relevant actuarial and statistical data;
or
30(1)(g) and 30(2)(g): is reasonable, having regard to other available relevant material; and
30(1)(h) and 30(2)(h): the person so discriminated against may appeal to the Human Rights and Equal Opportunity Commission for assessment of the basis of the decision, and must be provided with the information on which the decision was based.'

Recommendation 8

That a body established for religious purposes may not exclude a person from the receipt of services which are funded directly or indirectly, in whole or in part, from Commonwealth funding, on the grounds of the person's sexuality or gender status.

Clause 23 (1)...

23(2) A person or an organisation may not claim an exemption from this provision on the grounds of religious belief

Clause 28. 'Subject to Clause 23, Divisions 1 and 2 ...'

Recommendation 9

That the *Sexuality Discrimination Bill 1995* specify that discrimination on the basis of dress or appearance is prohibited.

Clause 6

(6) Discrimination includes a failure to offer or continue employment, or to provide access to goods and services, on the basis that a person's dress or appearance suggests he or she is of a particular sexuality or is a transgender person, or is thought to be of a particular sexuality or to be a transgender person, or has a relative or associate who appears to be, or is thought to be of a particular sexuality or a transgender person.

Recommendation 10

That, where affirmative action programs or services are approved, the Human Rights and Equal Opportunity Commission should review and report on these every second year, noting in particular:

- the need for such services;
- the benefits of providing such services; and
- the cost effectiveness of such services.

CHAPTER FIVE

Recommendation 1

That a clause be added to the *Sexuality Discrimination Bill 1995* which makes motive irrelevant.

Clause 6(7)

'In determining whether or not a person discriminates, the person's motive is irrelevant.'

Recommendation 2

That indirect discrimination on the grounds of sexuality be demonstrated to cause a disadvantage to the complainant

Replace Clause 6(2)(b) with the following:

Clause 6(2)(b) 'that, on the balance of probabilities, is considered to cause disadvantage to the aggrieved person or group.'

Recommendation 3

That a Clause be added to the *Sexuality Discrimination Bill 1995* to cover indirect discrimination in respect of transgender people.

Replace 6(4), which becomes 6(5), with the following:

Clause 6(4)(a) 'A person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of transgender identity or status if the discriminator requires the aggrieved person to comply with a requirement or condition that, on the balance of probabilities, is considered to have a disadvantageous effect on the complainant group;
(b) for the purposes of this Clause, a 'complainant group' is restricted to transgender people of a particular gender, regardless of re-assignment procedures.'

Recommendation 4

That all exemptions and exceptions provisions not otherwise subject to review be assessed and reported on within three years after the commencement of the Act with a view to determining if such provisions are necessary and effective.

Add to Clause 31

31(4) The President of the Commission will ensure that an organisation with appropriate legal qualifications and experience in the field of human rights legislation will review and report on all exemptions and exceptions, other than those subject to specific review, within three years from the commencement of the Act. The President will advise the Minister of the conclusions of this report.

Recommendation 5

That sexuality and gender discrimination issues be dealt with by the Sex Discrimination Commissioner.

Remove Clauses 99-106, and replace as follows:

Clause 99 (1) The Sex Discrimination Commissioner is to assume responsibility for issues of sexuality and gender discrimination.

(2) Within two years of the commencement of the Act, the President of the Commission is to report on the management of sexuality and gender complaints, including the appropriateness of the Sex Discrimination Commissioner continuing to have responsibility for sexuality and gender discrimination issues, and if there is a demonstrated need for additional resources.

Recommendation 6

That the Human Rights and Equal Opportunity Commission ensure that funding of information and education services on gender and sexuality discrimination take account of the specific needs of transgender and bisexual persons and allocate resources for appropriate services in respect of these groups.

CHAPTER SIX**Recommendation 1**

That a working group be established no later than the date of commencement of the Act in order to review all Commonwealth legislation, with priority being given to legislation affecting social security and related payments (including Veterans Affairs); taxation; superannuation legislation; health and family programs and services legislation, and family law matters.

Recommendation 2

That current Clause 107 become new Clause 17.

Recommendation 3

That the impact of the operation of new Clause 17 [formerly 107] be assessed by a qualified body two years after the commencement of the clause.

Clause 17(5)

(a) The impact of this section is to be assessed two years after its commencement, and a report provided to the President of the Human Rights and Equal Opportunity Commission.

(b) To assist in evaluating impact, relevant Commonwealth agencies and departments should collect appropriate data and provide this in a de-identified form to appropriate agencies.

Recommendation 4

That a consistent and gender neutral definition of living in a 'genuine domestic partnership', or in a 'bona fide domestic partnership or relationship' be established and be used by all Commonwealth agencies and departments.

Recommendation 5

That all couples or personal partnerships achieve legal recognition at Commonwealth level

Clause 17[107] (3) After the commencement of this Act, the law: confers the same right or entitlement, or imposes the same obligation, on a person who lives with another person, either or both being a transgender person, because of the couple living together on a genuine domestic basis'

Clause 17 [107] (4) the regulations may provide that this section does not apply to a specified law of the Commonwealth.'

Recommendation 6

That a States/Commonwealth working party be established to discuss the most effective way of providing standard identification documents for all transgender persons who require them.

Recommendation 7

That, in conjunction with new Clause 17, all Commonwealth superannuation legislation, and any related legislation, directly or indirectly affecting payment to people on the grounds of their sexuality or their gender status, be reviewed and amended.

Recommendation 8

That, in light of its previous work - *Super and Broken Work Patterns* (1995) - the Senate Select Committee on Superannuation be asked to consider and report further on any barriers to superannuation contributors being able to nominate a specific beneficiary or beneficiaries of lump sums, pensions or other payments. In particular, the Committee is asked to examine the situation of persons who, whether or not previously married or in a de facto relationship (including a same sex or transgender relationship) are single at the time of death.

CHAPTER ONE

INTRODUCTION

History of the Reference

1.1 The *Sexuality Discrimination Bill 1995* was developed by the Australian Democrats Party, particularly the then Senator Sid Spindler (Victoria). At the introduction of the bill into the Senate on 29 November 1995 Senator Spindler's second reading speech outlined the major reasons for the development of the bill. These included:

- that people receive equal treatment in areas governed by Commonwealth law and are protected against discrimination on the grounds of their sexuality or their transgender identity;
- that no special rights are developed for people of transgender status or non-heterosexuals but that they have rights equal to those available to others;
- that there be protection for people who are going through a gender re-assignment process 'or identifying as transsexuals'.¹

1.2 Senator Spindler acknowledged the concerns of some members of the community by stating that the bill did not represent an attack on marriage; did not encourage paedophilia; and did not seek to give to the non-heterosexual community rights more extensive than those available to others. It sought only to ensure that people had equal access to rights, and that they were not discriminated against in a number of areas, primarily those under Commonwealth control.² Areas of discrimination included superannuation and insurance, employment, education, industrial relations, the provisions of goods and services; protection against vilification was also seen as essential.

1.3 The development of the bill was based on the premise that the Commonwealth had power under the external affairs power of the Constitution to develop legislation which would implement the provisions of international treaties or conventions. A further premise was that the major international covenant - the International Covenant on Civil and Political Rights (ICCPR) - was concerned with the right not to be discriminated against on the basis of sexuality and transgender status.³

1.4 The Bill was referred to the Senate Legal and Constitutional References Committee on 30 May 1996.⁴ It was originally to report by the first sitting day in March 1997. Given a

¹ *Hansard*, Senate, 29 November 1995, p. 4126.

² *Hansard*, Senate, 29 November 1995, p. 4126.

³ *Hansard*, Senate, 29 November 1995, p. 4126. The issues of the Commonwealth external affairs power, the extent of international obligations and the controversy concerning the nature of these obligations, are considered in Chapter 3.

⁴ *Hansard*, Senate, 30 May 1996, p. 1381.

substantial increase in the workload of the Committee during early 1997, further extensions were granted to 2 June 1997,⁵ to 30 October 1997,⁶ and to the last sitting day of 1997.⁷

1.5 The Committee received 436 submissions, and these are listed at Appendix 1. It held nine public hearings, in all States and Territories except the Northern Territory, in the period 6 August to 22 October 1996. Persons giving evidence at these hearings are listed at Appendix 2.

Terms of Reference

1.6 The following report deals with each of the terms of reference by considering them in a specific chapter or section of a chapter or over several chapters, as the case may be. The first part of the first term of reference is 'the need to protect Australian citizens against discrimination and vilification on the grounds of their sexuality or transgender identity'. This is a complex issue dealing with the identification of discrimination and vilification expressed against two distinct groups of people in a wide range of areas. It is considered especially in Chapters Two, Five and Six.

1.7 The second part of the first term of reference is to consider the need for protection against discrimination and vilification 'with particular reference to Australia's international obligations in relation to sexuality discrimination and transgender identity and the action required to meet those obligations.' The international context of the debate is discussed in Chapter Three, which also examines the basis of power for the Commonwealth to develop anti-discrimination legislation. The issue of the action required to meet those obligations is also discussed, in Chapter Two. Chapters Five and Six outline some of the issues that arise in respect of anti-discrimination legislation and identify some areas where change may be needed in order to meet stated objectives of the legislation. Reference is made especially to issues which are not covered by the legislation and the concerns expressed by some groups that the legislation would not address matters of most concern to them.

1.8 The second term of reference is 'Measures which need to be taken to remove any legislative and administrative provisions which are currently discriminatory on the grounds of a person's sexuality or transgender identity'. It has been argued by some witnesses that the limitation of the legislation to Commonwealth legislation means that some important issues will not be addressed, and these concerns are referred to as they occur in Chapters Three to Six. The specific problems with existing legislation within scope are especially considered in Chapters Five and Six.

1.9 The third term of reference is 'The extent to which current legislation at a State level addresses discrimination on the grounds of sexuality or transgender identity and the extent to which Commonwealth legislation should take account of these provisions.' State and Territory anti-discrimination legislation is considered especially in Chapter Four. The benefits and disadvantages of various terminology; groups which are excluded or have

⁵ Hansard, Senate, 10 February 1997, p.365.

⁶ Hansard, Senate, 27 May 1997, p. 3782.

⁷ Hansard, Senate, 2 October 1997, p. 7434.

limited coverage; areas of exemptions and the effect of these, are also examined in Chapter Four. Problems that have been identified in State and Territory legislation are discussed in the consideration of Commonwealth anti-discrimination legislation in Chapter Five and also in Chapter Six.

1.10 It is noted in Chapter Six that although Commonwealth anti-discrimination legislation will take precedence over any incompatible State anti-discrimination legislation, it will not affect other State legislation. Therefore it is possible for State legislation to circumvent the operation of aspects of Commonwealth anti-discrimination legislation.

1.11 The fourth term of reference was: 'the appropriate scope of Commonwealth sexuality discrimination legislation and, in particular, the need for provisions including, but not limited to, the areas of:

- (a) public education;
- (b) appropriate exemptions;
- (c) dispute resolution;
- (d) remedies;
- (e) the availability of class actions; and
- (f) review of the legislation.'

These matters are considered in Chapter Five in particular.

1.12 The final term of reference concerns 'The extent to which the Sexuality Discrimination Bill 1995 effectively addresses the issues of sexuality and transgender discrimination and vilification and the nature of any amendments required to make it more effective.' These issues have been considered *inter alia* throughout the report; the extent of amendments, however, is restricted by the bill being limited in effect to Commonwealth legislation.

Terms and Definitions

1.13 One of the major difficulties in developing legislation which meets specific needs of groups of people is that the individuals affected by current discriminatory practices are often difficult to define and may differ substantially from other groups of people who are also discriminated against on the basis of sexuality or gender identity.

1.14 Not to acknowledge this fact is to consider all members of non-heterosexual groups or all persons of some transgender status to be indistinguishable and to be more easily classified according to their sexual orientation or their preferred gender identity than by any other feature.

1.15 The variety of response to the *Sexuality Discrimination Bill 1995* and the technical difficulty of providing adequate protection to some groups⁸ requires an acknowledgment of differences and some acknowledgment of preferences in terminology. This is not without problems, and it is acknowledged that the term non-heterosexual, although intended to be a shorthand means of referring to people whose sexual orientation is other than exclusively

⁸ Especially transgendered persons - see below, Chapters 4 and 5.

heterosexual, may feel they are being defined against the norm of heterosexuality- 'heterosexuals' always seem to be ranked first in terms of the hierarchy that is created judicially and legislatively, and then we sort of clump homosexuals into one category.⁹

1.16 As with other groups in society, there are differences within the wide category of people termed homosexual, bisexual or transgender. These differences concern status, the validity or otherwise of other people's sexual orientation or gender identity and the extent to which various rights should be developed or extended to all members of society. Political, socio-economic and other factors have shaped people's experience and influenced their expectations and their attitudes towards others, and these were an important part of their evidence.

1.17 A number of issues were identified relating to terminology. These went beyond words or phrases used to describe individuals or groups, having to do more with the status of sexuality or gender, or with the means by which previous inequities could or should be redressed.

Homosexual and Lesbian

1.18 In the current draft of the *Sexuality Discrimination Bill 1995*, the term 'homosexual' is used to mean both male and female homosexuals, or gays and lesbians. As noted by the author of the bill, former Senator Spindler, the term legally applied to both.¹⁰

1.19 Although it was acknowledged that the term was often used as a form of shorthand and meant to encompass both male and female,¹¹ there was considerable discussion as to whether the word 'lesbian' should be specifically included in the bill.¹² A majority of persons commenting on this issue supported inclusion, believing that a failure to mention 'lesbian' could reinforce the belief that males were dominant in homosexual life and that women were ignored or invisible.¹³

1.20 In particular it was stated that the nature of Commonwealth anti-discrimination legislation - which has generally been less formal and legalistic - effectively demanded

⁹ Evidence, Mr Christopher Kendall, p. 611.

¹⁰ Evidence, Mr Sid Spindler, p. 245.

¹¹ Evidence, Anti Discrimination Board of New South Wales, p.110.

¹² Evidence provided by witnesses in Tasmania (*Evidence*, Tasmanian Gay and Lesbian Rights Group, p. 376) suggested that lesbians were not included in the Tasmanian Criminal Code. They are not mentioned specifically but then nor are homosexual men, the terms used being 'any person' who 'has sexual intercourse with any person against the order of nature', 'consents to a male person having sexual intercourse with him or her against the order of nature' and 'any male person' who 'commits any indecent assault' ...with 'another male person'. *Tasmania Criminal Code Act 1924*, Sections 122 and 123.

¹³ Evidence, Ms Chapman; p. 273
Evidence, Federation of Community Legal Centres p. 327;
Evidence, Gay Men and Lesbians Against Discrimination, p. 337;
Evidence, Mr Christopher Kendall, p. 611.

terminology which increased access. Lesbians may believe that any legislation which mentions 'homosexual' but not 'lesbian' is not providing coverage to them.¹⁴

I take the point that legally homosexuality includes lesbians but I am not sure that that sort of distinction is very useful when you are talking about legislation which is aimed at providing an informal dispute resolution mechanism, something that can be initiated by people by themselves, perhaps with some help from a member of the commission or the appropriate body. But generally it is supposed to be an accessible piece of legislation.¹⁵

1.21 While there was considerable support for inclusion, the Australian Law Reform Commission advised that the inclusion of the word 'lesbian' could be tautologous insofar as the word 'homosexual' was understood to refer to both men and women.¹⁶ However, it is possible to accommodate this concern while still meeting the identified needs of others.

Recommendation 1

That the term lesbian be included in the *Sexuality Discrimination Bill*, as follows:

Clause 5, Definitions

'homosexuality'

'homosexuality' means the identity of being gay, lesbian, or homosexual.

Bisexual

1.22 Bisexual people are also invisible relative to gays and lesbians. They are not specifically mentioned in Queensland and Victorian legislation, but bisexual activity is legal in both states since heterosexual and homosexual activity is legal. Bisexual people are not referred to in New South Wales legislation and the legislation there does not prohibit discrimination against people on the grounds of their bisexual status or, indeed, heterosexual status.¹⁷

1.23 The *Sexuality Discrimination Bill 1995* includes 'bisexuality' in the definition of 'sexuality'. However, this in itself does not prevent some forms of discrimination against bisexuals, such as exclusion from sexuality-specific services (for example, gay or lesbian health services or clubs - exclusion from 'heterosexual' or mainstream organisations is not permitted). If specific needs of bisexual people are identified and these are not met by either

¹⁴ Evidence, Gay and Lesbian Rights Lobby; p. 184.
Submission, Feminist Lawyers, Vol. 8. p. 1639.

¹⁵ Evidence, Ms A. Chapman, p. 283

¹⁶ See also Evidence, Gay Men and Lesbians Against Discrimination, p. 339.
Submission, Australian Law Reform Commission, Vol. 9, p.2175.

¹⁷ See below, Chapter 4.

heterosexual or homosexual services, the affirmative action provisions of the legislation could also be of assistance through allowing the development of specific organisations.¹⁸

1.24 However, any discrimination experienced by bisexual people could also be limited by requiring all publicly funded services such as health, legal and educational services to provide services to bisexual and transgender persons.¹⁹ Sexuality-specific social organisations could be exempt.

Recommendation 2

All organisations receiving Commonwealth funding must provide access to services on equal terms to bisexual persons, and to transgender persons.

1.25 Related issues, such as harassment, are considered below at Chapter 2²⁰ and at Recommendation 1 of Chapter 2 and at Chapter 4.²¹

Asexual/Asexuality

1.26 There was little reference to asexuality in submissions or oral evidence, and no indication that people were discriminated against on the basis of having no apparent sexual orientation. If all other forms of legal sexual orientation are to be listed in the definitions of the Sexuality Discrimination Bill, then asexuality should also be added.²²

Recommendation 3

That 'asexuality' be added to the definition of sexuality in the *Sexuality Discrimination Bill*.

Clause 5, Definitions

'Sexuality means heterosexuality, homosexuality, bisexuality and asexuality'.

Heterosexuality

1.27 Many of the witnesses to the Committee noted that the heterosexual was the standard against which all other sexualities were evaluated, and that society was structured to favour heterosexuals and heterosexual families.²³ In this world view, the non-heterosexual often felt part of a different society:

¹⁸ See Chapter 4.

¹⁹ See Paragraph 1.58

²⁰ Chapter 2, Paragraphs 2.36 - 2.41

²¹ Chapter 4, Paragraphs 4.103 - 4.105

²² *Evidence*, Federation of Community Legal Centres, p. 326.
See also *Evidence*, Mr Christopher Kendall, p. 612.

²³ See Chapter 2, Paragraphs 2.59, 2.66, 2.68 -2.70.

'... often when a person declares themselves to be lesbian or gay ... it is very much a statement of personal identity, almost akin to a statement of one person's particular culture.'²⁴

1.28 The heterosexual society appeared to perceive the non-heterosexual solely in terms of sexual identity; and while the non-heterosexual person perceived their sexual orientation as only a part of their being, the actions of others could also lead to orientation influencing a substantial part of life:

'... stigmatisation can be a problem in two ways. For the homosexual individual the acceptance of the stigma will mean its incorporation into a negative self-identity. For the wider community, the difference in treatment under the law can create a perception of an underlying cause and justification for homosexuals to be treated in a different and unfair way in all forms of interaction, and not just those referred to in legislation.'²⁵

1.29 This was seen by some as being reflected in the Victorian and the Queensland anti-discrimination legislation which used the term 'lawful sexual activity' rather than homosexuality or heterosexuality.

Lawful sexual activity

1.30 Some people objected to the term on the ground that it necessarily included heterosexuality and thereby did not acknowledge the long-term history of discrimination experienced by non-heterosexuals.²⁶

1.31 Some disliked the phrase 'lawful sexual activity'²⁷ or the emphasis on sexual activity because it appeared to define people by their sexual orientation and no other factor.

'Having sex and being gay are two separate issues, though. Lawful sexual activity refers to the sex act, not to identity or belonging to a group.'²⁸

1.32 For others, there was also a belief that the use of the word 'lawful' somehow suggested that some of the activity was criminal:

'... there is an inference that the sexual activity gay men and lesbians participate in is in some way illegal. If you look at the fact that it was not decriminalised until 1981 in Victoria and 1984 in

²⁴ *Evidence*, Gay Men and Lesbians Against Discrimination, p. 336.

²⁵ *Submission*, Gay and Lesbian Welfare Association Inc., Vol 11, p. 2465.

²⁶ See below, Chapters 2 and 4.

²⁷ *Submission*, Associate Professor Tahmindjis, Vol. 4, p. 688.
See also below Chapter 2, Paragraph 2.83

²⁸ *Evidence*, Australian Council of Trade Unions, p. 317.

Sydney ... then it has sinister connotations about how we conduct our lives.²⁹

1.33 This approach, it was believed, led to an over-emphasis on sexual activity in consideration of individuals or groups, even though the same approach was not employed in assessing the suitability of other people for employment or membership of clubs or participation in cultural, religious or sporting activities:

'Very often the recipient party, upon hearing [that a person is gay or lesbian] takes it as something like a simple statement of sexual desire, or in the case of religious bodies, an intention not to follow certain rules or to be out of step with traditions...'³⁰

1.34 Although anti-discrimination legislation in itself sometimes appears to emphasise people's sexuality or some other ground of discrimination,³¹ one of the intended outcomes of the legislation is a greater awareness of people as individuals and a reduced inclination to categorise people by one feature rather than their whole being. The term 'lawful sexual activity' is not used in the *Sexuality Discrimination Bill 1995*.

1.35 The legislation should also address the fact that many people felt excluded from the operations of society if their sexuality was seen as undesirable. This issue could be dealt with to some extent by the processes established through the legislation which acknowledged a need for discussion and resolution of issues. In this way both parties could explain the basis of action and could do this by acknowledging the need for discussion:

'... often when a person is dismissed from or refused a position within a religious body there are enormous levels of negative feeling because, rather than just being simply a job, it can be like exclusion from the whole religion...We look for some process wherein these considerations can be discussed so that a more just outcome either way can be achieved.'³²

Heterosexuality as part of 'Sexuality'

1.36 As is discussed in greater detail below,³³ many witnesses were concerned that 'heterosexuality' is currently included in the definition of 'sexuality' in the bill (and many others were concerned that it should remain). The major reason for concern was the belief that the bill would be providing protection to those who did not need it, would make it more difficult and expensive to get special exemptions or exceptions for gay or lesbian organisations and services, and might lead to frivolous complaints.

²⁹ *Evidence, Gay Men and Lesbians Against Discrimination*, p. 336 and see also p. 338.

³⁰ *Evidence, Gay Men and Lesbians Against Discrimination*, p. 336.

³¹ See Chapter 4, and Chapter 5, Paragraph 5.59.

³² *Evidence, Gay Men and Lesbians Against Discrimination*, p. 336.

³³ See Chapter 4.

1.37 While recognising that heterosexual persons are less likely to be discriminated against, and less likely in particular to be verbally and physically attacked and abused, on the grounds of sexuality, the Committee has agreed that 'heterosexuality' be retained in the definition of sexuality. The reason for this is that it is important to establish general principles of formal equality. Special-needs groups may be identified and seek positive discrimination measures to overcome past disadvantage.³⁴ Clause 27 allows groups to meet 'special needs' and establish sexuality or gender specific services, which could include accommodation, specific events or social clubs. Clause 31 allows for applications for exemption from the application of provisions in Divisions 1 and 2 of the legislation. This would allow sexuality-specific or gender-specific organisations to be exempt from providing that service to others. Although some groups believed that having to follow these processes would be time-consuming, the Committee considers that the process need not be complex and will require all organisations to establish sound grounds for exemptions or special services.

Recommendation 4

That 'heterosexuality' remain part of the definition of 'sexuality'

Orientation or Preference

1.38 The terms 'sexual orientation' and 'sexual preference' are not used in the *Sexuality Discrimination Bill 1995*. Both terms are problematic in that they suggest that sexuality is a given factor or a matter of choice respectively,³⁵ and this is not an issue the Committee has been concerned with in detail - it has preferred to consider the best ways of addressing an existing situation regardless of the causal factor or factors.

1.39 Although the term 'sexual preference' is used in the *Human Rights and Equal Opportunity Act* regulations³⁶ and in other legislation,³⁷ this does not commit subsequent legislation to use of the same term.

Transgender

1.40 The current draft of the *Sexuality Discrimination Bill 1995* refers to 'transgenders', and includes within this group transsexuals, although it does not define transsexuals.

1.41 Other legislation, especially that of South Australia and the Northern Territory, also refer to transsexuals, a term which may be intended to cover all transgender persons. South

³⁴ There is, further, no evidence to suggest that people claiming to be discriminated against on the basis of heterosexuality are suggesting that this discrimination is caused by homosexuals. Systemic discrimination may occur on the basis of sexuality or marital status and arise from institutional prejudice rather than any bias by homosexuals. See for example, *Evidence*, p. 682 Queensland Anti Discrimination Commission.

³⁵ See, for example, *Submission*, Ms Sue Guinness, Vol 2, p. 225.

³⁶ *Evidence*, HREOC, pp. 135-136.

³⁷ See Chapter 6.

Australia includes the term 'transsexual' under 'sexuality'.³⁸ Transgender people are excluded from coverage in Victorian and Queensland legislation which deals only with sexuality.³⁹ New South Wales legislation provides extensive coverage for transgender people, defining a transgender to be:

1.42 Section 38A 'a person'

(a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or

(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or

(c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

and includes a reference to the person being thought of as a transgender person, whether the person is, or was, in fact a transgender person.

1.43 The New South Wales legislation differentiates between a transgendered person and a transsexual by naming the latter 'recognised transgender person'.⁴⁰ Transsexuals or recognised transgender persons are specifically protected in respect of their status as a man or a woman through the operation of Section 38B (1) (c) of the New South Wales legislation.⁴¹

1.44 There were two main issues concerning the issue and definition of transgender persons in the Commonwealth *Sexuality Discrimination Bill 1995*. The first of these was whether the word 'transgender' should be added to the title of the bill. The second, more important, issue was the extent to which the current definition of transgender in the bill was too broad or not sufficiently precise. A related issue was whether 'transsexuals' should be more clearly defined.

1.45 As an integral part of the discussion as to the powers of the Commonwealth to develop legislation relating to sexuality and gender status⁴² the Commonwealth Attorney General's department raised the issue of the meaning of 'transgender'. The department believed that, regardless of the extent to which one could claim either inclusion of transgenders in the International Covenant on Civil and Political Rights (ICCPR) or some level of international concern at the situation of transgenders,⁴³ the current definition of

³⁸ See Chapter 4.

³⁹ See Chapter 4.

⁴⁰ *Anti Discrimination Act 1977*, Section 38A. A 'recognised transgender person' is defined in the legislation as 'a person the record of whose sex is altered under Part 5A of the Births, Deaths and Marriages Registration Act 1955 or under the corresponding provisions of another Australian jurisdiction.'

⁴¹ See Chapter 4, Paragraphs 4.95-4.96.

⁴² These issues are discussed in Chapter 3 of this report.

⁴³ See Chapter 3, Paragraphs 3.24-3.25

transgender was too inclusive. It could be deemed to cover a range of people such as transvestites who would be hard to perceive as having a stable identity. Without some stability or certainty it was difficult to determine a person's gender status:⁴⁴

'This is a very broad definition, and it would seem to cover not only persons who live permanently in a gender role opposite to that corresponding with their biological sex at birth, but it also seems wide enough to cover cross-dressers. We would have some doubts whether, from a constitutional point of view, there would be support under the external affairs power for the application of the bill to that category of persons, as opposed to those who have, in some more permanent way, adopted a different gender role.'⁴⁵

1.46 The definition currently used is:

'a person of one sex who

(a) assumes any of the characteristics of the other sex, whether by medical intervention (including a reassignment procedure) or otherwise; or

(b) identifies himself or herself as a member of the other sex; or

(c) lives or seeks to live as a member of the other sex; or

(d) attempts to be, or identifies himself or herself as, a transsexual.'⁴⁶

1.47 The word 'transsexual' is not itself defined. This can also lead to confusion in that it is not clear how many people, if any, wish to be seen as transsexual rather than as a man or a woman. Those who are attempting to become a transsexual could be described as transgender or as pre-operative transsexuals, although it would be more accurate to say that these people are 'intending' to become a transsexual.

⁴⁴ See Paragraph 1.50 and also Chapter 4 and 5.

⁴⁵ *Evidence*, Commonwealth Attorney General's department, p. 6 . See also Chapter 3.

⁴⁶ *Sexuality Discrimination Bill 1995*, Clause 5.

1.48 There appeared to be a distinct hierarchy in the transgender world with transsexuals being at the highest end of the scale.⁴⁷ Transsexuals were classed as persons who had undergone a surgical and/or medical (drug based) change to become more obviously their preferred gender or at the least less obviously their biological gender.⁴⁸ Although some transsexuals disavowed the claim that they were more 'real' than persons who were at some other stage in a transgender process, there did appear to be a belief that those who had physically changed were more 'genuine.'

1.49 This ranking was not uniformly accepted, with many witnesses suggesting that surgery was only a last step, although various hormonal regimes appeared standard for those who wished to pass as of their preferred gender even if they did not have surgery.⁴⁹ The more important process was seen as becoming comfortable with the identity and being able to live it:

'The big change is the cultural change ... your day to day existence is far more important ... For some people, I think [the operation] is important. But for most transgenders, that is the minor aspect. It is the cultural ways of relating to everybody they meet every day.'⁵⁰

1.50 In this area as in others there was some concern for certainty and this to a degree was part of a desire to approve a medical model of gender change and, possibly, social models which accept only two genders and which prefer these genders to be stable. Those who advocated certainty believed that surgery was a definitive statement of wish since it was irreversible,⁵¹ although this would seem to confuse certainty with inability to change a physical feature:

'[the definition of transgender] would enable ... persons to move from one persona to another, for whatever reason, and to move back again, and to do so ... in both directions any number of times. In other words, there is no requirement, either of bona fides or of some degree of permanency or commitment. Commitment is what

⁴⁷ Evidence, Dr Finlay, p. 384.

From the evidence provided to the Committee there were fairly distinct groups of people and various political agendas associated with transgender people. Some people considered that those who wished to be another gender were suffering from a disorder called gender dysphoria (Evidence, Gender Dysphoria Clinic, p. 290.). Others did not perceive their wish to be of the gender opposite to that which they were born to be a medical or psychological/psychiatric condition, but a matter of non-alignment between psychological and biological sex. Only a small percentage of transgender persons actually undertake surgery, although a higher percentage may undertake some hormonal changes as part of a process towards change or possibly to eliminate the most obvious features of their biological gender (Evidence, Gender Dysphoria Clinic, pp. 291, 292-293).

⁴⁸ Evidence, Dr Finlay, p. 384.

⁴⁹ In its current form the *Sexuality Discrimination Bill 1995* described a 'reassignment procedure' (Clause 5) as 'a medical or surgical procedure or a combination of medical or surgical procedures...'. It is not clear if a 'medical' procedure would include only a drug regime intended to change the external appearance.

⁵⁰ Evidence, Ms Peters, p. 294.

⁵¹ There was some concern about people who may change their gender identity more than once, although there was virtually no evidence that people did this on a regular basis.

I find with post-operative transsexuals, who have displayed a considerable degree of commitment in having undergone surgical intervention by having their sexual characteristics changed, to the utmost degree possible, by the use of surgical and medical means.⁵²

1.51 However, the issue was not only one of certainty per se, but rather one of the validity of a change of status:

'One could seek to qualify that by putting in something about 'on a permanent basis', 'in a stable, consistent manner' or 'over a period of time ... certainly some sense of permanency would seem to be a helpful element in terms of administration of such a law...'⁵³

1.52 From the evidence received, much of the definition of transgender is acceptable apart from category (a) and, possibly, the use of the word 'or' rather than 'and' at the end of each category. All the other sub-clauses, especially when combined rather than separate, describe those whose identity is generally long-term or well established. The current definition may be seen as including people who either do not identify as a particular gender or seek to live as a member of that gender, whose membership of a particular 'gender' is often transitory and not part of an established personal identity, and whose need (if any) is possibly for protection from discrimination on the basis of a particular sexual preference.

Recommendation 5

That a more precise definition of 'transgender person' be developed for the *Sexuality Discrimination Bill 1995* to exclude from coverage persons who do not identify as, and seek to live as, a member of the sex opposite to their biological sex.

The suggested change is:

Clause 5, Definitions

'transgender person'

'transgender person means a person originally of one sex who:

- (a) identifies and lives or seeks to live as a member of the other sex; and
- (b) assumes the characteristics of the other sex on a full time basis or as much as is reasonable in the circumstances; and
- (c) includes a transsexual'

⁵² Evidence, Dr Finlay, p. 383.

⁵³ Evidence, Commonwealth Attorney General's department, p. 8.

Recommendation 6

That the *Sexuality Discrimination Bill 1995* define the word 'transsexual' to mean a person who is undergoing or who has completed sexual re-assignment surgery.

The suggested change is:

Clause 5, Definitions
'transsexual'

'transsexual means a person who:

- (a) has undergone, or is in the process of undergoing, a surgical re-assignment procedure, and
- (b) who identifies and lives or seeks to live as a member of the sex to which he or she has been reassigned or seeks to be re-assigned.'

1.53 There was little if any objection to changing the title of the bill to include transgender people since the legislation itself also addressed this issue and made a clear distinction between sexual and gender issues.⁵⁴ I see it simply as a discrimination bill. It deals with discrimination against different groups so why should they not be included in the one bill?⁵⁵

Recommendation 7

That the name of the bill be changed to: *Sexuality and Gender Status Discrimination Bill 1997*.

Other issues for transgender people

1.54 Transgender people also experience other problems, some of which can be addressed by legislation. These are not being perceived as a member of a couple; and the sexuality of a transgender person being ignored.⁵⁶

1.55 The first of these problems has been addressed to some extent by the *Sexuality Discrimination Bill 1995*, although various changes have been recommended to improve coverage.

1.56 The difficulties in transgender couples being seen as a couple are primarily that:

- one of the couple may be male and the other a pre-operative male to female transgender; in such cases, the couple would be considered a same sex couple, which is currently not accepted in several areas including Social Security legislation; and

⁵⁴ *Evidence*, Equal Opportunity Commission of Victoria, p. 231.
Evidence, GLAD, p. 337.

⁵⁵ *Evidence*, Ms Langley, p. 302.
See also *Evidence*, Anti Discrimination Board of New South Wales, p. 112.

⁵⁶ *Evidence*, Adelaide Central Mission, p. 438.

- even if same sex couples were recognised, the transgender couple may wish to be acknowledged as an opposite sex couple.

1.57 This issue could be addressed by allowing a variety of couples or partners to obtain legal status for various reasons including welfare benefits, insurance and superannuation. These matters have been addressed in the following report.⁵⁷

1.58 The issue of the sexuality of transgender persons is only a matter of concern for legislation insofar as different sexualities may not be accepted by various groups within society, or by those who do not accept a specific sexuality being expressed by a transgender person:

'There are many transgendered people who actually identify as gay or lesbian. It becomes a complex issue for some people if someone who has been a man chooses to become a woman but still identifies as a lesbian.'⁵⁸

1.59 Although education may assist in increasing understanding of a range of sexuality and gender issues, legislation may need to ensure that specific funding be allocated for some groups who may not obtain access to the funding or services available to mainstream gay and lesbian organisations. However, Recommendation 2 above is intended to provide access to services for transgender people as well as bisexuals, and Recommendation 1 of Chapter 2, relating to harassment, specifically addresses issues affecting transgender persons.

Terms used in Report

1.60 Various recommendations have been made in the report which would affect the meaning of various words used in the bill or would seek to vary the current meaning of some words and phrases in the bill. The following terms are used in the report:

asexual - the status of being an asexual person.

asexual person - a person who has no actual or apparent sexual orientation.

bisexual - the status of being a bisexual person.

bisexual person - a person attracted to both men and women, and/or who engages in both homosexual (gay or lesbian) and heterosexual activity.

gay - male homosexual.

homosexual - the status of being a homosexual person.

⁵⁷ See Chapters 5 and 6.

⁵⁸ *Evidence*, Adelaide Central Mission, p. 438,
and see also *Evidence*, Australian Transgender Support Association, p. 790: 'transgender's gender identity has nothing to do with their sexual identity, inasmuch as we run the whole gamut of sexuality. In other words, we can be heterosexual, bisexual, asexual or obviously lesbian or gay.'

homosexual person - a person, male or female, whose sexual interest is primarily in persons of the same gender.

lesbian - female homosexual.

non-heterosexual - the status of being a non-heterosexual person.

non-heterosexual person - a person whose sexuality is other than exclusively heterosexual.

non-operative - a person who does not wish to align their psychological and biological selves through the means of surgery although they may use drugs to change the most obvious signs of their birth gender.

post-operative - a person who has undergone re-assignment surgery to become transsexual.

pre-operative - a person who wishes to have re-assignment surgery to become transsexual; this includes a person who may wish to, but cannot afford to do so or who cannot undertake such surgery for medical reasons.

re-assignment surgery - irrevocable surgery which removes the physiological sexual characteristics a person has been born with and replaces these with ones approximating the physiological characteristics of the preferred gender; (note - this differs from the current definition in the *Sexuality Discrimination Bill* which refers to a re-assignment procedure and includes a medical procedure which would cover drug treatments).

transgender - the status of being a transgender person.

transgender person - a person who identifies on a consistent basis as a person of the gender opposite to that which they were born, whether or not they have undergone medical or surgical treatment to assume the sexual characteristics associated with that gender.

transsexual - the status of being a transsexual person.

transsexual person - a person who has undertaken (or is undertaking) surgical re-assignment to correlate his/her psychological and biological gender.

CHAPTER TWO

THE RATIONALE FOR THIS INQUIRY

Introduction

2.1 Developing legislation to provide protection against discrimination on the basis of sexual orientation and transgender status is an issue which has caused considerable debate over an extended period of time. The proposed legislation which is the subject of this inquiry and report was introduced into the Senate in response to Australian discussion of the need for some form of legislation to ensure that people were not discriminated against on the basis of sexuality or gender status. This movement was further influenced by the awareness of certain 'obligations' under international law; numerous, often significant human rights developments in other countries, particularly in Europe; and a measure of international interest and 'concern' about the extent to which the rights of people were limited because of their sexual orientation and gender identity.¹

2.2 The existence of State and Territory legislation in Australia,² as well as numerous reports and comments, indicated that the issue of discrimination against people on the basis of sexuality had been considered important and as requiring specific legislative measures.³ Less consideration had been given to issues affecting bisexual and transgender persons.⁴

2.3 State and Territory anti-discrimination legislation was a response to complaints, made over a long time period, of systemic⁵ and individual discrimination; these complaints had been made by people who believed their sexual orientation or gender identity were a major or sole reason for their being treated less favourably than other members of the community.

2.4 Although some changes had occurred for the better as the result of legislative change at State and Territory level, witnesses provided a substantial amount of evidence on a wide range of issues they felt demonstrated the need for uniform national legislation. Much of this evidence indicated that many of the rights and freedoms that are considered an integral part of Australian society are not readily available to non-heterosexuals or to transgender persons. Although there was also extensive comment that extending anti-discrimination legislation would create *special* rights, there was little evidence supporting this belief. On balance, the Committee found that existing legislation was not sufficiently specific to address many of the major problems experienced by non-heterosexuals and transgender persons, and believes that anti-discrimination legislation should be standardised throughout the nation.

¹ These issues are discussed in Chapter 3.

² See Chapter 4.
Evidence, Equal Opportunity Commission Victoria, p. 229.
Submission, Equal Opportunity Commission Victoria, Vol 7, p. 1465.

³ *Submission*, Kingsford Legal Centre, Vol 5, p. 924.

⁴ *Evidence*, Australian Bisexual Network, p. 671.

⁵ *Submission*, Equal Opportunity Commission Victoria, Vol 7, p. 1464.

Major areas of complaint

2.5 The main areas of complaint for both systemic and individual discrimination were: employment;⁶ the provision of goods and services;⁷ and harassment and violence.

Employment

2.6 Problems in this area included getting access to employment, and being promoted or receiving other benefits such as training opportunities and positive performance reports;⁸ access to 'standard' benefits such as various types of leave and allowances;⁹ being able to benefit from arrangements available to others such as being able to take leave or to work at the same time as a partner; treatment of superannuation benefits;¹⁰ and intimidation at work.¹¹

2.7 A number of submissions offered evidence demonstrating limited access to employment opportunities.¹² These resulted from numerous factors, including interrupted education, which could mean fewer opportunities later in life:

'Discrimination in schools and other educational institutions limits educational opportunities for advancement. Where a teacher fails to prevent targeting of homosexual students for harassment and bullying by fellow students, tacit support is given for the conduct by the authority figure. This can lead to students failing courses and in some cases leaving the educational institution altogether.'¹³

⁶ Evidence, Equal Opportunity Commission Victoria, pp. 223 and 229.

⁷ Evidence, Equal Opportunity Commission Victoria, p. 223.

Submission, Gay and Lesbian Rights Lobby, Vol 5, pp. 1019-1020.

⁸ Submission, Gay and Lesbian Rights Lobby, "Previously well-regarded employees suddenly receiving poor work performance reports when their sexuality is disclosed, unfair dismissals." Vol 5, p. 1017.

⁹ Evidence, Queensland Association for Gay and Lesbian Rights, pp. 729 and 734.

¹⁰ See Chapter 4.

¹¹ Examples, Evidence, Council for Equal Opportunity in Employment, p. 43.

Submission, ACTU, Vol 8, p. 1655.

¹² Examples, Submission, Gender Council of Australia (WA) Inc, "the current situation for gender dysphoric persons is such that they tend to lose heart and drop out of the mainstream. Thus the contribution that they could make is reduced or lost." Vol 6, p. 1271.

Evidence, Australian Bisexual Network, "There can be degrees of discrimination and so forth, along the same lines as a gay or lesbian person would experience. Alternatively, if you were applying for positions in maybe some gay and lesbian businesses, you may not be favoured." p. 674.

Evidence, Lesbian and Gay Community Action, p. 471.

¹³ Submission, Kingsford Legal Centre, Vol 5, p. 924.

Evidence, Lesbian and Gay Youth Services, "A lot of people who experience discrimination at school end up just dropping out because there are not a lot of options available for them apart from going to a different school or leaving school altogether....Theoretically, you can become a mature-age student later in life or go to TAFE but usually the result is that that person does not complete their education and is then unable to be as employable as they could have been." p. 170.

Evidence, PFLAG, pp. 652-653.

2.8 Disrupted employment patterns affected employment experience and records.¹⁴ Of those who do complain, many will only do so after they have left work,¹⁵ which reduces the possibility not only of conciliation but also of future employment.

'...a formal complaint is lodged ... after the person has resigned, and that is because the prospect of lodging a complaint on these issues is so difficult that people would rather wait ... until they are actually out of the workplace.'¹⁶

2.9 Other witnesses referred to various leave provisions being ignored or relationships being excluded:

'...I am finding that both employers and unions, in reaching workplace agreements, are ignoring the decisions.

[Queensland Association for Gay and Lesbian Rights] has been getting quite a number of phone calls from people seeking advice about the fact that we are making a workplace agreement and they have put in family leave, but they have just put in mother, father and children or they are avoiding the whole issue of that decision about household, which is where same sex couples were recognised.'¹⁷

2.10 Concomitant problems included reduced income and the effects of continued harassment and victimisation including lack of confidence¹⁸:

'To allow any group to be impaired in participating fully in the economic life of the community is to create a second class of citizen. Where a person suffers economic discrimination they become more vulnerable to other forms of discrimination and liable to become dependent on government or charitable support. The members of this sub-class become less able to protect themselves against further discriminations and the ordinary vicissitudes of life.'¹⁹

¹⁴ Evidence, Queensland Anti Discrimination Commission, p. 691.

¹⁵ Submission, Gay and Lesbian Welfare Association, "Other people had left work because no action was taken by management", Vol 11, p. 2466.

¹⁶ Evidence, Council for Equal Opportunity in Employment, pp. 43-44.

¹⁷ Evidence, Queensland Association for Gay and Lesbian Rights, p. 729.

¹⁸ Submission, Gay and Lesbian Lawyers, Vol 3, p. 483.

Evidence, Ms Langley, "What happens to these people's self-esteem when they have difficulty getting employment in the first place is that it lowers their expectations of being able to get work. They eventually stop looking. There is a cycle for a number of transgendered people when one thing goes wrong and they just go downhill from there and they get trapped in poverty." p. 304.

Evidence, Australian Transgender Support Association Inc, p. 792.

¹⁹ Submission, Gay and Lesbian Lawyers, Vol 3, p. 494.

Evidence, Lesbian and Gay Community Action, p. 471.

2.11 Although little information was given on the limitation of employment opportunities for transgender persons,²⁰ some evidence was provided that they were more likely to be forced to rely on prostitution²¹ or some forms of entertainment work²² for a living. However, other evidence suggested that transgender people included many with high levels of education and experience²³ and that involvement in prostitution or entertainment was minimal.²⁴ Those who already had employment or qualifications and experience when they became transgender might not be as disadvantaged as those who had limited skills, although this was not invariably the case.²⁵

'I worked for the one organisation for quite a number of years and when I changed I still stayed with that organisation. Management were very good, but I found that I was daily vilified particularly by a lot of males. I was vilified by the minute for the first three months particularly...'²⁶

2.12 Employment problems for both transgender persons and non-heterosexual persons occurred in both the private and public sector, in large and small organisations:

'...when we conduct training in the area of dealing with workplace harassment, the area that is perhaps of the most challenge and where there is the highest level of discomfort amongst participants is in the prospect of working with people who are of a different sexual orientation from the majority of the people in the workplace.'²⁷

2.13 Educational bodies were adversely commented on by a number of witnesses,²⁸ possibly because private education (much of it provided by religious bodies) was exempted from the discrimination provisions of State legislation. Employment in such educational bodies appeared limited:

Evidence, ACTU, "where the issue of denial of access to superannuation was identified as a problem causing financial hardship in some relationships", p. 314.

²⁰ *Evidence*, The Queensland Association for Gay and Lesbian Rights noted that transgender persons were not covered by industrial legislation, p. 729.

²¹ *Evidence*, Anti Discrimination Board of New South Wales, p. 110.

²² *Evidence*, The Chameleons, pp. 512-513.

²³ *Submission*, Ms J Aspen, Vol 1, pp. 45-46.

²⁴ *Evidence*, Australian Transgender Support Association Inc, p. 793.

²⁵ *Submission*, Ms C Ronalds, Vol 2, pp. 298-299.

Evidence, Ms Langley; pp. 295-296.

Roberta Perkins, *Transgender Lifestyles and HIV/AIDS Risk* (1994), p.3.

²⁶ *Evidence*, Ms Peters, pp. 296 and 306.

²⁷ *Evidence*, Council for Equal Opportunity in Employment, p. 439.

Submission, Gay and Lesbian Rights Lobby, Vol 5, p. 1017.

²⁸ *Submission*, Kingsford Legal Centre, Vol 5, p. 924.

Evidence, ACTU, pp. 310, 315.

Evidence, GLAD, p. 336.

'...what often happens in these circumstances, too, is that it becomes a prohibition on people to move into that area of employment altogether. The problem with it is that it generates an expectation or a belief within the community that homosexual people should not work in private schools.'²⁹

2.14 There seemed to be a belief in some sections of the community that non-heterosexual persons were more likely to commit sexual acts against students and would actively promote their sexual orientation.³⁰ Witnesses also referred to teachers being dismissed because they had been seen at a social event associated with non-heterosexuals.³¹

2.15 Some educational authorities may also be influenced by the existing social and religious structure which perceives the *in loco parentis* authority to be within a heterosexual context. 'What we are interested in is the fact that teachers are in loco parentis. Therefore, they need to act in accordance with the parents' rights and requirements on this matter.'³²

'The myth that offering legislative protection will pose a challenge to a particular religious set of beliefs or practices is just that. Religious schools have always employed and taught lesbian gay bisexual and transgender people and will always do so, and in spite of this religious beliefs are very evident and will continue to be.'³³

2.16 Much of the evidence on State educational systems' employment practices and student management suggested that there had been inadequate attention paid by schools and educational authorities to the issues of both systemic and individual discrimination and violence. Witnesses suggested that a certain amount of violence and intimidation/harassment was tolerated by teachers who therefore provided little guidance for pupils and failed to support other staff or students who were the victims of verbal or physical abuse.³⁴

2.17 The Anti Discrimination Board of New South Wales stated that there had been some changes in the NSW State education department since the introduction of state anti-discrimination legislation,³⁵ and this was supported by another witness.³⁶ A need for educational services in schools appeared to be widespread:

²⁹ *Evidence*, ACTU, p. 315.

³⁰ *Evidence*, Salt Shakers, "...it was only after significant lobbying against the bill, mainly from church groups and schools, that exemptions were inserted on religious grounds. The homosexual community wanted unimpeded access to all groups.", p. 250.
On the issue of choice, see Chapter 2, Paragraphs 2.87-2.88.

³¹ *Evidence*, ACTU, pp. 317 and 323.

Evidence, Mr C Kendall, p. 615.

³² *Evidence*, Association of Catholic Parents, p. 756.

³³ *Submission*, Context, Vol 1, p. 213.

³⁴ *Evidence*, GLAD; p. 335.

Evidence, Human Rights and Equal Opportunity Commission Tasmanian Regional Office, pp. 348, 352.

Evidence, Tasmanian Gay and Lesbian Rights Group, p. 363.

Evidence, Ms Rogers, pp. 440-442, 446.

Submission, Fringedwellers Community, Vol 11, p. 2490.

³⁵ *Evidence*, Anti Discrimination Board of New South Wales, p. 115.

'Several attempts have been made in Queensland to begin initiatives to support gay and lesbian teachers and their gay and lesbian students in secondary schools. Still only a skeleton of contacts exist for teachers, with no services at all for students ... Teachers who find that they must investigate and deal with issues of their own development and social interaction in a legal situation that in many ways forbids them to discuss it with their friends and co-workers will feel isolated and unhappy. It is not stretching a point to state that many good teachers are lost to the department this way.'³⁷

Goods and services

2.18 Unequal access to goods and services was also a major concern, particularly to medical, police and education services. The extent to which Commonwealth powers extended to the provision of goods and services and also of issues such as superannuation, was raised by the Commonwealth Attorney General's department. The department believed that such matters were not spelled out in the various international treaties or covenants which were to be the basis of the legislation.³⁸ Thus, even if one could accept both sexuality and transgender status being included as a part of these 'obligations', it was another issue altogether to fill in a very detailed coverage of issues.³⁹ This argument, which is considered in more detail in Chapter Three, was not accepted by other witnesses who believed that once an obligation could be identified and agreed to as existing for Australia, the means by which that obligation could be met were extensive.⁴⁰

Medical services

2.19 The main problems were identified as:

- the difficulty that some non-heterosexual persons had in identifying as gay, lesbian or bisexual and in discussing specific health issues;⁴¹
- some doctors not having adequate knowledge of the health services required by homosexuals or bisexuals, and inadequate funding being available for services;⁴²

³⁶ Evidence, Lesbian and Gay Anti Violence Project, p. 199. See also Evidence, Salt Shakers, pp 250-251. Evidence, Aids Council of New South Wales, pp. 167-168.

³⁷ Submission, Gay and Lesbian Welfare Association Inc., Vol 11, p. 2466.

³⁸ See Chapter 3, Paragraph 3.18.

³⁹ Evidence, Commonwealth Attorney General's Department, p. 6.

⁴⁰ Evidence, Mr W. Morgan, p. 278.

⁴¹ Submission, Ms R Cowling, Vol 2, p. 286.

⁴² Submission, Gay and Lesbian Lawyers, "Homophobia, like gender, is an issue that tests the health system and health policy...many services provide well for the treatment of diseases of affluent males and they provide least well for the preventive needs of those at the margins. Similarly, they can inhibit

- some medical practitioners not wanting to accept homosexuals as patients⁴³. Witnesses believed they were subjected to greater discrimination in medical services because of assumed ill health or high risk behaviour.⁴⁴

'Obviously equal treatment in a medical setting is imperative. In practice the picture is much less attractive. Homophobia is as much a problem among doctors and nursing staff as it is in the general community. It is like putting your health in the hands of someone who hates you.'⁴⁵

- homosexuals and bisexuals believed there was a need for specialised services because of because they experienced considerable stress.⁴⁶ A similar issue was identified for transgender people as well, especially resulting from problems in getting employment.⁴⁷

2.20 State government hospitals and community medical services can be directly controlled under the provisions of State legislation, and the employment provisions of the *Sexuality Discrimination Bill 1995* apply to employment in the State public sector. Where specific problems in service provision are identified these should be notified to the relevant health authority.

2.21 Some additional problems in service provision were also identified beyond hostility or lack of knowledge, although these included matters that could come under the responsibility of the Commonwealth government, such as limited access to re-assignment surgery for

access by homosexual men and women because in their apparent equity, they can be insensitive or even hostile. Some would argue that, in effect, the entire health system is biased particularly to meet the special health needs of heterosexual males: such as comprehensive coronary care facilities and accident and emergency departments." Vol 3, p. 508.

⁴³ Submission, Australian Bisexual Network, Vol 8, p. 1616. Evidence, GLAD, p. 334. Submission, GALL, Vol 3, p. 508.

⁴⁴ Example, Evidence, Equal Opportunity Commission Victoria, p. 230. Evidence, Salt Shakers, p. 259.

⁴⁵ Submission, Ms Thompson and Ms Connor, Vol 5, p. 932. Submission, GALL, In contrast, a social work unit in a major Sydney hospital had undertaken work on the rate of random physical violence based on sexuality, indicating an awareness of the problems of non-heterosexual communities, Vol 3, p. 508. Evidence, GALL, p. 193.

⁴⁶ Submission, Australian Bisexual Network, Vol 8, p. 1616. Submission, GALL, which lists the effects of homophobia, Vol 3, p. 502. Evidence, p. 445.

Submission, Gay and Lesbian Welfare Association Inc., 'although homosexuality is not a pathology and although homosexuals are no more likely to suffer psychiatric disturbance than the general population there exist many more avenues whereby a homosexual person may suffer psychiatric distress than for the general population. Frequent themes in counselling calls received by the Association are loneliness, isolation, depression, low self-esteem and helplessness. These feelings are engendered by a stigmatisation of the caller, or a perception by the caller of stigmatisation, because of the caller's sexuality.' Vol 11, pp. 2464-2465. Submission, Mr James Peck, Vol 11, p. 2476.

⁴⁷ Evidence, Ms Langley, p. 304.

transgendered persons⁴⁸ and some problem with access to required drugs.⁴⁹ However, access to some drugs was limited on the basis of a person's formal gender status, as opposed to their preferred gender status.⁵⁰

Community services

2.22 A number of community based services, such as refuges, other accommodation, food and counselling services, may be run by organisations which limit access for some groups⁵¹ (contrary to the spirit of the Commonwealth or State funding principles). Some of these organisations or services were operated by religious bodies:

'One of the things that concerns us is the growing extent to which the church and religious organisations are delivering services ... Probably one of the most tangible examples would be the Salvation Army, who do case management work for the Department of Employment Education and Training. They would see themselves as falling within this exemption [for religious bodies]. But they are actually performing a task for the government and they are actually engaging in case management...

We would argue that the recommendation as it currently stands would do nothing to prevent an organisation such as the Salvation Army from actively discriminating against gay people in terms of the services which they are publicly funded to perform on behalf of the Commonwealth.⁵²

2.23 Religious bodies themselves expressed concern that their members might have to separate their religion from their business and provide community based services, including child care in accordance with the proposed legislation.⁵³

2.24 The issue of religious organisations possibly excluding people from community based and government funded services, on the basis of sexuality or gender status, is considered further below in Chapter 4.⁵⁴

⁴⁸ *Submission*, Ms C Ronalds, Vol 2, p. 299.
However, some of these problems had been overcome by early 1996,
Submission, Department of Health and Family Services, Vol 11, pp. 2557-2558.

⁴⁹ *Evidence*, Department of Health and Family Services, p. 791.

⁵⁰ *Submission*, Department of Health and Family Services, Vol 11, p. 2558.

⁵¹ *Submission*, GALL 'where charities or voluntary bodies receive public funding, it is inappropriate for them to act contrary to public policy.' Vol 3, p. 481.
Submission, Context, Vol 1, p. 215.

⁵² *Evidence*, Queensland AIDS Council, pp 713-714.
Submission No. 281, Queer Sexuality Collective, Vol 11, p. 2482.

⁵³ *Evidence*, Christian Outreach Centre, p. 786.

⁵⁴ See Chapter 4, Paragraphs 4.183-4.193.

2.25 The extent to which the quality of service provision to clients might vary was not clarified. There was some suggestion that a service might not be available at all,⁵⁵ and, in some instances, physical or verbal violence could occur or inappropriate services be provided:

'We are looking at people who are generally leaving a family environment because of violence which is related to their sexuality preference. They go to get some support and safety in mainstream services. What they actually find is that they get further discrimination. This can be as obvious as outright violence, and that would generally be in the context of other young people within those services, or it can be more subtle institutionalised violence where the service does not have any policies specifically relating to young gays and lesbians...

Importantly, a lot of the homophobic murders have been perpetrated by young people who were using support services in Sydney, such as youth refuges. That is of significant importance when we are looking at such limited services to young people who are in the [face] of such extreme discrimination.⁵⁶

2.26 The issue of religious bodies obtaining an exemption for services provided in and to the community under government programs is considered further in Chapter 4.⁵⁷

Police Services

2.27 Although witnesses did not provide a great amount of direct detail on their dissatisfaction with access to police services, it was stated that discriminatory behaviour included:

- not taking non-heterosexual domestic disputes seriously;⁵⁸
- not taking appropriate action in response to random violence by heterosexuals against homosexuals;⁵⁹

⁵⁵ See Chapter 2, Paragraph 2.102.

⁵⁶ *Evidence*, pp. 169-170. It was also believed that there was some discrimination within existing specialist services- for example, that AIDS services were primarily for gays and lesbians, not bisexual or transgendered persons (see *Submission*, Australian Bisexual Network, Vol 8, pp. 1615, 1617.) This situation may reflect the awkward situation of bisexual and transgender people, who claim not to be supported in some instances by homosexual groups.
Evidence, Australian Bisexual Network, pp. 671, 672 and 676.

⁵⁷ See Chapter 4, Paragraphs 4.183-4.193.

⁵⁸ Most evidence given related to violence and harassment from people in public. However, there was an acknowledgment that there could be domestic disputes and worse between same sex couples
Evidence, Ms J Millbank; p. 144.
Submission, Gay and Lesbian Welfare Association Inc., Vol 11, pp. 2466-2467.
Information was provided that de facto couples generally were more prone to violence and that therefore it would be a mistake to extend this status to same sex couples, but no evidence was attached to demonstrate this -
Submission, Ms V. Salkin, Vol 2, p. 222.

- seriously discriminatory language and behaviour from police.⁶⁰

'While we like to think that both our police service and legal system are unbiased, the fact is that people have such strongly held views about gays and lesbians that that then impacts on the way we are treated. It is to deal with that - to make sure that we get to courts, that we get treated fairly by the police and that we get treated fairly in the legal system - that we need this sort of legislation.'⁶¹

2.28 It was stated by the Anti Discrimination Board of New South Wales that there had been substantial and welcome changes in the NSW Police Service since the introduction of the NSW legislation. These changes included better training and education.⁶² This type of argument was supported by other witnesses who believed that the NSW police were taking crime more seriously and were also beginning to collect data on the rate of sexuality-motivated violence, and had issued a report on assault against lesbians and gays.⁶³ Some police forces in Australia also had gay and lesbian liaison officers and staff⁶⁴ and education courses on homosexuality had been developed.⁶⁵ There was also evidence suggesting that good communication with police had helped develop a working relationship in which all parties were able to work together:

'The Tasmanian police are perhaps the best government department in Tasmania on gay and lesbian issues....They have some very good policies in terms of our community and they are not going to victimise us...'⁶⁶

2.29 Other witnesses pointed out that violence against homosexuals was still supported by the police or legal system especially in cases when arguments justifying excessive force or violence were seen as acceptable. In particular, the 'homosexual panic defence' or 'homosexual advance defence' was raised as an issue of some concern since it could be used to demonstrate provocation in order to justify killing or extremely brutal violence.⁶⁷

⁵⁹ Evidence, Lesbian and Gay Community Action, pp. 475-476.
Evidence, The Chameleons in respect of the response to rape of a transgender person, pp. 511-512.
Submission, Fringedwellers Community, which comments on the positive support of police in one instance, Vol 11, p. 2490.

⁶⁰ Submission, Mr W Anderson, Vol 2, p. 273.
Evidence, Lesbian and Gay Community Action; p. 462.
Evidence, Mr A Hosken, pp. 619-620, 621, 622, 625.

⁶¹ Evidence, Gay and Lesbian Rights Lobby, p. 180.

⁶² Evidence, Anti Discrimination Board of New South Wales, p. 115.

⁶³ Evidence, Lesbian and Gay Anti-Violence Project, p.191.

⁶⁴ Evidence, Lesbian and Gay Anti-Violence Project, pp. 192, 199.
Evidence, Queensland Anti-Discrimination Commission, p. 695.

⁶⁵ Evidence, Lesbian and Gay Community Action, p. 461.

⁶⁶ Evidence, Tasmanian Gay and Lesbian Rights Group, pp. 375-376.

⁶⁷ Evidence, Lesbian and Gay Anti-Violence Project, pp. 188-189, 191, 194-196.
Evidence, Lesbian and Gay Community Action, pp. 461-463, 475-476.

2.30 From the evidence provided it appeared that there was still substantial prejudice within various police forces against non-heterosexual persons, including fellow police:

'...gay and lesbian members are still subjected to "witch hunts" in the Victoria Police usually under the guise of either administrative reviews or by the selective application of the discipline system. Being a paramilitary organisation and one operating in a highly dynamic and often quickly changing circumstances, work practices frequently differ from the procedures set down.'⁶⁸

Education Services

2.31 Access to education is essential for employment opportunities and socialisation. However, just as people perceived themselves to be discriminated against in access to employment within education services, so also did others state that people seeking education would find themselves disadvantaged in access because of violence, harassment and lack of support. A witness for GLAD referred to the reaction especially in schools to discussion of homosexuality:

'I would like to bring to the committee's attention the extreme level of fear, anger, absolute hatred and despising which comes forth from students regarding the topic. This was my experience even this very morning when I was at a state high school. For 90 minutes there was a total barrage of feelings of resentment coming from the students as to the continued existence of lesbians and gay men in this state.'⁶⁹

2.32 Evidence provided to the committee about the extent of violence and harassment in NSW schools also suggested that the safety of staff and students was at risk and their capacity to benefit from the school environment was undermined.⁷⁰ This discrimination was experienced in both the public and the religious school system, and it was thought that the discrimination already well established was being encouraged by the existence of weak legislation.⁷¹ Other witnesses referred to discrimination in tertiary education services both from students and from staff, including discrimination against people on the basis of presumed sexuality:

'In some cases the harassment has been such that the individual has withdrawn from the subject. This is often a problem for people who are heterosexual. In particular, women pursuing study in

Evidence, Mr Anthony Hosken, p. 629.

⁶⁸ Submission, Gay and Lesbian Police Employees Network Victoria, Vol 13, p. 3158.

⁶⁹ Evidence, GLAD, p. 334.
Evidence, PFLAG, p. 649.
Submission, Fringedwellers Community, Vol 11, p. 2489.

⁷⁰ Submission, Gay and Lesbian Teachers and Students Association Inc, Vol 13, pp. 3038-3056.

⁷¹ Submission, Fringedwellers Community, Vol 11, p. 2489.

traditionally male areas can be accused of being lesbian or generally have their sexuality questioned.⁷²

2.33 One witness also suggested that it was not enough to prohibit discrimination. It was also necessary to make education relevant:

'Provisions regarding education in the Bill refer only to discrimination against students or those applying to be students ... We support the extension of this provision to cover the range of subjects and services provided by the educational institution.

For example, should there be significant demand for a particular subject to be taught (perhaps on AIDS law) then the institution shall not refuse to provide the subject or withdraw the subject from its syllabus only on the ground that it wishes to discriminate against students of particular sexualities.⁷³

2.34 This may be seen as a measure to remedy any practices such as the provision of anti gay and lesbian material⁷⁴ as well as extension of educational options.

2.35 Witnesses referred to a number of areas in which they either could not obtain access or received less favourable treatment. These are considered in further detail below.⁷⁵

Harassment, violence, and vilification

2.36 Many witnesses gave evidence of verbal and physical harassment and intimidation, and believed that legislation was required to address this issue.⁷⁶

2.37 Discrimination not only excludes people from access to, or advancement in, education and employment and a range of rights available to others but also causes them emotional and psychological damage and physical harm,⁷⁷ and increases their isolation.⁷⁸ The risk may be

⁷² *Submission*, Queer Sexuality Collective, Vol 11, p. 2483.

⁷³ *Submission*, GALL, Vol 3, p. 494.
Submission, Context, Vol 1, p. 214.
Submission, Mr James Peck, Vol 11, p. 2477.

⁷⁴ *Evidence*, GLAD, p. 334.
Evidence, Ms M Rogers, which discusses what is and is not acceptable to discuss in schools, pp. 439, 441.

⁷⁵ See Chapter 2, Paragraphs 2.64-2.68 and also Chapters 4 and 6.

⁷⁶ *Submission*, ACTU, Vol 8, pp. 1661, 1678.
Submission, Tasmanian Gay and Lesbian Rights Group, Vol 8, p. 1741.
Submission, Australian Bisexual Network, Vol 8, p. 1616.

⁷⁷ *Submission*, Inner City Legal Centre, Vol 12, pp. 2741-2742.

⁷⁸ *Submission*, Kingsford Legal Centre, Vol 5, p. 923.

even higher for young people and those living in rural communities⁷⁹ if there are fewer options for assistance and support:

'From my work at the coal face, suicide, mental illness, homelessness and physical and sexual abuse are common problems that many young people in particular face, but many gay and lesbian people experience them due to their sexuality and because of a lack of social and legislative protection.⁸⁰

Harassment

2.38 A number of witnesses stated that harassment was a common factor in the lives of non-heterosexual people.⁸¹ Harassment and intimidation was often expressed at work, where it has the capacity to make a person feel even more excluded from the mainstream:

'Our client worked in the administration section of a defence force institution in NSW. He was subjected to repeated name calling and graffiti was written in the office restroom about him. The name calling and graffiti made derogatory reference to him in terms of his sexuality. At one stage a supervisor threatened him with physical violence and made reference to his sexuality. Our client took stress leave as a result of the harassment and was placed under the care of a psychologist.

Our client has remained out of employment for a number of years as a result of the discriminatory conduct and has been diagnosed as clinically depressed as a direct result of the discrimination.⁸²

2.39 Other evidence emphasised that verbal assault and intimidation was disturbing, and that legislation had to deal with this effectively as well as with more obvious violence: 'When we are talking about discrimination, we are not necessarily talking about matters which are as physical as that...discrimination is often much more subtle.⁸³ Although much of

⁷⁹ See Chapter 2, Paragraphs 2.78 - 2.79.
Submission, Ms Thompson and Ms Connor, Vol 5, p. 932.

⁸⁰ *Evidence*, AIDS Council of New South Wales, p. 166. A major source of information on violence and on other forms of discrimination is the report produced by GLAD (Gay Men and Lesbians Against Discrimination), which was referred to in a number of written and oral submissions:
Submission, Equal Opportunity Commission Of Victoria, Vol 7, pp. 1463-1464.
Evidence, p. 222-223.
Evidence, Anti Discrimination Board of New South Wales (reference is made to the Lesbian and Gay Anti Violence Project) p. 110.
Submission, Ms R Cowling, Vol 2, pp. 285-286.
Evidence, Gay and Lesbian Rights Lobby and AIDS Council of New South Wales, pp. 164, 173.

⁸¹ *Evidence*, Australian Bisexual Network, pp. 676-677.

⁸² *Submission*, Kingsford Legal Centre, Vol 5, p. 923.
Submission, Ms C Ronalds, Vol 2, pp. 298-299.

⁸³ *Evidence*, Human Rights and Equal Opportunity Commission, Tasmanian Regional Office, p. 354.

the evidence given referred only to harassment of homosexual people, transgender people also indicated that such treatment was quite common for them as well.⁸⁴ It is also possible for harassment of transgender persons to include a refusal to treat them as a member of the sex or gender with which they identify, a concern which was often expressed in evidence to the Committee.⁸⁵

2.40 *The Sexuality Discrimination Bill 1995* does not contain any specific provision regarding intimidation and harassment. A number of witnesses suggested that it should do so,⁸⁶ and this move was supported by former Senator Spindler, author of the bill.⁸⁷ Those supporting this addition advised that the provisions in the *Sex Discrimination Act 1984* relating to harassment would be a useful model. In general terms this may be so although the specific provisions of the harassment clauses in the *Sex Discrimination Act* include reference to 'unwelcome sexual advances' and an 'unwelcome request for sexual favours' and 'other unwelcome conduct of a sexual nature'.⁸⁸ Harassment based on sexuality is unlikely to include such advances or requests for sexual favours, and is more likely to consist of abuse and intimidation of the person because of their sexuality or gender status. The more appropriate section of the *Sex Discrimination Act* is 28A(1)(b) which refers to 'conduct of a sexual nature' which includes 'making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing'.⁸⁹

2.41 A more appropriate model may also be the provisions of the *Racial Discrimination Act 1975* which refer to offensive behaviour⁹⁰ a term which can cover harassment as well as vilification. Section 18C(1) of the *Racial Discrimination Act* refers to an act 'which is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people', the act being done because of the race or ethnic characteristics of an individual or some or all of the members of a group. Such action is unlawful, although unlawful acts are not necessarily criminal.

⁸⁴ Evidence, Ms Peters, pp. 296, 306 (see also above, Paragraph 2.11)
Submission, Ms J Aspen, Vol 1, p. 45.
Evidence, The Chameleons, p. 512.

⁸⁵ See Chapter 2, Recommendation 1 following Paragraph 2.41.

⁸⁶ Evidence, New South Wales Anti Discrimination Board, p. 107.
Evidence, North Melbourne Legal Service, p. 326.

⁸⁷ Evidence, Mr Sid Spindler, p.242.

⁸⁸ *Sex Discrimination Act 1984*, Section 28A.

⁸⁹ *Sex Discrimination Act 1984*, Section 28A(2).

⁹⁰ *Racial Discrimination Act 1975* Section 18C.

2.42

Recommendation 1.

That harassment of people on the grounds of their sexuality or their transgender status (or perceived sexuality or gender status) be proscribed.

Add to Clause 6 of the *Sexuality Discrimination Bill 1995*:

Clause 6

(5)(a) discrimination includes harassment, which is an act reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate a person or an associate or relative of the person;

(5)(b) harassment of a person on the ground of transgender status includes harassment of a person by refusing to acknowledge that he or she wishes to be known as a member of a specific gender and has made this preference clear.

Violence, Incitement to Hatred and Vilification

2.43 More obvious violence, including quite severe physical violence, was more likely to be expressed in public and by strangers.⁹¹ Some groups in the community have advised that the extent of intimidation can be quite dangerous, and that people are exposed to levels of violence and harassment that would not normally be tolerated:⁹²

'... it is hard if you are not gay or lesbian to understand how ingrained the hatred can be in society. We are talking about a belief by many people that, if people are homosexual, those rights that are there under common law do not exist for them because they are not seen to be equal - they are not seen to have rights.'⁹³

2.44 In some instances, this violence and intimidation appears supported by religious bodies, and by society in general.⁹⁴ The 'moral rightness' of violent attacks was referred to by witnesses:

'If you actually think of it from the perspective of a perpetrator of this violence, [it] seems logical. The laws have said that homosexuals are illegal and they are perverted. They are not provided the same treatment before the courts. Many young people

⁹¹ Evidence, Ms J Millbank, pp. 140-141.
Evidence, Metropolitan Community Church, pp. 180-181.
Evidence, Lesbian and Gay Anti-Violence Project, p. 188.
Alternative view see: Evidence, Dr Reece, p. 767.

⁹² Evidence, Lesbian and Gay Youth Services, p.169.

⁹³ Evidence, Gay and Lesbian Rights Lobby and Metropolitan Community Church, p. 180.
Evidence, Lesbian and Gay Anti Violence Project, p. 188.
Evidence, ALSO, p. 325.

⁹⁴ See Chapter 2, Paragraph 2.91.
Evidence, Lesbian and Gay Youth Services, p. 177.

ambassadors. They see that they are doing something right. They are doing something socially sanctioned.⁹⁵

2.44 One witness suggested that some data relating to sexuality-based violence was misleading insofar as it suggested disproportionate violence being experienced by homosexuals relative to their percentage in the population.⁹⁶ It was also suggested that the murder rate of homosexual men was closely linked to the predominance of key factors at key times;⁹⁷ this correlation indicated that lifestyle helped contribute to the murder rate although the violence expressed by the non-gay community itself was not dismissed.

2.45 However, developing legislation specifically to deal with sexuality or gender based harassment, intimidation and violence was seen as inappropriate by some witnesses. They believed that such a request was an instance of homosexuals seeking special rights and stated that there was already adequate legislation in place to cope with violence and assault, and that people should use this: 'Existing laws protect all citizens in cases of assault and libel.'⁹⁸

2.46 This point was also made by a strong supporter of the bill. The Victorian Council for Civil Liberties noted that although there is a provision in the *Sexuality Discrimination Bill 1995* regarding incitement to violence, this was already covered by both state and federal legislation.⁹⁹

2.47 However, some believed that specific legislative prohibition of sexuality based violence was necessary to help reduce the ingrained beliefs that some forms of violence were acceptable and were in fact not 'real' violence:

'Whilst I would encourage people to use existing criminal provisions when we are talking about actual acts of violence, it depends on the individual police officer in many instances as to whether you are going to be treated fairly and whether the matter is going to be treated seriously once it is discovered that you are gay or lesbian. Once you end up in court, again it depends on the individual magistrate or judge whether you are going to be treated

⁹⁵ Evidence, AIDS Council of NSW, pp. 167-168.
Evidence, Metropolitan Community Church, pp. 171-172, pp. 180-181.
Evidence, Lesbian and Gay Anti-Violence Project, pp. 189-190.
Evidence, Mr Sid Spindler, p. 237.
Evidence, ALSO, p. 325.

⁹⁶ Evidence, Dr Reece, p. 767.

⁹⁷ Evidence, Dr Reece, p. 767.

⁹⁸ Evidence, Salt Shakers and Focus on the Family, p. 249.
Evidence, Calvinistic Political and Social Association, p. 664.

⁹⁹ Evidence, Victorian Council for Civil Liberties, It was also suggested that if there was separate legislation dealing with violence/vilification, this might make the offences less important, less 'mainstream', p. 803.
Evidence, Senator Abetz, 'during the racial hatred hearings...there was a submission...that argued that the creation all around Australia of, in effect, a separate offence of domestic violence nearly degraded domestic violence as being something lesser than a criminal assault and did not let people be treated who perpetrated domestic violence. They suggested that, in fact, being offenders of a violent nature, somehow you put the tag of domestic violence on it and it really did soften it somewhat', pp. 179-180.

fairly ... It is to deal with that ... that we need this sort of legislation. It is not to stop people being charged with criminal offences.¹⁰⁰

2.48 Some witnesses believed that anti-vilification provisions were seen as interfering with free speech.¹⁰¹ This approach also appeared supported by the belief that non-heterosexual behaviour was inherently wrong:

'Australians must guard the right of free speech on all issues. Vilification legislation is mind control. This is borne out by experiments to 'de homophobe' students in New South Wales schools. After initial lessons, it was found that they soon reverted to their so-called 'homophobic' attitudes after about six months and needed further programming. The training failed because the majority of the community, including our children, know that the homosexual lifestyle is not a natural one.'¹⁰²

2.49 In contrast, a member of another religious organisation stated that the organisation was opposed to arguments of free speech and religious belief being used to obscure violence and discrimination:

'...freedom of religious expression ... is one of the great aspects of our country. However, when that freedom of religious expression crosses over and starts to be an expression of hatred and actually condones violence or stands in the way of people receiving welfare services or other services to which they are entitled, then I have to speak out very loudly against any exemption that would allow that to happen.'¹⁰³

2.50 Even though there is a specific rejection of physical violence by most churches,¹⁰⁴ the language of rejection can seem violent.¹⁰⁵

'...for other Australians, including our members, homosexual behaviour and homosexual relationships are viewed as inherently disordered and of no positive social value ... anti-discrimination legislation which makes sexuality a ground for claims, unjustly imposes a positive, or at best, a neutral view of homosexual behaviour and relationships on those Australians who, for

¹⁰⁰ Evidence, Gay and Lesbian Rights Lobby, p. 180.
Evidence, Mr Anthony Hosken, 'what you will change with your legislation is that you will empower people. That is what equal opportunity is all about.' p. 624.

¹⁰¹ Evidence, Salt Shakers, p. 250.
Submission, Ms Thompson and Ms Connor, 'While the right to free speech is an important element in any democracy it should not allow anyone to advocate violence and murder.' Vol 5, p. 935.

¹⁰² Evidence, Salt Shakers, pp. 250-251.

¹⁰³ Evidence, Metropolitan Community Church, p. 171.

¹⁰⁴ See Chapter 2, Paragraph 2.91.

¹⁰⁵ Evidence, Lesbian and Gay Youth Services and Metropolitan Community Church, pp. 169, 172.

whatever reason, have a negative view of such behaviour and relationships.¹⁰⁶

2.51 Although gay, lesbian, bisexual¹⁰⁷ and transgender people all referred to violence and harassment, the Anti Discrimination Board of New South Wales considered that transgender people might be particularly vulnerable to public violence. This in part related to the belief that many transgender people obtained employment in the sex industry and also had problems with drug abuse: 'this has led to them having a particular status as targets of violence and harassment.'¹⁰⁸ However, linking transgender people to prostitution and to various forms of entertainment appears to be discriminatory. Much of the evidence provided to the Committee indicated that many transgender people had worked in 'ordinary' jobs, including the professions, and wished to remain in such employment. The difficulty in maintaining previous employment could be related to social pressures rather than any inherent 'transgender' characteristics.¹⁰⁹

'...part of what this bill will do for the transgendered is that it will get people out of welfare. It just happens so many times, time and time again. People get a job, they have found out that they are transgendered and then they are asked to leave or they are forced to leave because of the vilification or discrimination.'¹¹⁰

2.52 Those transgender people who do earn a living in the prostitution and entertainment areas may be as likely to be violently attacked as some homosexuals whose lifestyle factors may increase the likelihood of violent attack.¹¹¹ However, the main reason for other transgender people being attacked may simply be the fact that such violence is not discouraged by law. As is the case with violence directed towards many homosexuals, people may perceive there is cultural support of such actions, and education services as well as clear legal prohibition may need to be specifically directed towards resolution of this situation.¹¹²

2.53 Anti-vilification legislation is relatively rare in Australia. The Commonwealth *Racial Discrimination Act 1975* prohibits vilification on the grounds of race, colour, national or ethnic origin. The New South Wales *Anti Discrimination Act 1977* prohibits vilification on the grounds of race (including serious racial vilification)¹¹³ and also on the grounds of

transgender status, homosexuality and HIV/AIDS status¹¹⁴, including 'serious' vilification in all three areas. Serious vilification charges proceed only when the State Attorney General agrees, such acts being deemed to be criminal.

2.54 The Commonwealth Attorney General's department expressed some concern at the provision in the *Sexuality Discrimination Bill 1995* of a section proscribing vilification on the basis of sexuality and transgender status.¹¹⁵ The basis of this concern was the absence of any specific international statement on vilification unlike the situation with racial vilification which was supported by the existence of the Convention on the Elimination of all Forms of Racial Discrimination:

'We doubt that [clause 26] could be regarded as a measure adapted to giving effect to any international obligation that Australia might have ... The racial vilification legislation ... relied on a specific provision ... In the area of sexual preference and transgender identity there is no equivalent international obligation.'¹¹⁶

2.55 A similar point of view was expressed by the Victorian Council for Civil Liberties, although the Council believed an argument could be mounted that 'vilification measures were in fact another form of protection against discrimination. That would ultimately be up to the High Court to decide the validity of those, but it certainly is less clear.'¹¹⁷

2.56 These positions, especially that of the Attorney General's department, were challenged by a number of witnesses who felt that the Commonwealth external affairs power would enable the development of anti-vilification legislation in the area of sexuality and transgender status, linked to a more clearly defined and established international interest and concern on sexuality and transgender issues generally:

'The issue of whether we have an international obligation then leads on to the question of whether it activates the external affairs power. I am saying that our international obligation under article 26 of the international covenant [ICCPR] would support legislation dealing with goods and services and legislation dealing with vilification.'¹¹⁸

2.57 The Committee notes that there are defences to the charge of vilification ('safe harbour' provisions)¹¹⁹ in the bill. These allow a range of actions to be exempt on the grounds of being public acts done 'reasonably and in good faith'.¹²⁰ As was the case with

¹⁰⁶ Submission, Australian Family Association, WA Branch, Vol 2, p. 257.

¹⁰⁷ Submission, Australian Bisexual Network, Vol 8, p. 1615.

¹⁰⁸ Evidence, Anti-Discrimination Board of New South Wales, p. 110, and see above Paragraph 2.11. Reference was also made to a case of murder where, although it was not clear if a transgender person was the victim, the appearance of a man dressed as a woman was deemed a form of provocation justifying a violent attack.

¹⁰⁹ Evidence, Australian Transgender Support Association Inc, pp. 792-793. Submission, Ms Abbie Hughes, Vol 6, p. 1297.

¹¹⁰ Evidence, Ms Peters, p. 296. Evidence, Australian Transgender Support Group Inc, p. 290.

¹¹¹ See above, Paragraph 2.44.

¹¹² See above, Paragraphs 2.29, 2.46-2.47.

¹¹³ NSW *Anti Discrimination Act 1977*, Sections 20B, 20C, 20D.

¹¹⁴ NSW *Anti Discrimination Act 1977*, Sections 38R-T, 49ZS-ZTA, and 49ZXA-ZXC respectively.

¹¹⁵ *Sexuality Discrimination Bill 1995*, Clause 26.

¹¹⁶ Evidence, Commonwealth Attorney General's Department, p. 6.

¹¹⁷ Evidence, Victorian Council for Civil Liberties, p. 803.

¹¹⁸ Evidence, Mr W. Morgan, p. 278. Evidence, Ms K. Walker, p. 279.

¹¹⁹ Evidence, Victorian Council for Civil Liberties, p.801.

¹²⁰ *Sexuality Discrimination Bill 1995*, Clause 26(3).

other exemptions, however, there was some concern expressed that these exemptions would be abused by certain groups purporting to be acting in good faith:

'The criteria for safe harbour provisions ... would require a judge to give content to all or many of these expressions. It is our view that the uncertainty inherent in that exercise is inimical to the law. The provision is so widely cast that it would simply encourage the expression of hatred on sexuality or transgender identity. It is, in our view, a positive inducement to homophobes ... to dress up their views as pseudo science to being them within the safe harbour provisions.'¹²¹

2.59 The Committee believes it is important to retain these exemptions in respect of the vilification provisions of the bill. It acknowledges that the public expression of dislike and hatred can provoke further verbal and physical abuse. It would expect that education and information services during the first two years of operation of the legislation would help in making all members of the community aware of the need to respect the right to free speech and the importance of responsible use of free speech. It believes that the issues raised by all parties about the importance of freedom of speech and about the need for responsible exercise of this freedom dictate an addition to the current provisions regarding vilification.¹²²

Recommendation 2

That the current provisions in the Sexuality Discrimination Bill regarding vilification be retained. However, the Committee believes it is appropriate that there be a review of the operation of the vilification provisions, to be completed no later than two years from the commencement of the Act, with a view to determining if the provisions should be retained, modified or repealed.

Clause 26

Add

(4) A review of this section is to be completed by the Human Rights and Equal Opportunity Commission or by an appropriately qualified organisation or review panel, within two years from the commencement of the Act, with a view to determining if the provisions regarding vilification/incitement to hatred should be retained, modified or repealed.

¹²¹ Evidence, Victorian Council for Civil Liberties, pp. 801-802.

¹²² Submission, Law Institute of Victoria, Administrative Law Section, - the Institute stated that it was important for vilification to be recognised as being directed to individuals as well as to groups, Vol 12, p. 2859. This is covered by Section 26(2) of the *Sexuality Discrimination Bill 1995* which refers to 'a person or group of people'.

Possible causes of discrimination

Social constructs - the family

2.60 Much of the discrimination and indeed violence directed towards non-heterosexual people was believed to be based on the existence of a social and religious norm of heterosexuality and heterosexual partnerships.¹²³

'...it seems to me that we need to understand that lesbians, gay people, people with different sexualities, have been placed in the position of being seen in a negative role by history, and I think it is very important that we understand that it was only the early moral or religious code which said that all sexual behaviour that was not for procreation was to be seen as a sin. It was that code that then got encoded into the legal code that was developed and that in turn became stated as the medical code.'¹²⁴

2.61 Benefits have been developed by government and by other institutions which direct preferential treatment to couples rather than single people,¹²⁵ and also to people with children or 'families', an arrangement that was seen by some as a reward for the hard work involved in marriage:

'...marriage brings with it a lot of responsibility and a lot of commitment. For that some rewards are given, such as superannuation is given tax free.'¹²⁶

2.62 For some organisations, even a willingness to accept the confines of marriage-like relationships and family responsibilities would not justify granting such benefits - thus, the objection appeared to be based either on sexuality or lack of formal marriage rather than a lack of 'commitment'.¹²⁷ One submission, however, stated 'Religious activities should have no

¹²³ Submission, Australian Festival of Light, Vol 4, p. 693.
Evidence, pp 767-768. Comments made by Dr Reece suggest that there is a strong link between homosexuality and childhood abuse, indicating that it is not a normal sexuality.
Submission, Women's International League for Peace and Freedom, Australian Section, Vol 8, p. 1771.

¹²⁴ Evidence, Dr V Cass, p. 522.

¹²⁵ There are some exceptions to this, for example in the rate of government benefits payable, where the couple rate is less than two single rates, with some exceptions relating to rental assistance - see: Evidence, Department of Social Security, pp. 36-37.
However, as indicated below, the importance of recognition of a same sex or transgender relationship may be seen as outweighing the financial value of retaining two single rather than a married couple payment.
Submission, Ms C Ronalds, Vol 2, pp. 303-312.

¹²⁶ Evidence, Salt Shakers, p. 257.
Evidence, Focus on the Family, p. 262.

¹²⁷ Submission, The Australian Family Association (W.A. Division), Vol 2, pp. 257, 268.
Submission, Endeavour Forum, Vol 3, p. 417.
Evidence, Baptist Churches of Tasmania, pp. 412-413.
Evidence, Salt Shakers, p. 257.

bearing on the legal right of any two adults, of whichever sex, to enter into a legal contract that formalises their social commitment',¹²⁸ a view also supported by the Religious Society of Friends.¹²⁹

2.63 In some cases, organisations appear to believe that as marriage really only exists for creating an environment for the raising of children- 'in our view society has an interest in preserving the goods of marriage-stability and exclusivity directed to the bearing and nurture of children'¹³⁰ - then the financial benefits directed to this relationship (regardless of the presence of children) should not be available to any other relationship.¹³¹ '[the proposals] are not supportive of the family unit as the basis for society [and] if enacted would weaken the role of the family.'¹³²

2.64 Some witnesses indicated they had no interest in changing the place of the family in society,¹³³ but only in extending the definition of family to embrace a wider range of arrangements:

'...the relationship recognition in this bill would not recognise a lesbian mother, who has an adopted child, in a non-sexual relationship with another woman - whose child recognises the other woman as the partner and another mother - as a family, but they see themselves as a family.'¹³⁴

2.65 Even in instances where more flexible family or partnership arrangements were at least acknowledged, there appeared to be a reluctance to extend financial benefits, if only on grounds of cost.¹³⁵ Such costs are particularly obvious in terms of insurance and superannuation payments, family benefits in housing and allowances and in matters such as health insurance where the definition of a family may currently oblige some 'families' to pay higher rates than others.¹³⁶

¹²⁸ *Submission*, Ms Thompson and Ms Connor, Vol 5, p. 933.

¹²⁹ *Submission*, Religious Society of Friends (Quakers) in Australia Inc., Vol 11, pp. 2509-2510.

¹³⁰ *Submission*, Australian Family Association (W.A. Division), Vol 2, p. 267.

¹³¹ *Submission*, Australian Family Association (W.A. Division), Vol 2, pp. 267-268.

¹³² *Submission*, Catholic Women's League Australia, Vol 5, p. 1000.

Evidence, Salt Shakers, 'Why has marriage and family traditionally been given, if you will, special privileges and benefits? Simply because society has always looked on marriage and family as such an important institution, not only for the raising of children but for social cohesion...' p. 262.

¹³³ *Evidence*, Tasmanian Gay and Lesbian Rights Group, 'It is not the policy of the ...Group that we must reject the family. [We]...would emphasise that the definition of 'the family' should be broadened to include same-sex couples.' p. 378.

Submission, Ms Frances Sutherland, Vol 4, p. 715.

¹³⁴ *Evidence*, Tasmanian Gay and Lesbian Rights Group, p. 380.

¹³⁵ *Evidence*, Department of Defence, pp. 20, 22.

¹³⁶ See the case of *Hope & Anor v NIB Health Funds Ltd* where there was recognition of the family of a homosexual couple.
Submission, Ms J Millbank, Vol 1, p. 118.
Other discussions of welfare costs relate more to paying each individual a sum, rather than paying on the basis of families.

2.66 Benefits are available to heterosexual married and de facto couples in a number of areas, at State and Commonwealth level, and from the private sector, including:

- taxation, including availability of rebates for dependant spouses and for carers, and a range of other concessions relating to marital status;¹³⁷
- health insurance rates;¹³⁸
- life insurance rates and payments;¹³⁹ and
- arrangements for payment of superannuation benefits, including pensions.¹⁴⁰

2.67 The heterosexual model of family has also helped to shape other legislation and arrangements regarding marital and next of kin status, both of which are generally denied to same sex couples or couples with other than heterosexual relationships.¹⁴¹

'As it stands the Superannuation Act gives definitions of relationships which are heterosexist in their intent. So, when it talks about next of kin, it specifically nominates opposite-sex partner or a blood line which runs through your immediate family.'¹⁴²

2.68 This could mean that non-traditional partners:

- could not automatically inherit property on the death of the other partner;¹⁴³
- might have to pay higher land transfer payments on the termination of a relationship (stamp duty);¹⁴⁴
- might be excluded from loan arrangements available to others;
- would not be seen as 'next of kin' for purposes of health care decisions, transplant or donation decisions, funeral arrangements;¹⁴⁵

Evidence, Mr Sid Spindler, p. 243.

¹³⁷ *Submission*, HREOC, Vol 7, pp. 1583-1584.

Submission, Ms Thompson and Ms Connor, Vol 5, p. 932.

¹³⁸ *Submission*, HREOC, Vol 7, p. 1584.

Submission, Ms Thompson and Ms Connor, Vol 5, p. 930

¹³⁹ *Submission*, Ms Thompson and Ms Connor, Vol 5, p. 929.

¹⁴⁰ In superannuation and insurance it is important to ensure that rates are not determined by a person's sexuality rather than by their mode of life. In respect of superannuation and insurance payments to partners, the issue is more complex - see below, Chapters 4 and 6.

¹⁴¹ *Submission*, Equal Opportunity Commission Victoria, Vol 7, p. 1464.

¹⁴² *Evidence*, Australian Council for Lesbian and Gay Rights (WA), p. 568.

¹⁴³ *Evidence*, Queensland AIDS Council, pp. 711, 719.

¹⁴⁴ *Submission*, HREOC, Vol 7, p. 1583.

¹⁴⁵ *Evidence*, Gay and Lesbian Rights Lobby, p. 165

- depending on institutions, might not be seen as the automatic beneficiary of superannuation;¹⁴⁶
- might be denied access to, or custody of children;¹⁴⁷
- could be in a tenuous position regarding the support of children;¹⁴⁸
- be excluded from provisions of the Family Law Act.¹⁴⁹
- could be excluded from IVF programs,¹⁵⁰ although this may be on grounds of being fertile, or on the basis of parental or couple status rather than explicitly because of sexual orientation.¹⁵¹

2.69 For transgender people in particular, especially those who did not undertake formal re-assignment, there was limited access to recognition of themselves as individuals as well as members of a relationship.¹⁵² A number of witnesses referred to being treated unfavourably by Commonwealth departments particularly the Department of Social Security, not so much with respect to eligibility for benefits - although this has been an issue - but in terms of not being treated in the correct or chosen sexual identity.¹⁵³ Evidence was also given that the Austudy rules on homelessness had particularly disadvantaged gay and lesbian young people.¹⁵⁴

Submission, HREOC, Vol 7, pp. 1586-1588.

Evidence, Australian Council for Lesbian and Gay Rights(W.A.), p. 569.

Evidence, Queensland Association for Gay and Lesbian Rights, pp. 722-723.

¹⁴⁶ *Submission*, Ms Thompson and Ms Connor, Vol 5, p. 931.

¹⁴⁷ *Submission*, COAL, Vol 3, p. 615-616.

Submission, Ms Thompson and Ms Connor, Vol 5, p. 934.

Evidence, Mr Anthony Hosken, p. 624.

Submission, Mr Hosken, Vol 11, pp. 2502-2503 - the case referred to concerned loss of access because of HIV status.

¹⁴⁸ *Submission*, HREOC, Vol 7, p. 1585.

Submission, Coalition of Activist Lesbians. Lesbian co-mothers do not have clear rights except perhaps to pay child support, Vol 3, p. 615.

Submission, Ms J Millbank, Vol 1, pp. 125-145.

¹⁴⁹ In some States the state power to deal with de facto relationships has been transferred to the Federal Family Court, but this does not affect non-heterosexual relationships - see

Evidence, Queensland Gay and Lesbian Rights Group, p. 725.

See Chapter 6.

¹⁵⁰ *Evidence*, Tasmanian Gay and Lesbian Rights Group, p. 379.

¹⁵¹ *Evidence*, Victorian Equal Opportunity Commission, p. 230.

Evidence, Mr Sid Spindler, p. 242. An outline of problems is given in *Submission*, the Law Institute of Victoria, Maintenance and Property Section, Family Law Section, Vol. 16, pp. 3645-3646.

¹⁵² *Submission*, HREOC, Vol 7, p. 1588.

¹⁵³ Example, *Submission*, Queensland Anti Discrimination Commission (QADC), Vol 2, p. 236.

¹⁵⁴ *Evidence*, Queensland Association for Gay and Lesbian Rights, p. 734.

2.70 The changes that have occurred in terms of legislation appear to benefit those transgender people who are able to establish a new identity. Those who cannot afford surgery¹⁵⁵ or who choose not to undergo it are excluded from the very services they may require the most - formal recognition of themselves as an individual; formal recognition of a relationship; and appropriate identification documentation.¹⁵⁶ For those who are unsure about their identification, this may be a particular problem,¹⁵⁷ although the question of documentation and appropriate status was important for all transgender persons. Other areas of discrimination or exclusion for transgendered persons were similar to those for other non-heterosexual people - accommodation/housing;¹⁵⁸ employment;¹⁵⁹ benefits and pensions, and concessional arrangements for partners.¹⁶⁰

2.71 The idea of the (heterosexual) family or couple is important in shaping social institutions - for example, single people are also discriminated against in most superannuation payment arrangements¹⁶¹ and various insurance schemes have only recently begun to recognise the different natures of 'families'. Nonetheless, it is not clear that social inequities can necessarily be overcome by having a broader understanding of the concept of couple or family, since this might continue discrimination against those who were single or did not choose to identify as a member of a family.¹⁶²

2.72 While for some witnesses, the formal recognition and the resulting benefits were seen as important,¹⁶³ other witnesses were also aware that the concept of 'couples' might also be discriminatory:¹⁶⁴

¹⁵⁵ If the cost of re-assignment surgery is a major determining factor, socio-economic status would also be important in determining what are major issues, as they may also be for gay, lesbian and bisexual people.

¹⁵⁶ Transgender people in particular experienced problems with documentation, including difficulty in obtaining identification as being of a particular gender, and this often led to a range of problems. These included: inability to use certain benefits or concessions because these were made out in a male name and the person identified as female (or vice versa); lack of privacy, e.g. even if a passport was available in the gender of identity, other documentation linked to that would still refer to the previous gender; exclusion from any gender identity concessions or documentation for those who were not post operative; limited recognition of relationships which again were dependent on formal change of gender; possibly limited access to certain services, such as medical services and AIDS information and other services, and non-recognition of status in prisons.

¹⁵⁷ *Evidence*, New South Wales Council for Civil Liberties, pp. 300-301.

¹⁵⁸ *Submission*, Illawarra Legal Centre Inc, Vol 5, pp 914, 915.

¹⁵⁹ See Chapter 2, Paragraphs 2.11-2.12

¹⁶⁰ *Evidence*, Anti Discrimination Board of New South Wales, pp. 109-110.
Submission, HREOC, Vol 7, p. 1588.

¹⁶¹ See Chapters 4 and 6.

Super and Broken Work Patterns (1995), Senate Select Committee on Superannuation, Report No. 17.

¹⁶² *Evidence*, Queensland AIDS Council, p. 720.

¹⁶³ *Evidence*, Tasmanian Gay and Lesbian Rights Group, p.381.

¹⁶⁴ Most witnesses did not go into theoretical discussions about the perpetuation by some gay or lesbian couples of a heterosexual 'family' or couple structure. These issues have been considered in numerous reports and articles.

'One of the problems with lesbians and gay people participating in an institution like the family, as we now know it, is that it tends to prop up the type of institutions which have, in fact, been responsible for our own historical and present oppression'.¹⁶⁵

2.73 Other witnesses, while interested in more formal recognition of non-heterosexual relationships and the benefits of such recognition, were reluctant to make this mandatory.¹⁶⁶ This reluctance was based on factors which should be emphasised since they help to break down one of the stereotypes about non-heterosexuals, that of homosexuals and bisexuals all being middle-class and financially well-off. In contrast to this stereotype, it was argued that non-heterosexuals are a cross-section of society, socially and economically; and that homosexual women may be more financially disadvantaged than homosexual men. Any compulsory notification of relationships could benefit some (especially with respect to superannuation) but greatly disadvantage others, especially women who might be dependent on social security benefits.¹⁶⁷

'...we are aware that this is a controversial issue and that there are many different points of view ... Our opposition is based on the simple fact that the de facto recognition only provides limited protection to gay and lesbian couples, whilst placing some couples in a worse position ... The de facto recognition will only assist those who are already well off ... and could be to the detriment of many of those who are on social security benefits. Like most women, most lesbians are poorer than most men (including gay men). Lesbians are much more likely to have children than gay men and hence to be receiving benefits ... which would be affected by the de facto regime.'¹⁶⁸

¹⁶⁵ Evidence, Mr C Kendall, p. 616, and see also:
Evidence, Mr C Kendall, 'insofar as families are recognised as a form of benefit, and lesbian and gay domestic partnerships, for example, are simply denied the opportunity to participate in that, then I support any legislative effort which extends those benefits...I would like to see in the future an attempt to extend those benefits to different types of families, for example, to four or five women, who for economic reasons, live together so that they might support their children.' p. 615.

¹⁶⁶ Evidence, Tasmanian Gay and Lesbian Rights Group, pp. 378-381.
Evidence, PFLAG, p. 649.
Evidence, Queensland Association for Gay and Lesbian Rights, p. 725.

¹⁶⁷ Evidence, Ms J Millbank, pp 138-140.
Evidence, Ms K Walker, p. 277.
Evidence, Queensland AIDS Council, p. 719.
Evidence, Queensland Association for Gay and Lesbian Rights, pp. 724-725.
Evidence, Mr C Kendall, 'I think if gay men, in particular, committed themselves a little more readily to gender equality and to eliminating all forms of racial discrimination as they should, that politically would be much more effective.' p. 615

¹⁶⁸ Submission, Feminist Lawyers, Vol 8, pp. 1642-1643.
Evidence, Gay and Lesbian Rights Lobby, p. 184.
Evidence, North Melbourne Legal Service, p. 327.

2.74 The obligatory nature of any couples arrangement was also rejected,¹⁶⁹ as was the reluctance to have past injustices in a sense swept away without any formal recognition of the financial and other problems that had shaped people's lives.¹⁷⁰

2.75 A similar attitude was expressed with regard to excluding the term 'heterosexuality' in the definition of 'sexuality', since this suggested that all people were equally discriminated against on the basis of sexuality.¹⁷¹

'...it lies about the experience of discrimination ... if you have formal equality when you begin with substantive vast inequality, it does not even things up. It tells a lie about where everyone is actually positioned in relation to each other.'¹⁷²

2.76 In some respects, non heterosexual people were requesting exclusion or exemption arrangements, or positive discrimination, in order to overcome some elements of past discrimination.¹⁷³ However, a number of witnesses did not believe that homosexuals and transgender people experienced any more discrimination than other groups in the community, and that specific legislation and related provisions would be a mistake:

'Homosexuals are by no means the only people, class or group subjected to peer rejection for their sexual ideology ... We recognise that there are indeed significant social problems in the area of sexuality with conflicting culture and conflicting moral values as a consequence of the diversity of human experience. However, we believe that legislating to give an advantage to homosexual culture and homosexual values by outlawing criticism of that lifestyle is unjust.'¹⁷⁴

Social constructs - stereotypes

2.77 Another major possible reason for discrimination is the difficulty which society has in seeing non-heterosexual people as individuals. This is manifested in two main ways, the continuation of certain negative images¹⁷⁵ and the emphasis on non-heterosexual people being defined purely by their sexual orientation and assumed activity, and not by any other quality or feature.

¹⁶⁹ Evidence, Ms J Millbank, where reference is made to the 'presumption of dependency' in Social Security legislation, p. 141.

Evidence, Tasmanian Gay and Lesbian Rights Group, pp. 367, 377.
See Chapter 6.

¹⁷⁰ Submission, GALL, Vol 3, pp. 483-491.

¹⁷¹ Evidence, Ms J Millbank, p. 140.
See Chapter 1, Paragraphs 1.36-1.37.

¹⁷² Evidence, Ms J Millbank, p. 142.

¹⁷³ See Chapter 4.

¹⁷⁴ Evidence, The Community and Family Rights Council, p. 394.

¹⁷⁵ Submission, Kingsford Legal Centre, Vol 5, p. 922.

2.78 If the heterosexual family, responsible and committed, caring for the young in a moral environment, is seen as the norm, others deviating from this are generally presented as individual people without commitment or responsibility, obsessed with sex, indiscriminate in appetite and particularly attracted to the young¹⁷⁶ whom they seek to seduce and then convert:

'I think the paranoia and fear which revolves around this question is really important to study. It is based on essentially two fundamental myths. The first is that homosexuality can be taught. There is this extraordinarily irrational fear in the community that we must prevent homosexual teachers from existing and from teaching ... because their very presence in the classroom may influence a child to become homosexual...

I think also that there is the fear that by educating people about homosexuality you can in some way encourage them or teach them to be homosexual. That is patent nonsense as well.¹⁷⁷

2.79 Many witnesses referred to self indulgence, obvious flaunting of sexuality,¹⁷⁸ and numerous sexual partners and relationships¹⁷⁹ as characteristics of homosexual persons.¹⁸⁰ There is a perception of wealth, of all non-heterosexuals being affluent and occupying white-collar jobs,¹⁸¹ and of being city dwellers. But, one witness noted, there were many disadvantaged people who were lesbians and gays:

'What concerns me most is that those people who are not educated and not secure financially and who do not have the assertiveness are the people who really suffer discrimination ... It does seem to me that these are the kinds of people that need the backing of government: the people who are vulnerable, the people who are perhaps emotionally or financially weaker than others.'¹⁸²

¹⁷⁶ Submission, Equity Office of the University of Western Australia, Vol 5, p. 918.

¹⁷⁷ Evidence, Australian Council for Lesbian and Gay Rights (WA), p. 573.
Evidence, Australian Family Association, p. 577.

¹⁷⁸ Evidence, Council for Equal Opportunity in Employment, p. 47, p. 50.
Evidence, Salt Shakers, pp. 252 and 257.
Evidence, Tasmanian Gay and Lesbian Rights Group, p. 363.
Evidence, Calvinistic Political and Social Association, p. 664.

¹⁷⁹ Evidence, ALSO, p. 322.
Evidence, Association of Catholic Parents, p.757.
Evidence, Australian Bisexual Network, p. 675.
Evidence, Dr Reece, pp. 759-761, 772.

¹⁸⁰ Evidence, Queensland Association for Gay and Lesbian Rights, p. 736.
Evidence, Association of Catholic Parents, p. 739.

¹⁸¹ Evidence, Australian Family Association, p. 579.

¹⁸² Evidence, Dr Vivienne Cass, pp. 521-522.

2.80 Any emphasis on wealth and power and influence¹⁸³ contributes to general alienation, and the emphasis on non-heterosexuals being predominantly resident in cities may increase the sense of isolation of those who do reside in regional and rural areas:¹⁸⁴

'The issues that are commonly faced by those people are intense isolation, lack of accurate information and support, and lack of appropriate and sensitive health care services. People face discrimination at school, in the workplace and in the community. They are often victims of violence. They are often at greater risk of drug and alcohol abuse and mental illness. Young people, in particular, are at greater risk of homelessness and suicide. Isolation is a key factor for this group of people. It maintains the oppressive conditions they experience and is one of the most significant factors in poor health care.'¹⁸⁵

2.81 Because of this supposed indulgence and lack of self control, non-heterosexuals are deemed too dangerous to be employed in child care or in education services.¹⁸⁶ It is thought they will have no interest in actually caring for or teaching a child, but will instead make their sexuality known, advocate that others share it,¹⁸⁷ and educate the impressionable away from their natural sexual preference of heterosexuality:

'These amendments [to the Western Australian *Decriminalisation of Sodomy Act* 1989] are repugnant because they perpetuate the myth and the insidious mythology that homosexuality is something that can be promoted and encouraged and is something that can be taught, neither of which is true.'¹⁸⁸

2.82 They will presumably also indulge in some forms of sexual activity in the workplace given their supposed predilection for paedophilia:¹⁸⁹

¹⁸³ Evidence, Australian Family Association, p. 579.

Evidence, Association of Catholic Parents, 'According to some statistics that have been given, it is proved that many people - the more highly educated people - who favour this lifestyle are amongst the higher income earners.' p. 750.

¹⁸⁴ Evidence, pp. 164-166.

Evidence, Gay and Lesbian Counselling Service of Western Australia: '...from reports from clients and the records we keep of clients we find that they come to the city because it is just too hard in the country to manage because there is no way that they can find people who have similar feelings.' pp. 553-554.

¹⁸⁵ Evidence, AIDS Council of New South Wales, p. 166.

¹⁸⁶ Submission, COAL, Vol 8, p. 1711.

Evidence, ALSO, pp. 322, 323.

Evidence, GLAD, p. 338.

¹⁸⁷ Evidence, Adelaide Central Mission, p. 434.

¹⁸⁸ Evidence, Australian Council for Lesbian and Gay Rights (WA), p. 564.

¹⁸⁹ Submission, Australian Family Association (W.A. Division), Vol 2, p. 266.

Evidence, ALSO, p.321.

Submission, Ms R Cowling, Vol 2, p. 286.

Evidence, Association of Catholic Parents, p 738.

'The anti-vilification measures are also an appropriate response to the particular forms prejudice against lesbians and gay men taken in our community (very often a generalised negative stereotyping of lesbians and gay men as perverted or paedophiles; often sexual preference is included in the same category as incest, sexual assault or bestiality, where effective consent is non-existent or unobtainable.¹⁹⁰

2.83 Stereotyping, as noted above, tends to consider non-heterosexuals in terms of a part of their life, assuming that the whole of their life is directed to one activity: 'your sexual orientation is not relevant to a person who is operating a coal loader in a coal mine, or to a person who is designing buildings or whatever. The issue, in fact, is the capacity to do the job.¹⁹¹

2.84 For this reason, although some witnesses were not opposed to the term, others were opposed to legislation which included 'lawful sexual activity' as an attribute.¹⁹²

'The Queensland and Victorian provisions referring to 'lawful sexual activity' have been rightly criticised by gay, lesbian and transgender organisations for their lack of clarity. This term defines people by what they do and not who they are, in terms of sexual acts rather than identity.¹⁹³

2.85 Defining some people according to their sexual orientation (although heterosexuals do not define themselves in such ways) strengthens the perception that sexuality is the entity of a non-heterosexual person. This makes it easier to ignore the education, experience and other attributes of people and to exclude them from certain areas of employment or occupation, thereby reinforcing the belief that they must be excluded because all they will do is prey on others:¹⁹⁴

'...most importantly, there is some concern about whether it would prevent discrimination on a daily basis.

...for example, ... there was a recent case in Queensland where two men holding hands in public were not afforded protection under the current Queensland act because their behaviour did not relate to lawful sexual activity. A similar example might be, say, two

people trying to book a motel room together. Does that relate to their sexual activity and, if they were discriminated against on that basis, then would they be covered?¹⁹⁵

2.86 Transgender people are presented through other stereotypes such as choosing to move between genders as the opportunity to benefit arises. This perception, which was expressed by a number of witnesses, was identified as being quite misleading. It reflected especially a lack of awareness of the processes involved in identifying as transgender and then as choosing to live as a transgender person (or as a man or woman).¹⁹⁶

'We have regarded the question of transgender commitment on the part of an individual to be something in which a person in fact makes a commitment to live as and to seek to be identified as a member of a sex which is not the sex that they were biologically born with or which they biologically are. It is not a matter of the immediate fashion of the day. It is not the business of deciding that you want to assume the status of a woman one day and a man another day. It is where an individual person seeks to live as, identifies as and indeed seeks to be recognised in the community as a person of the other sex.¹⁹⁷

2.87 Transgender witnesses, whether transsexual or otherwise stated that as individuals they had long been aware of being a different gender psychologically.¹⁹⁸ They strongly opposed the idea that people moved between genders on a regular basis, especially for financial gain.¹⁹⁹ The confusion between transvestites, drag queens and transgendered persons²⁰⁰ and the fact that some people may experience uncertainty as to gender identity²⁰¹ may contribute to the belief that gender identity is transient, and that there is an element of choice:

'Could I emphasise that being transgendered is not a matter of choice. In our clinic all of us have a strong feeling that this is probably a genetic abnormality ... people seem to be more or less born with the need to be transgendered. It is not something that people can choose - 'I think I will be a man today' or 'I think I will be a woman tomorrow' - that sort of thing. It is not an issue in which one can say, 'I can do this or I can't do that.' The urge to change one's gender has to be extremely strong, otherwise no-one would do it.²⁰²

¹⁹⁰ *Submission*, Australian Feminist Law Foundation, Vol 6, pp. 1321-1322.

¹⁹¹ *Evidence*, Council for Equal Opportunity in Employment, p. 48.

¹⁹² A further reason for opposing the term 'lawful sexual activity' is lack of clarity and possible exclusion from legal protection because of ambiguity or contradiction - see *Submission*, ACTU, Queensland Branch, Vol 11, p. 2240. See Chapter 1, Paragraphs 1.30 -1.35.

¹⁹³ *Submission*, Gay and Lesbian Rights Lobby Inc, Vol 5, p. 1024. *Submission*, CONTEXT, "Lawful Sexual Activity" does not refer to a persons identity but rather behaviour that is engaged in and consequently reduces identity to a set of behaviours.' Vol 1, p. 210.

¹⁹⁴ *Submission*, Australian Bisexual Network, which outlines some of the different 'identities' of bisexual people, such as being a parent, being of an ethnic background etc, Vol 8, pp. 1622-1623.

¹⁹⁵ *Evidence*, Queensland AIDS Council, pp. 715-716.

¹⁹⁶ See Chapters 4 and 5.

¹⁹⁷ *Evidence*, New South Wales Anti Discrimination Board, p. 108.

¹⁹⁸ *Evidence*, Australian Transgender Support Association Inc, p. 794.

¹⁹⁹ *Evidence*, Australian Transgender Support Association Inc, pp. 795, 796.

²⁰⁰ *Evidence*, Australian Transgender Support Association Inc, p. 789.

²⁰¹ *Evidence*, Gender Dysphoria Clinic, p. 297.

²⁰² *Evidence*, Gender Dysphoria Clinic, p. 297.

2.88 Stereotypes are also used to argue that there is an element of choice²⁰³ in non-heterosexual sexual orientation, but do not consider the issue of choice to be relevant with respect to heterosexuality. In some submissions, the concept of choice was linked to that of lifestyle, with an equation being drawn between being homosexual and choosing to be a promiscuous heterosexual.²⁰⁴ Others made a distinction between being homosexual and choosing to engage in a homosexual lifestyle. The meaning of 'lifestyle' varied from having a sex life to having a promiscuous sex life.²⁰⁵

2.89 So long as the idea of choice remains part of the stereotype,²⁰⁶ the idea of choosing to be irresponsible, anti-family, non-committed and so on becomes something in the control of the individual. It is not something that society has helped to establish and that society can also help deconstruct.²⁰⁷

'...the law says to the population of Australia that we are less than everyone else; that we do not have long-term relationships; that those relationships, should they exist - and most people do not believe they do - are not supported by the state.'²⁰⁸

2.90 Where the individual or group is seen as diverging from the mainstream, there is pressure for that individual or group to return, to be integrated, through the exercise of their will. There is less discussion of the mainstream examining its own rationale and allowing flexibility and diversity, although there have been some noticeable changes in the attitude of influential bodies such as churches.

Support of Stereotypes and Discrimination

2.91 The effect of these stereotypes is apparent in the areas of education, training, employment and employment opportunities, and general health and well being; and, less obviously, they will also affect the extent to which non-heterosexuals are perceived as people

Evidence, Australian Transgender Support Association Inc, p. 793.

²⁰³ *Submission*, Mr Songailo, Vol 1, p. 183.

Evidence, Adelaide Central Mission, pp 430-431.

Evidence, Dr Roosevear, p.702.

Evidence, Association of Catholic Parents, pp 750-751.

²⁰⁴ *Submission*, Mr Smeaton, Vol 1, p. 188.

²⁰⁵ *Evidence*, Baptist Churches of Tasmania, p. 421.

²⁰⁶ *Evidence*, Dr Roosevear, 'I did not choose to be gay but I do choose to be honest', p. 699.

Evidence, Dr Roosevear, p. 702.

²⁰⁷ The issue of 'choosing' to be non-heterosexual is too complex to be dealt with in this report. Many witnesses provided information on the effect of destiny, biology, psychology and human willpower. Regardless, while behaviour may be a matter of choice it is less clear that sexuality *per se* is a matter of choice.

²⁰⁸ *Evidence*, Gay and Lesbian Rights Lobby, p. 181, pp. 184-185.

Evidence, Queensland Association for Gay and Lesbian Rights, p. 727.

entitled to the rights enjoyed by others, such as freedom from random attack and systemic discrimination on the basis of sexuality or gender status.²⁰⁹

2.92 Aside from State and Territory legislation,²¹⁰ there has been limited response to these identified problems. A number of organisations have expressed a belief that there is little reason for specific legislation in respect of sexuality or gender identity.²¹¹ While generally acknowledging that violence and certain other forms of discrimination should not be exercised against people because of their sexuality or gender identity²¹² ('most churches today do not uphold to the killing of homosexuals, because that was changed by the New Testament')²¹³, these groups have stated that there is sufficient protection available. It is also argued that there is no need for what are perceived as special rights, particularly for people who may be seeking to advocate their particular sexual 'preference', or seeking the 'normalisation of homosexuality'.²¹⁴

2.93 There was a clear opposition to any privileges being extended to non-heterosexual and transgender people, as opposed to their access to ordinary rights. The *Sexuality Discrimination Bill 1995* was seen as promoting such privileges especially through the anti-vilification provisions of the legislation.²¹⁵

2.94 What is usually meant in respect of there being sufficient protection available is the theoretical equal access by all members of the community to appropriate remedies: 'Existing laws protect all citizens in cases of assault and libel.'²¹⁶ Some witnesses also suggested that non-heterosexuals should not be asking for 'special' rights, especially if they are seen as discriminating against other people.²¹⁷

²⁰⁹ *Evidence*, Queensland Association for Gay and Lesbian Rights, p. 736.
Submission, Mr Mark Riley, Vol 6, p. 1329.

²¹⁰ See Chapter 4, and Chapter 5 on the role of education in anti-discrimination legislation.

²¹¹ *Evidence*, Australian Family Association, p. 579.

²¹² Many major religious groups have stated that there could not be any tolerance of violence and of some forms of discrimination: see
Submission, Australian Catholic Bishops Conference, 'The Church has upheld and taught consistently that the inherent and inviolable dignity of every human being, without exception, must be the foundation for any examination of individual and communal rights and responsibilities.' Vol 4, p.719.
Submission, Catholic Women's League Australia, Vol 5, p. 1003.

²¹³ *Evidence*, Salt Shakers, p. 250.

Evidence, Calvinistic Political and Social Association, pp. 661,666.

²¹⁴ *Evidence*, Salt Shakers, p. 249.

Evidence, Association of Catholic Parents, p. 747.

Evidence pp 777, and 779, Assemblies of God Queensland Conference.

²¹⁵ *Evidence*, Association of Catholic Parents, pp. 738-740, 746, 747-748, 755.

Evidence, Australian Family Association, p. 759.

Evidence, Dr Reece, p. 766.

²¹⁶ *Evidence*, Salt Shakers, pp. 249, 256.

Submission, Catholic Women's League Australia, 'there is already adequate legislative scope for homosexuals and transsexuals to seek redress before international law for suffering discrimination or vilification.' Vol 5, p. 999.

²¹⁷ *Submission*, Endeavour Forum, Vol 3, p. 417.

Submission, Australian Catholic Bishops Conference, Vol 4, p. 719.

2.95 There appeared to be some variation between members of a religion about the extent to which they accepted non-heterosexuals. One witness stated that there had been changes in the attitudes of religions other than Christianity and these should also be acknowledged:

'In particular, the reform and reconstruction branches of Judaism are now ordaining gay men and lesbians as rabbis. A number of branches of Buddhism are changing their perspective and accepting gay, lesbian, bisexual and transgender people; in fact, they are bringing in ceremonies for joining same-sex couples.²¹⁸

2.96 Many of the mainstream Christian religions have made statements about homosexuality, generally making a distinction between people being homosexual and leading a homosexual lifestyle.²¹⁹ However, there is not necessarily uniformity within churches; the Uniting Church, for example, has been openly divided on the subject. One witness spoke of the reaction to workshops on discrimination:

'There has been quite a controversial position where a Uniting Church mainstream organisation has actually funded a program which some constituents of the religious groups feel is recruiting rather than supporting and assisting people in need. This has caused quite a few divisions amongst the people in that church, amongst the people who are the worshippers, and also amongst the staff of a very large organisation.²²⁰

2.97 Some churches do not appear willing to accept persons as members unless they are heterosexual,²²¹ and, while many religious groups may accept some non-heterosexuals into their membership, this acceptance is conditional:

'Most churches are moving towards an open position of accepting homosexuals into their churches as people seeking after change, but they are not accepting them in the sense of accepting their lifestyle.²²²

2.98 In some cases this acceptance was more generous than it might appear at first sight, in that the issue of privacy and restraint seemed to be highly valued - those who did not advertise themselves as openly non-heterosexual were more tolerated.²²³ This situation

²¹⁸ Evidence, Queensland Association of Gay and Lesbian Rights, p. 735.

²¹⁹ Evidence, Baptist Churches of Tasmania, p. 421.

²²⁰ Evidence, AIDS Council of South Australia, p. 425.
Evidence, AIDS Council of South Australia, pp. 429, 435.

²²¹ Submission, Messrs Kelsey, Stevens and Way, Vol 2, p. 343.

²²² Evidence, Salt Shakers - in this context, lifestyle does not mean numerous casual relationships etc. but not hiding or avoiding sexuality issues, p. 250.
Submission, Uniting Church in Australia, Vol 7, p. 1542.
Evidence, Mr Sid Spindler, pp 237-238.
Evidence, Calvinistic Political and Social Association, pp 660-661.

²²³ Evidence, Focus on the Family, p. 259.

demonstrated the concern held by some religious groups about discretion, although it also indicated a belief that sexuality was a matter of choice and self-control.²²⁴

2.99 In some churches there was a respect for privacy to the point of not wishing to see any re-introduction of the criminal penalties for private consensual sexual activity.²²⁵ In others, there was a clear desire to have nothing to do with any practices by people who did not obey certain precepts - in this context, heterosexuals might also be unwelcome depending on their actions: "Because of our conscience before God, we would not...knowingly employ a sodomite, fornicator or adulterer ...[or] work in a place used for prostitution or sodomy."²²⁶

2.100 Some national and established churches were perceived as having a range of responses to people of other than heterosexual status, ranging from acceptance to homophobia and intolerance:

'My two Pastors support my sense of call and accept and affirm my sexuality. They do not see sexuality as a bar to participation. The view of my Pastors is not held by all members of the Congregation, some are conditionally supportive and others are openly homophobic, unsupportive and discriminatory.²²⁷

2.101 While this may not represent a church's agreed stance²²⁸ some witnesses suggested that the variety of responses and the freedom to discriminate within churches could result in discrimination, including in employment. Members of churches might not be accepted as pastors or priests, or might not be able to work with all members of a community:²²⁹

'As Catholics we have a particular perspective on these issues. It could justifiably be claimed that Catholics, more than any other group in the gay and lesbian community, have been and are still being oppressed by reason of their sexual identity ... It is clearly the case that amongst the most oppressed and [fearful] ... gay and lesbian people are teachers in Catholic schools.²³⁰

2.102 In other instances, members of some religions might actively seek not to employ people of certain sexual orientations in their businesses, even if these were not services provided directly by a church: 'why should we be obliged by legislation to maintain a lesser standard of moral protection in our places of business than in our homes?'²³¹ Awareness of

²²⁴ Evidence, Focus on the Family, p. 259.

²²⁵ Evidence, Salt Shakers, p. 257.

²²⁶ Submission, Messrs Kelsey, Stevens and Way, Vol 2, p. 343.

²²⁷ Submission, Mr W Anderson, Vol 2, p. 275.
Submission, Uniting Church in Australia, Vol 7, pp. 1541-1542.
Evidence, Dr Roosevear, pp. 703-704.

²²⁸ Submission, Uniting Church in Australia, Vol 7, pp. 1544-1545.

²²⁹ Submission, See Mr W Anderson, Vol 2, p. 275.
Submission, Uniting Church in Australia, Vol 7, p. 1546.

²³⁰ Submission, Acceptance Melbourne Inc., Vol 7, p. 1452.

²³¹ Submission, Messrs Kelsey, Stevens and Way, Vol 2, p. 343.
Evidence, Baptist Churches of Tasmania, p. 420.

this problem had led to an exemption being suggested for 'small' businesses in the draft legislation.²³²

2.103 Discrimination or exclusion could also occur in church operated services, even if these were government funded.²³³

'[a young woman] had gone to one of the church run welfare organisations here in Sydney ... and when she walked in she saw a sign on the wall that said, "If you are not part of a traditional family structure, don't bother asking for help."²³⁴

2.104 It was accepted by many spokespersons that one had to make a distinction between a person's sexuality (which was not necessarily a matter of choice) and the practice of this sexuality, or the advocacy of such sexuality in a wider forum - for example, in education or in child care services.²³⁵ One submission noted that:

'...it would appear that a clear distinction must be drawn between sexual conduct and sexuality. A person's sexuality does not of itself mean that he or she will engage in any particular type of sexual conduct. For example, in the same way that a heterosexual may engage in sodomy, a homosexual may choose celibacy.²³⁶

2.105 While identifying a difference between being homosexual, and undertaking homosexual acts, some organisations also indicated that they did not in any way mean that acceptance of the person should be seen as acceptance of any sexual action of the person:

'The particular inclination of the homosexual person is a more or less strong tendency ordered toward an intrinsic Moral Evil and this inclination itself must be seen as an objective disorder. Therefore special concern should be directed toward those who have this condition lest they be led to believe that the living out of this orientation in homosexual activity is a morally acceptable option.²³⁷

²³² See Chapter 4, Paragraphs 4.50-4.51, 4.53-4.54, 4.70, 4.11. However, small businesses (up to five or six people, excluding members of the employer's family) or partnerships, are traditionally exempted from anti-discrimination legislation, primarily on grounds of privacy, choice, and practicality, rather than religion.

²³³ See Chapter 2, Paragraphs 2.22-2.24.

²³⁴ *Evidence*, Metropolitan Community Church, p. 172.

²³⁵ *Submission*, Calvinistic Political and Social Association, Vol 4, p. 705.
See Chapter 4, Paragraphs 4.205 - 4.210: three states provide an exemption from anti-discrimination legislation in respect of people caring for children and young people. These exemptions appear to be directed against non-heterosexuals.

²³⁶ *Submission*, GALL, Vol 3, p. 495.

²³⁷ *Submission*, Association of Catholic Parents, Vol 2, p. 389.
Submission, Association of Catholic Parents, Vol 9, p. 2005.
Evidence, Association of Catholic Parents, pp. 740-741.

2.106 This distinction between orientation (and the difficulty or impossibility of changing this) and supporting or expressing this sexuality is similar to the attitudes referred to above.

2.107 There may be limited support by some religious groups for anti-discrimination legislation but it is likely that most would take advantage of the exemptions currently offered in the draft legislation.²³⁸ In contrast, the Social Responsibilities Commission of the Anglican Church (Anglican Province of Western Australia) did not support the idea of exemptions for religious bodies,²³⁹ but appreciated the fact that they might be required for a short period:

'I suppose that much of the problem in those respects is a whole lot of stereotyping of homosexual people. That is to say there is a view that there is some connection between homosexuality and paedophilia, and that there is some relationship between homosexual people who are predatory: all of those kinds of things. They are stereotypes. I would have thought that the exemptions would have to be there for as long as it takes to be educative.²⁴⁰

2.108 In considering the basis of action and reaction within society, evidence was given which suggested that it was important to separate the principles of a society from various practices which people would find unacceptable:

'We have said, "The principle is that people have to be treated with respect and dignity, and this is the basis of a civilised society." I suppose what we are saying is that we are allowing people to act in emotional ways, irrational ways or fervent ways, if you like, within those different areas, but there comes a point where it is not right. I think this is the difficulty that every society has: how to balance out the individual good versus the collective good.²⁴¹

2.109 Another issue raised by witnesses was the need for a reduction in discrimination so that all members of society could contribute, and could also develop their own potential without fear. Although there was not much detailed discussion on the practical effects of discrimination in areas such as employment, there was an awareness that this went beyond the loss of income and independence of the individual. The community also lost the talents of many of its members, and young people lost role models.²⁴²

Evidence, Association of Catholic Parents, pp. 740-741.

²³⁸ *Submission*, Religious Society of Friends (Quakers) in Australia Inc., 'we do not see the necessity for religious bodies to be exempt from any section of the Bill.' Vol 11, p. 2509.

²³⁹ *Evidence*, Anglican Social Responsibilities Commission, p. 598.

²⁴⁰ *Evidence*, The Australian Gay and Lesbian Interfaith Federation, did not support exemptions for churches (*Submission* Vol 6, p.1314); but indicated that, if these were granted, they should be subject to an education process, p. 603.
Evidence, The Metropolitan Community Church was also opposed to exemptions although also aware that they may be required, p. 171.

²⁴¹ *Evidence*, Dr Vivienne Cass, p. 526.

²⁴² *Evidence*, Ms K Walker, p. 282.
Evidence, GLAD, p. 334.
Evidence, Tasmanian Gay and Lesbian Rights Group, p. 380.

2.110 Other witnesses provided information on the health effects of discrimination,²⁴³ the stress caused by trying to pass as heterosexual; and noted that the concern experienced by many people - of being exposed, of being intimidated - was sufficient to limit their development as individuals:

'It impinges on people's ability to function in society, to contribute to society if they are so scared about going for a job because if someone finds out they are gay, they are going to lose it; if they are so scared that they cannot contribute in other ways towards the community because they are not going to be accepted. It is not just about political correctness. Definitely, it is about the impact that it has on people, the impact on their self-esteem.'²⁴⁴

2.111 In this environment it is appropriate for governments to examine a situation to determine if the community is being disadvantaged by legislation that may no longer reflect beliefs and attitudes. While some witnesses saw that government (or government legislation) was backward, relative to community perceptions,²⁴⁵ there was a strongly expressed belief that although legislation was not the only answer,²⁴⁶ it was an integral part of change:

'...there are really two different issues in relation to this legislation. One is the fact that it provides legal remedy when you are discriminated against. But, in some ways more importantly, it sets a benchmark, it takes a stand and says, 'This discrimination is unacceptable' ... When Martin Luther King and his colleagues tried to introduce equal opportunity laws and civil rights for blacks in America, many whites argued against that and said, "You can't change people's attitudes and opinions with legislation." He retorted by saying, "Judicial decrees may not change the heart but they can restrain the heartless." I think that is important because what he is saying, and what I concur with, is that when the parliament takes a stand on behalf of the community and says, 'Look, this is wrong. We are providing a beacon, a sentinel of what is just', that is often more important than the actual practicality of the bill itself.'²⁴⁷

2.112 For others, anti-discrimination legislation had gone too far and was an invasion of people's individual rights.²⁴⁸ Hence, they did not support any legislation dealing with

²⁴³ See above, Paragraph 2.19.

²⁴⁴ *Evidence*, Gay and Lesbian Counselling Service of Western Australia, pp. 557-558.

²⁴⁵ *Evidence*, Dr Vivienne Cass, p. 525.

²⁴⁶ *Evidence*, Tasmanian Gay and Lesbian Rights Group, p. 366.

²⁴⁷ *Evidence*, Australian Council for Lesbian and Gay Rights (WA), p. 570.
Evidence, PFLAG, p. 651.

²⁴⁸ *Evidence*, Australian Family Association, p. 586.

sexuality or transgender issues. Others also believed that there were no international obligations that Australia had to meet in this respect.²⁴⁹

2.113 Since 1996 when the Committee began taking evidence on this inquiry, there have been some changes, including the introduction of further State legislation. A number of developments have occurred overseas, including the establishment of partnership recognition arrangements which has the support of churches even though it is not a form of marriage; and the extension to people of various civil rights regardless of sexuality or gender identity.

2.114 Although these changes may add further weight to arguments that the level of international interest or even 'concern' is sufficiently great to ensure Australia meets its obligations in the international arena, there is still considerable argument that no such obligations exist; or that, if they do, they have been met more or less by existing legislation and administrative arrangements. Similarly, it could also be argued that the development of anti-homosexual legislation in some forums is indicative of continued opposition to granting recognition of rights. In order to assess these views, the Committee has considered them in detail in the following chapters.

²⁴⁹ See Chapter 3.

CHAPTER THREE

SOURCES OF ANTI-DISCRIMINATION LEGISLATION

3.1 Beliefs about the content of anti-discrimination legislation and about the extent of human rights vary over time along with perceptions of different societies as to whether rights are available to all people in the community; whether they are available only to citizens; or whether some other factor, such as religion, gender, national origin or race is an adequate ground on which to base exclusion.

3.2 The various human rights statements issued by the United Nations should be seen in this context - as statements not so much of rights which in real terms are currently available to all but which, in due course, may be accessed by all humans.

International sources

3.3 The most important international statements of human rights are the International Convention on Civil and Political Rights (ICCPR) and, to a lesser extent, the International Convention on Economic Social and Cultural Rights (ICESCR).

3.4 These two treaties acknowledge the existence of a range of rights, applicable to 'all peoples' such as the right to life; freedom from torture or degrading punishment; freedom from slavery; the right to freedom from arbitrary interference with privacy; the right to work; to fair remuneration, just working conditions; the right to education. Neither specifically mentions a right to reasonable expression of sexual orientation or of gender identity; and neither specifically lists sexuality or transgender as a status. In short, neither explicitly acknowledges any sexual orientation other than heterosexual. Equally, neither treaty indicates that sexuality or transgender status is a recognised and common ground of exclusion from the rights available to 'all persons'.¹

3.5 In Australia all treaties are entered into under the Executive power of the Constitution (S61), and there is no requirement either to advise Parliament or to reveal the contents of treaties prior to entering into them. Australia ratified the ICCPR on 13 August 1980 and in 1991 signed the first Optional Protocol to the ICCPR which allowed an individual to complain directly to the United Nations Human Rights Committee. Australia ratified the ICESCR in 1975 and it came into force for Australia in 1976.

3.6 In recent years there has been greater pressure to advise Parliament of treaties on a more regular basis, since, among other reasons, while the Executive agrees to undertakings via treaties, it is the Parliament which has the power, under S 51 (xxix) - the external affairs power - to develop domestic legislation that implements the provisions of these treaties.²

¹ See Appendix 3.

² State and Territory governments may also make human rights laws as a part of their power to legislate for peace, order and good government (O'Neill and Handley, *Retreat From Injustice*, pp. 34, 38, 118). While there is no requirement that such legislation refer to an external treaty, State and Territory

The external affairs power

3.7 Unlike many other Western countries Australia does not have either a bill of rights or a constitutional guarantee of equality.³ In the absence of such broad provisions, a number of rights have had to be established separately, as is witnessed by Commonwealth legislation relating specifically to discrimination on the basis of race, sex and disability, as well as the establishment of the Human Rights and Equal Opportunity Commission (HREOC). This anti-discrimination legislation must either be based on specific 'domestic' constitutional powers, or must call into play the constitutional external affairs power which allows the development of legislation to implement the provisions of treaties.

3.8 Most Australian anti-discrimination or human rights legislation has been developed through use of the external affairs power. This situation arises not only because of the absence of constitutional guarantees to equality but because the constitution itself does not identify a large number of specific rights.⁴ While the High Court has referred to implied rights within the constitution,⁵ human rights legislation is still based primarily on external sources. Thus, in its development of human rights, the Commonwealth has been more influenced by external organisations than by an established Australian tradition of equality and equal access to law.

3.9 The content of treaties have been held to 'have no effect in domestic law until they are implemented by legislation.'⁶ Consequently, it is not possible to act as though legislation is in place simply because Australia has ratified a treaty.

The content of external affairs power legislation

3.10 The external affairs power effectively assures Parliament of a substantial input to the content of domestic legislation and, indeed, to the timetable of such implementation. This is not to say that the content of treaty-based legislation is uncontroversial. Some of the most substantial debates over the external affairs power concern the content of matters 'external'. The High Court's interpretation of the external affairs power has been relatively broad in recent years. The Court has acknowledged, most recently in *Victoria v Commonwealth*, that the external affairs power can be understood to include matters external to Australia as well as matters specifically listed in treaties, referring to the statement of Dawson J in *Polyukhovich v The Commonwealth*:

[The] power extends to places, persons, matters or things physically external to Australia. The word 'affairs' is imprecise, but it is wide

governments have implemented a wide range of human rights legislation, including that relating to sexuality and gender. See Chapter 4.

³ See O'Neill and Handley, *Retreat From Injustice*, pp. 22-24. See also *Evidence*, Australian Law Reform Commission, p. 56.

⁴ Such as the right to religious freedom, the right for property to be purchased at a fair price - see *Retreat From Injustice*, pp. 26-27, 39-40, 45-74.

⁵ *Evidence*, p. 64 see also *Retreat From Injustice*, p. 27 and Chapter 3 passim.

⁶ *Evidence*, Ms K. Walker, p. 286.

enough to cover places, persons, matters or things. the word 'external' is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs'.⁷

3.11 It is also argued that parts, as opposed to the whole, of treaties may be implemented and that it is not necessary for legislation to be restricted to the terms of the treaty:

'The power to enact legislation under the external affairs power is thus a reasonably broad one, but there is one important limitation on the power: mere entry into a treaty does not create a new, plenary head of power for the Commonwealth to enact legislation with respect to the subject matter of the treaty; rather, the legislation must faithfully implement or give effect to the treaty. That is, legislation cannot depart from the terms of the treaty in substance, although it is not required to reproduce word for word the precise language used in the treaty ... The test that has been accepted by the [High] Court is that the legislation must be "capable of being reasonably considered to be appropriate and adapted to give effect to the treaty."'⁸

3.12 Further, matters of 'international concern'⁹ may be legislated on by the Commonwealth pursuant to the external affairs power, and this is a means by which issues not specifically raised in treaties can be considered:

'It is, however, relevant for present purposes to note that the responsible conduct of external affairs in today's world will, on occasion, require observance of the spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuit of international objectives which cannot be measured in terms of binding obligations. This was recognised by Evatt and McTiernan JJ in *Burgess' Case* when ... they commented that "it is not to be assumed that the legislative power over 'external affairs' is limited to the execution of treaties or conventions" and illustrated the comment by adding that "the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organisation or of other international recommendations or requests upon other subject-matters of concern to Australia as a member of the family of nations". Circumstances could well exist in which a law which procured or ensured observance within Australia of the spirit of a treaty or compliance with an international

⁷ *Victoria v The Commonwealth*, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at p. 15.

⁸ *Submission*, Ms K. Walker, Vol. 5, p. 949.

⁹ For a discussion of 'matters of international concern' see below, Paragraphs 3.26-3.31.

recommendation or pursuit of an international objective would properly be characterised as a law with respect to external affairs, notwithstanding the absence of any potential breach of defined international obligations or of the letter of international law.¹⁰

3.13 Thus, even if structures or institutions were not specifically mentioned in treaties it could be assumed that they were necessary in order for the specific provisions to be realised. Hence, the external affairs power has been used in the recent past to develop legislation which is wide in scope and not limited by the specific content of treaties.

3.14 HREOC, in accordance with its more liberal interpretation of access to human rights, believed that the general principles of the ICCPR were broad enough to encompass all the means and processes by which the principles themselves were to be implemented:

'It is generally accepted that, along with liberty, equality is the most important principle imbuing and inspiring the concept of human rights. Fittingly with the fundamental nature of this right, the concept of equality contained in Article 26 includes not only equality before the law but equal protection of the law and effective protection against discrimination. Decisions of the [UN] Human Rights Committee indicate that the obligation embodied in the first sentence of Article 26 to respect and ensure the 'equal protection of the law' constitutes an obligation to prevent discrimination in the law, in the application of the law or in any action under the authority of law. Article 26 thus applies to any laws enacted to give effect to any rights "regardless of whether this has to do with the regulation of the rights of the Covenant or of other human rights including rights provided by the ICESCR or with any other subjective rights and duties."¹¹

3.15 This point was reiterated in HREOC's supplementary submission, which noted that Australia 'has undertaken to eliminate discrimination as well as to seek effective remedies against discrimination in all areas...'¹²

'...the first sentence of Article 26 recognises the right to equality before the law and requires equal protection of the law for "all persons", "without any discrimination." [emphasis in original] The United Nations Human Rights Committee has indicated that discrimination for the purposes of this provision encompasses any distinction which nullifies or impairs the recognition, enjoyment or exercise on an equal footing of human rights and freedoms and which is not a reasonable and objective means to achieve a legitimate purpose.'¹³

¹⁰ *Commonwealth v Tasmania* see O'Neill and Handley, *Retreat From Injustice*, pp. 29-30.

¹¹ *Submission*, HREOC, Vol. 7, p. 1562.

¹² *Submission*, HREOC, Vol. 12, p. 2852.

¹³ *Submission*, HREOC, Vol. 12, p. 2853.

3.16 A similar point was also made by the Victorian Council for Civil Liberties which believed that there were 'moral and practical obligations inherent in particular international human rights law'. The extent of such obligations depended on one's interpretation of the relevant conventions and the Council's interpretation was fairly broad:

'I think the most important thing to point out here is that, in the drafting of the convention, the clause that relates to the prohibition of discrimination is regarded as an all inclusive provision which would apply to discrimination on any ground.'¹⁴

3.17 Notwithstanding, this broad approach has not gone unchallenged, and this difference of opinion is evident in much of the evidence presented to the Committee. A number of witnesses, while acknowledging there had been changes in the interpretation of the external affairs power, indicated that there were limits to the nature and extent of legislation arising from treaties and conventions.

3.18 The Commonwealth Attorney General's department, for instance, argued that if there was no specific mention of a benefit in a treaty, this should not be included in any domestic legislation unless it could be argued that the level of 'international concern' about the issue was sufficiently high to warrant such inclusion.¹⁵ In the context of the sexuality discrimination legislation, the department considered that benefits such as some aspects of goods and services, and the prohibition of vilification¹⁶ could not be added to legislation because they were not specifically spelt out in the ICCPR:¹⁷ reliance on powers other than the external affairs power will not give constitutional support to the full operation sought by the Bill and...the external affairs power will not support all of the proposed provisions.¹⁸

3.19 In this argument, the department made a clear distinction between the external affairs power and domestic powers of the constitution, and between items specifically mentioned in

¹⁴ *Evidence*, Victorian Council of Civil Liberties, pp. 799-800.

See also *Evidence*, Mr W Morgan, p. 274: 'both of those articles of the covenant do not specifically mention sexual orientation or sexuality or some analogous ground. They are both what we call 'open-ended clauses'. In other words, they say that no discrimination is to take place. They enumerate a number of grounds and then they say 'or on any other basis'.

¹⁵ *Submission*, Commonwealth Attorney General's department, Vol. 7, p.1511.

¹⁶ *Submission*, Commonwealth Attorney General's department, for access to goods and services, and facilities, Vol. 7, p.1519; and *Evidence*, p. 6.

Superannuation was referred to in the department's Submission (see Vol. 7, p.1519), but was not discussed further.

Incitement to hatred was also an area which the department's submission considered was excluded from possible legislation since it was not mentioned in the relevant covenant, the International Covenant on Civil and Political Rights (ICCPR).

The Victorian Council for Civil Liberties made a similar point with respect to vilification noting that there was a specific mandate in respect of racial, national and religious hatred and incitement to hatred in the ICCPR but not in respect of hatred of 'other groups such as sexual minorities', *Evidence* p.802.

See also Chapter 2.

¹⁷ *Submission*, Commonwealth Attorney General's Department, Vol. 7, pp. 1511, 1519.

¹⁸ *Submission*, Commonwealth Attorney General's department, Vol. 7, p. 1519.

external covenants and those not specifically mentioned. Some basic goods and services may be provided through the domestic powers of the constitution.¹⁹ Certain rights, such as 'employment, education, housing, property, leisure' could be seen as coming within "rights and freedoms" and others could relate to "equality before the law" (Commonwealth laws and programs). However the constitutional status of other benefits may depend on a belief in general equality, yet this principle of general equality is not present in either the ICCPR or the ICESCR:

'There may be, however, certain provisions of the bill which go beyond what could be covered by the external affairs power. For instance, its application to the provision of goods and services and facilities would not seem to be a right that is covered by any of the covenants. It is not a right provided by law; hence there may be some doubts as to whether it would extend that far.'²⁰

3.20 Most other Commonwealth anti-discrimination legislation has standard provisions regarding access to goods and services and to facilities. These clauses, recognising the need for people to obtain equal access to standard services, are to be found in the *Disability Discrimination Act 1992* (DDA), the *Sex Discrimination Act 1984* (SDA) and the *Racial Discrimination Act 1976* (RDA). However, the DDA relies heavily on external measures for details. The Declaration of the Rights of Disabled Persons (especially Sections 6 and 7) states that there shall be access to a range of goods and services, employment and education.

3.21 It could be argued that in spite of no covenant specifically referring to goods and services there must be structures in place that allow for the operation of other more specific rights. According to some witnesses, the provision of access to goods and services and facilities through legislation was seen as both appropriate and possible, via Article 26 of the ICCPR: 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground.'²¹

3.22 This view was supported by HREOC which argued it has been established that specific issues do not have to be mentioned in particular covenants or treaties in order to be covered.²² In this view it is assumed that the pre-conditions for effective operation of the

¹⁹ *Submission*, Commonwealth Attorney General's department, Vol. 7, p. 1519.

²⁰ *Evidence*, Commonwealth Attorney General's Department, p. 6.
Submission, Vol. 7, p. 1519.

See also *Submission*, Tasmanian Gay & Lesbian Rights Group (Vol. 8, p. 1735) which suggested that the principles of the ICESCR be called into play if the ICCPR was not considered sufficiently broad. However, this point was not developed in any detail by legal bodies making submissions although there was some conjoining of the provisions of the ICESCR and the ICCPR by the Victorian Council for Civil Liberties and, to some degree, by the Commonwealth Attorney General's department.

²¹ *Evidence*, Ms K Walker, p. 276, and
Evidence, Mr W Morgan, pp. 278-279.
See also *Evidence*, Queensland Association for Gay and Lesbian Rights, p. 726.
Others have argued that this use of the external affairs power may be challenged on the grounds that 'sexuality' and 'transgender' are not specifically listed in the relevant Article and may not be assumed to be covered under another ground.

²² *Submission*, HREOC, Vol. 7, p. 1569.

principles of a treaty can be established separately, and that if there is ratification of a treaty or convention then there is by implication a willingness to establish those preconditions - such as access to rights - assuming these are not too far removed from the gist of the treaty or covenant.²³ This view is supported by a number of precedents:

'All means which are appropriate and are adopted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power. The power must be construed liberally, and much must necessarily be left to the discretion of the contracting States in framing legislation, or otherwise giving effect to the convention. For instance, general safety and other regulations may be necessary for supplementing the convention, and probably exemptions are legitimate where it appears unnecessary or undesirable that the provisions of the convention should apply. A construction of the power that enables a ready application of the convention to various circumstances and conditions is preferable to one that insists upon an inflexible and rigid adherence to the stipulations of the convention. After all, we should remember that the power is conferred for the purpose of carrying out an international and not a mere local agreement.'²⁴

3.23 Thus, even though the ICCPR does not refer to incitement to hatred of persons on the basis of attributes, it may be possible to either argue that freedom from vilification is intended in the covenants, or is deemed to be a precondition for the operation of equality. Otherwise, one may have to identify other ways in which the Clause may be constitutional:

'...in the area of sexual preference and transgender identity, there would not appear to be an equivalent authorisation or obligation [to the Convention on the Elimination of Racial Discrimination]. These provisions therefore will probably only come within constitutional power to the extent that they can validly rely on powers (other than the external affairs power) relevant to the matters outlined in Clause 4.'²⁵

3.24 The Attorney General's department was also concerned that the external affairs power would not support a very broad definition of transgender and transsexual.²⁶ Working on the assumption that either 'sex' or 'other status' categories in the ICCPR would give some coverage to people on the basis of their sexual orientation and transgender identity, the department advised that a definition which included some 'sexual' behaviour that might be

²³ *Submission*, HREOC, Vol. 7, p. 1570.

²⁴ *R v Burgess; Ex parte Henry* (1936) 55 CLR, 608, 659-660 Starke J quoted in O'Neill and Handley, *Retreat from Injustice*, p. 30.

²⁵ *Submission*, Commonwealth Attorney General's department, Vol. 7, p. 1520.
At p. 1519 the department notes that Clause 4 of the bill utilises a number of established Commonwealth powers, applying the bill to Commonwealth employees, the exercise of Commonwealth law, and so forth.

²⁶ See *Submission*, Commonwealth Attorney-General's department, Vol. 7, pp. 1515-1516, and 1520.

'transitory' in nature, or else not classified as part of sexual or gender identification (such as transvestism)²⁷ would probably not be covered:

'We would have some doubts whether, from a constitutional point of view, there would be support under the external affairs power for the application of the bill to that category of persons, as opposed to those who have, in some more permanent way, adopted a different gender role.'²⁸

3.25 A further argument in the Attorney General's department's evidence was that the extent of rights and benefits available to transgendered persons (even assuming a more limited definition)²⁹ would be subject to the same restrictions applicable to the benefits available to persons of non-heterosexual status - that is, that only those benefits listed in the conventions could be extended, under the use of the external affairs power.³⁰

Other sources of international support

3.26 It was also emphasised that there were other sources of support for specific types of legislation. These were international customary law³¹ and the writings of eminent publicists³² and these were seen as strengthening obligations through helping establish international 'concern' on specific issues such as sexuality:

'Australia's obligations under Customary International Law stem from the growing 'international concern' over, and state practice

²⁷ *Submission*, Commonwealth Attorney General's department, Vol 7, p. 1516.
Evidence, p. 6.
See Chapter 1, Paragraphs 1.44-1.52

²⁸ *Evidence*, Commonwealth Attorney General's department, p. 6.
It is possible that there may be support for a broader definition through the influence of 'international concern', but, as noted previously, the department assessed international concern in this area as being much lower than other witnesses considered. The basis of the department's argument is not entirely clear, since it is possible to argue that a person's biological gender *may* remain constant regardless of other changes which may be made through surgery. Thus, it could be argued that transvestites would be protected from discrimination on the basis of 'sex' insofar as 'sex' tends to mean gender, although currently, Commonwealth anti-discrimination law may not protect transvestites given that the *Sex Discrimination Act 1984* primarily pertains to 'women' and 'men'. Transvestites are to be distinguished from transgenders, if only on the grounds that the latter dress, on a permanent basis, in a fashion considered more appropriate to a particular gender. Should the Attorney General's department be arguing that transvestism is a form of sexuality, then there is no reason why transvestites should not be protected under any provisions applicable to people of a sexual orientation other than heterosexuality - that is, either 'sex' or 'other status' under ICCPR. The occasional as opposed to continuous or permanent nature of the activity is irrelevant. Another issue which the department may be raising is that legislation regarding appropriate behaviour is primarily a concern of the States and Territories. State Crimes Acts may prohibit people dressing or behaving in a particular fashion in public places.

²⁹ *Submission*, Commonwealth Attorney General's department, Vol. 7, p. 1520.

³⁰ *Submission*, Commonwealth Attorney General's department, Vol. 7 p. 1519.

³¹ *Evidence*, Mr W Morgan, p. 274-275.

³² *Evidence*, Mr W Morgan, pp. 274-275.

concerning, the rights of sexual minorities. That sexuality discrimination is a matter of international concern is obvious when recent state practice is reviewed. State practice leads to the development of Customary International Law and is a separate source of obligation for Australia.³³

3.27 Those who have ratified treaties and assumed obligations under them are further influenced in their understanding of these obligations by writings which deal specifically with human rights issues:

'Our international law obligations do not just stem from the treaty; they also developed from customary international law - that is, the practice of states themselves. If we look at that practice ... we will see that there is now substantial practice to demonstrate a great international concern over the treatment of sexual minorities and transgender people ... Also we have seen developments within international conferences ... [which] expressed international concern over the treatment of sexual minorities ... Finally, ... I would also like to highlight that international law is further formed by the opinions of what is called 'eminent publicists'....there is now quite a substantial volume of work by publicists who recognise that international human rights law does include obligations to protect people on the basis of their sexuality.'³⁴

3.28 It was also noted that a level of concern by itself, regardless of the presence of a treaty on an issue, could be sufficient to support legislation:

'...it has been accepted that an international obligation is not a prerequisite for legislation under the external affairs power. International concern is also sufficient to activate that power. In the context of sexuality discrimination, I think it is very clear that there is considerable international concern on the question of discrimination against gay men and lesbians.

I would point out to the committee that the level of international concern required does not have to reach the level of customary international law. It does not have to be a universal concern manifested by every state in the world. It is sufficient that a significant number of states demonstrate a concern about these issues to reach the level of international concern that the High Court has mentioned in its judgments.³⁵

³³ *Submission*, Mr W Morgan, Vol. 7, p. 1374.
See also *Evidence*, pp. 274-275.

³⁴ *Evidence*, Mr W Morgan, p. 275.

³⁵ *Evidence*, Ms K Walker, p. 276.
See also *Submission*, Vol. 5, p. 951.
See also *Evidence*, Ms K Walker, pp.287-288 where reference is made to a level of international concern in respect of homosexuality in the context of providing refugee status,

3.29 The use of international jurisprudence to build a base of support for particular views was referred to by other witnesses. The main difference between witnesses did not concern the acceptance of this practice but the extent to which international concern relating to sexuality and transgender identity was sufficiently high to add support to any treaty obligations. One organisation stated that different political situations could affect the extent to which international support was openly expressed, but that this had to be distinguished from a lack of interest in an issue:

'I think the point is that at both conferences, first at Vienna and then in Beijing, there was an increasing number of countries each time who made statements in favour of addressing the issue of sexuality discrimination. That is our example of growing international concern. Perhaps that has not yet reached the final statement of a particular conference, but that is the direction in which we are heading.'³⁶

3.30 The Attorney General's Department, while accepting the use of international case law and writings,³⁷ did not consider the level of international concern regarding sexuality and gender issues sufficiently high to add support to any treaty obligations. This situation could change over time, as with all issues 'what is regarded as discrimination or 'another status' may evolve and international practice and acceptance may develop'.³⁸ But at this particular point, it was thought, concern had not reached a level similar to that acquired by disability issues prior to specific action being taken on disability. And, even though sexuality or sexual orientation was becoming more of an issue, gender identity was less prominent.³⁹

3.31 The department also noted that, if sexuality was to be considered a subject of international concern, including through discussion in cases and writings, this would more likely be on the basis of its being considered included within the ICCPR's 'other status' rather than 'sex' category.⁴⁰ Another witness, the ALRC, also referred to the impact of international law, emphasising that a wide range of sources could be used to support particular arguments or enhance interpretations:

and Chapter 6, Paragraphs 6.148-6.149.

³⁶ Evidence, Tasmanian Gay and Lesbian Rights Group, p.371.

³⁷ Evidence, Commonwealth Attorney General's department, p. 13.

³⁸ Evidence, Commonwealth Attorney General's department, p. 9.

³⁹ Evidence, Commonwealth Attorney General's department, p. 13: 'we are not suggesting there is not a strong case, and in the area of sexual preference I think it is stronger than in the area of transgender identity where there is certainly much less developed jurisprudence.'

⁴⁰ Evidence, Commonwealth Attorney General's department, p. 11. This opinion was based on the predominance of 'other status' issues in international jurisprudence, notwithstanding the then recent comment by the United Nations Human Rights Committee suggesting that 'sexual orientation' might be included under 'sex' rather than 'other status.' 'While there were remarks that sexual preference could be embraced within sex as a ground of discrimination, our view is that this remark is not particularly well-founded as a matter of international jurisprudence - see below, Paragraphs 3.64-3.67.

'...in order to amplify the meaning of the words used in article 26 [of the ICCPR] we have drawn not only upon the meagre jurisprudence-really one, possibly two cases, under the ICCPR. We have drawn also from a greater volume of jurisprudence in Canada ... and also the European Convention on Human Rights. We do so on the basis that the articles under both of those conventions are broadly similar to the terms used under the ICCPR. Of course, Australia is a signatory to only the ICCPR.'⁴¹

Timetable for implementing legislation

3.32 In ratifying treaties, it is possible for countries to request exemptions from various provisions or to take advantage of any lack of an agreed timetable for implementation of rights.

3.33 With respect to the two main treaties the ICCPR and the ICESCR, there are no timetables for implementation, and to this extent Australia is not in breach of any arrangements. There is, however, some support for the idea that required legislation will be passed within a 'reasonable time'.⁴²

3.34 It is also important to note that Australia included a reservation to its ratification of the ICCPR.⁴³ This reservation, later withdrawn, has no direct bearing on issues of sexuality/gender. However, it indicates that member nations have a role in determining any specific issues that may be delayed or not implemented. Importantly, the existence of reservations has a corollary - that those areas where reservations are not sought are taken as areas which are agreed to. In theory, Australia's support of ICCPR and ICESCR was freely given; and, since a choice did exist, there is an implicit understanding at least that obligations will be met.

Obligations and Sovereignty

3.35 For some people the continual reference to overseas experience and decisions reflects an inappropriate influence by nations or institutions on an autonomous state and on the power of Parliament to legislate. There is concern about the appropriateness of an international body such as the United Nations defining rights which may not be universal, and which are not always available in some member states.⁴⁴

'The point I am making is that only 19 out of the 40-odd countries that are represented on these UN human rights committees are countries which are free or partly free. These people representing their own countries are making decisions for and on behalf of us

⁴¹ Evidence, Australian Law Reform Commission (ALRC), p. 57.

⁴² Submission, HREOC, Vol. 5, p. 1565.

⁴³ Senate Legal and Constitutional Affairs References Committee, *Trick or Treaty* (1995), pp. 39-40.

⁴⁴ See for example, *Submission*, The Australian Family Association (WA Division), Vol. 2, pp. 262-263; *Submission*, Association of Catholic Parents, Vol. 2, p. 390.

here in Australia. Australians should be making law in Australia for and on behalf of people in Australia rather than having their future dictated by committees from overseas, based half a world away, which are unelected and unaccountable to us.⁴⁵

3.36 In response, the ALRC stated that although this may be the case, some countries, including Australia, might rather wish to be seen as a leader in democracy:

'...we happen to have a standard of which we can all be justly proud, and I think we need to be seen [to be] enhancing on that in the future rather than diminishing it to meet short-term or more pragmatic judgments, maybe at a fairly regional or local level.'⁴⁶

3.37 There is also some debate about the extent to which any statements of human rights carry obligations and in the inquiry witnesses gave conflicting evidence on the 'obligatory' nature of treaties and on demonstrating compliance through legislative and other change.

3.38 According to HREOC, Australia had a number of obligations which had to be met through positive action:

'States parties to the ICCPR, ... ICESCR and ILO 111 are obliged "to ensure" the realisation of the rights set out in those treaties. The obligations assumed upon ratification involve a positive obligation to protect rights in addition to the more passive undertaking to "respect" them.'⁴⁷

3.39 This point was reinforced in oral evidence:

'Australia's international human rights obligations require Australia to take all necessary measures to eliminate discrimination including, in our view, discrimination on the grounds of sexual orientation and transgender identity.'⁴⁸

3.40 A similar view was put forward by other witnesses who emphasised that treaty obligations were accepted as binding by member states, given that they were freely entered into and because it is possible to make reservations regarding specific sections of treaties, a procedure which Australia has previously utilised.⁴⁹

⁴⁵ Evidence, Baptist Churches of Tasmania, p. 409.

⁴⁶ Evidence, Australian Law Reform Commission, p. 62.

⁴⁷ Submission, HREOC, Vol. 7, pp. 1560-1561.

⁴⁸ Evidence, HREOC, p. 121.
See also Submission, Mr W Morgan, Vol. 7, p.1374; O'Neill and Handley, *Retreat From Injustice*, pp. 104, 113.

⁴⁹ A. Twomey, *Procedures and Practice, of Entering and Implementing International Treaties* (1995) cited as *Procedures and Practices*, pp. 3-4, 7; and, for ILO treaty conventions, see p.16.
See Evidence, Mr W Morgan, p. 274.

3.41 For a member state to move away from an international obligation because of a change in domestic government (or, indeed, for any reason) was technically possible.⁵⁰ However, there were a number of implications, both domestic and international, a point made most clearly by the ALRC:

'...if we do have international legal obligations reflecting earlier judgments, our domestic position becomes that much more complex. We do have a very complex political situation in Australia which does mean that, if we are going to change domestic legal positions, we need to bear in mind not only the domestic political climate at the time but also our international legal obligations and what that puts on us as added responsibilities and, in many ways, makes the debate far more complex.'⁵¹

3.42 The ALRC further noted that some residual rights may continue in domestic law even after other legislation were passed:

'...normal statutory interpretative approaches by the court would preserve much of what was there before unless it was quite draconian legislation which set about undoing in very express terms each one of those previously existing rights.'⁵²

3.43 The Attorney General's department, while not challenging the obligatory nature of ratified treaties *per se*, did state that it was possible to move relatively slowly to meet undertakings, and that one could argue that limited actions were seen as appropriate given various circumstances:

'...even though the Commonwealth may have the power to enact specific anti-discrimination legislation, failure to take such action would not necessarily mean that Australia would be in breach of its international obligations. States are afforded discretion in determining what measures to take in ensuring that persons whose rights or freedoms are violated have an effective remedy.'⁵³

3.44 The department also expressed some reservations about the extent to which more detailed interpretations of treaties might be seen as 'obligatory'. In commenting on the then recent statement by the UN Human Rights Committee concerning the inclusion of 'sexuality' in the phrase 'sex' the department did not perceive such statements to be gospel:

'While the Human Rights Committee is authoritative in the sense that it receives reports from states, makes general comments and so on, we have never accepted that its findings or its decisions are

⁵⁰ Evidence, Australian Law Reform Commission, p. 63.
See Twomey, *Procedures and Practice*, p. 4.

⁵¹ Evidence, Australian Law Reform Commission, p. 61.

⁵² Evidence, Australian Law Reform Commission, p. 64.

⁵³ Submission, Commonwealth Attorney General's Department, Vol. 7, p. 1515.

binding on states ... it is always open to a state to reach its own view, which it may have to justify internationally for the course of action it takes.⁵⁴

3.45 While agreeing that the UN Human Rights Committee might support a particular approach regarding the standing of sexual orientation, for example, Australia might not wish to proceed with any implementation of this. Again, this does reinforce the fact that a state has considerable choice in implementation, including the absence of specific timetables for the development of legislation.⁵⁵

3.46 In this context, the argument is not so much about the freedom and independence of United Nations members as it is about the extent to which members of an international community perceive they maintain their status by fulfilling commitments they entered into freely. According to the ALRC, the issue becomes the extent to which the spirit rather than the letter of treaties dominates a society's approach, the acceptance of the highest level of international debate as the basis for domestic law rather than society settling for a narrow interpretation, or even for no change in domestic law:

'...international law has a very strong normative effect, at the very least, within the Australian domestic jurisdiction, and ... its aims and authority are substantial. We can ignore that and we can avoid meeting our obligations with no domestic legal retribution, although that is open to question on the basis of executive implementation ... we do so at a political cost both domestically and internationally.⁵⁶

⁵⁴ Evidence, Commonwealth Attorney General's Department, p. 13.

⁵⁵ See above, Paragraphs 3.32-3.34.

⁵⁶ Evidence, Australian Law Reform Commission, p. 63.

The issue of obligations and enforcement raised two issues - the first was the extent to which choice existed, and the second, related, issue was whether a state had any independence with respect to international obligations - to some extent, whether it was bound by past actions; and whether it had any element of choice in implementation. These issues appeared to be concerned with individual states' sovereignty, both in respect to earlier commitments made by domestic governments, and with respect to the control exercised by an international body. As indicated, the Attorney General's department appeared to give some weight to the undoubted right of a member state not to proceed with certain actions which it had agreed to, thus providing more indirect emphasis on sovereignty. It is true that there are very few actions if any which an international body can or will take in respect to the lack of progress of a member state, although it is possible that other forums might also be utilised to help bring about some change.

It is not so much that there is a lack of power to enforce, but that such enforcement presumably conflicts with the fact that the obligation was entered into freely, on the part of the member state. That being the case, the member state should not require pressure in order to take action - especially given the element of choice that is possible, as outlined above. Further, the gentleman's agreement nature of the relationship makes the issue of enforcement irrelevant. The ratification is really a statement of intention which is binding in its own way. The question of enforcement in a sense also relates to the extent to which a member state, experiencing a change of government, may distance itself from earlier 'obligations.' Again, the nature of international agreements is such that to an extent such changes are seen as irrelevant, or domestic matters. This does not mean that a member state cannot change its mind. As it may choose not to enforce changes - although this may damage its credibility - so also it can withdraw from an agreement, although at the cost of credibility also. Second, the element of choice within such obligations lay in the type of actions taken and the timeframe within which action was taken. It was

The beneficiaries of sexuality and gender anti-discrimination legislation

3.47 Statements of human rights are interpreted by member states according to their needs and their ability to implement widespread and often substantial change.⁵⁷ In interpreting Australia's responsibilities and obligations under international agreements, parties have expressed different opinions not only as to whether there are obligations, but also as to what exactly the treaties have stated; what specific phrases mean; and whether other support is available for particular views.⁵⁸

3.48 Firstly, there was uncertainty as to the who exactly were the beneficiaries of human rights - everyone, or only those who did not appear excluded by various phrases? Secondly, and integral to the first argument, was the debate over whether the term 'sex' in the conventions means 'gender' or 'sexuality', and whether anyone who is not considered to be included under 'sex' can or should be considered covered by the phrase 'other status'.

3.49 As stated above, the two relevant covenants both refer to rights being available to 'everybody' or 'all people', without there being regard to various factors such as race or sex. To some, these phrases are seen as stating that rights are available to all people, regardless.

'...in the drafting of the convention, the clause that relates to the prohibition of discrimination is regarded as an all inclusive provision which would apply to discrimination on any ground.⁵⁹

3.50 For others, the phrases mean that the rights that are available are not to be withheld from people on the grounds of race, sex, religion etc or 'other status' *but* can be withheld either if one's dominant characteristic does not appear to be listed under sex, race etc; or one cannot demonstrate that one's dominant characteristic could reasonably be included under 'other status.'

3.51 A third view, which appears to be held concurrently with the first interpretation of general rights, is that while the phrases 'everybody' or 'all people' do mean everyone, the terms 'regardless of sex, race etc' are a form of additional support of the terms 'everybody' or

clear from the evidence offered that various factors could influence the speed and extent to which member states implemented legislation. In most cases, there is no time limit on the development of domestic legislation; a state may claim that it must accommodate changes to its own laws; and there are, as noted, few sanctions imposed. This is pointed out by the Attorney General's department, especially as regards individual choice, see Evidence, p. 13.

⁵⁷ Some western countries do not accept that certain international principles are applicable to 'domestic' law - for example, the United States, which has not yet ratified the first Optional Protocol to the ICCPR, does not believe that certain of its own legislation can be influenced or read in the light of international covenants. Other member states are more liberal in their application of covenants as well as being influenced by other statements and by the decisions of other courts, such as the European Human Rights Court.

⁵⁸ See Evidence, HREOC, p. 132 - the interpretation of treaties can change over time, a point accepted by others such as the Commonwealth Attorney General's department - Evidence, p. 9.

⁵⁹ Evidence, Victorian Council for Civil Liberties, pp. 799-800.

'all people'. Consequently, the emphasis of this interpretation is not only on the importance of the first interpretation but the inaccuracy of the second viewpoint which seeks to use the secondary phrases as excluding, rather than including.⁶⁰

3.52 HREOC, while clearly supporting the broad and general first interpretation also supplements this with a defence of the inclusive nature of the supporting phrases:

"The general right to equality before the law and equal protection of the law for "all persons", "without any discrimination"... clearly requires that there be no discrimination in the administration of the law on any ground and that the provisions of the covenant should not be interpreted restrictively...

Non discrimination provisions apply to members of any group of persons who hold what could be regarded as a "status", not only to those belonging to the particular groups specified.⁶¹

3.53 It could be argued that excluding or including people on the basis of a particular feature is contrary to human rights, and it can be argued that these terms are meant to be read in a non-discriminatory way. In short, the history of exclusion has been such that (and supporting the argument that 'race, sex etc' is only a subordinate and illustrative clause) these examples are to remind people not to automatically exclude substantial numbers of the population. In this context, the words can be seen not as excluding but as including, especially with the use of the phrase 'other status' as a form of catch-all.⁶²

3.54 Those who prefer the second interpretation appear to ignore the message of the primary statement to concentrate on the meaning of a subordinate phrase. Nonetheless, since some have read the covenants to effectively exclude from cover all those who are not specifically referred to and cannot logically be included in 'other status' (for a variety of reasons) much time has been spent on this issue. If there are obligations that must be met or should be met, it is necessary to determine the extent of those to whom one has an obligation.

3.55 The Commonwealth Attorney General's department adopted a fairly restricted interpretation of the reference by the ICCPR and ICESCR to the rights available to 'all people' or 'all individuals within [a] state or territory'.⁶³ The department's submission and evidence did not emphasise that benefits were to be extended to all people. In line with the approach of others, it considered that the treaties apply to specific groups of people, and the main emphasis is on determining whether particular groups are or are not included,⁶⁴ and

⁶⁰ Evidence, Victorian Council for Civil Liberties, p. 800.

⁶¹ Submission, HREOC, Vol. 7, p. 1563.

⁶² Others have argued that while the phrase may be a catch all, it is intended to embrace all possible areas of discrimination in the future, rather than be a reminder of past exclusions. See Evidence, pp. 57,59 Australian Law Reform Commission.

⁶³ ICCPR, Articles 1 and 2 (See Appendix 3) and ICESCR, Articles 1 ('all peoples' and, for example, Articles 6 and 12, 'everyone') - see Appendix 3.

⁶⁴ Logically, substantial parts of each society would be considered covered even under this narrow interpretation, given that 'sex', 'race', 'religion' and 'social status' are factors which must not affect the

whether time has changed perceptions so as to allow such people now to be included because they can be classified as having some form of status.

3.56 The Attorney General's department did not exclude the possibility of legislation based on an interpretation of the provisions of the ICCPR and ICESCR. Rather, its argument was that any legislation would result not from general rights of mankind (with which it did not appear to agree) but if sexual orientation and gender status could be deemed to come within the category of 'other status' (rather than the category of 'sex')⁶⁵ or else be deemed a matter of international concern at the appropriate level.⁶⁶

3.57 In contrast HREOC and others believed that the existing treaties authorised broad and detailed legislation because they gave rights to everyone, and included among those rights the principle of 'equality before the law'. Thus, as well as arguing on the basis that discrimination is not to be applied to anyone on any ground, some witnesses also noted that there was a right to equality before the law which was not specifically withheld from anyone on any ground:

"The other provision in international law which is important is that of equality before the law and equal protection by it. The ICCPR, again, stipulates that provision. As with Article 2.1, the grounds of discrimination enumerated in the second sentence of this provision clearly do not constitute an exhaustive list. Sexual preference is therefore not excluded simply because it is not specifically listed....This is re-iterated in the wording of the article with respect to all persons and without any discrimination, the accent being on 'all' and 'any'.⁶⁷

3.58 In HREOC's view the general principles listed in the ICCPR - the right to equality and equal treatment before the law, the prohibition of any form of discrimination against any person - were sufficiently wide to protect the rights of people in respect of sexuality and gender identification. This argument depends not only on defining distinct rights but especially on interpreting the Covenant to be stating that rights are available to all people. In such an interpretation the phrases in the Covenant which refer to examples of unacceptable grounds of exclusion are, again, only illustrations of a universal principle:

extension of rights. Nonetheless, there is room to argue that each state may wish to exclude some groups from coverage or from immediate coverage, and this can be done, even by ratifying nations, by taking time to implement principles or by considering that some groups have not been deemed included.

⁶⁵ See below, Paragraphs 3.64-3.67

⁶⁶ 'If it were held that sexual preference comes within the term "other status" which appears in the ICCPR and the ICESCR, the external affairs power could be used to support legislation which aimed to ensure the enjoyment of the rights and freedoms provided for in the two Covenants without discrimination on the basis of sexual preference. If, however, a contrary view of "other status" were to be adopted, the question would arise as to whether the Commonwealth would have power to enact legislation under the "international concern" limb of the external affairs power.' Submission, Commonwealth Attorney-General's department, Vol 7, p. 1515, see also p.1516. Much the same point is made in the department's evidence, Evidence, pp.3-4.

⁶⁷ Evidence, Victorian Council for Civil Liberties, p. 800.

'Article 2.1 of the ICCPR provides that all rights in the Covenant apply equally to "all individuals". The requirement prohibits discrimination "of any kind" which affects the exercise or enjoyment of rights recognised in the ICCPR ... In general terms, Article 2 requires that the civil and political rights provided for in the Covenant ... be guaranteed without discrimination of any kind...

Article 2.1 does not depend on the independent violation of some other provision of the Covenant. It will apply if discrimination occurs in the manner in which any of the rights set out in the Covenant are guaranteed. Article 26 deals with discrimination not only with respect to those rights recognised in the ICCPR itself but in any area of law or government action, federal state or territory. It provides an independent right to equality.⁶⁸

Sexuality -Privacy, Sex or 'Other Status'?

3.59 Given these differences of opinion regarding the application of general principles of equality, there has been substantial debate in the community on the issue of access to human rights through inclusion under some other part of the ICCPR.⁶⁹ This debate spilled over into the Committee's inquiry to some extent as various parties sought to establish the relative merits of considering freedom from discrimination on the basis of sexual orientation (and, to some lesser extent, gender status) as being included under 'privacy', 'sex' or 'other status'.

Privacy

3.60 The issue of 'privacy' arose partly because of the decision by the United Nations Human Rights Committee that the rights of an individual to freedom from arbitrary invasion of privacy under Article 17 of the ICCPR had been transgressed.⁷⁰ This decision, made on March 31 1994, was a response to the application by Nicholas Toonen from Tasmania under the first Optional Protocol⁷¹ which claimed that sections of the then existing criminal legislation in Tasmania, outlawing various forms of sexual activity, were in breach of the ICCPR. The United Nations Human Rights Committee decision, by agreeing that privacy had been invaded, implicitly recognised that Mr Toonen was a person entitled to the protection of ICCPR since it did not establish any proviso regarding this breach - for

⁶⁸ *Submission*, HREOC, Vol. 7, pp. 1561-1562.

It could be argued that HREOC then undermines its own argument against the all-embracing nature of principles by stating that Articles 2 and 26 of the ICCPR cover sexual orientation because this is included in 'sex' or 'other status', or, indeed, both (*Submission*, HREOC, Vol. 7, p. 1564).

⁶⁹ *Evidence*, Wesleyan Methodist Church in Queensland, p. 785.

⁷⁰ Tasmania did not respond to this decision; consequently, the Commonwealth developed legislation to overcome the Tasmanian Criminal Code, using invasion of privacy as a ground. This law was not seen as effective because it was not specific about the nature of privacy invasion. See below, Chapter 4, Paragraphs 4.2,4.23.

⁷¹ See above, Paragraph 3.5

example, that although ordinarily this might be a breach of privacy, a gay man had no such right.⁷²

3.61 The UN Committee believed that although there was an invasion of privacy, it was not 'unlawful' insofar as it was authorised by the existing Tasmanian *Criminal Code*. However, it could possibly be considered an arbitrary invasion of privacy in that such invasion was contrary to the principles in the ICCPR:

'...the committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.'⁷³

3.62 The Commonwealth Attorney General's department referred to this case in its evidence, but did not draw any wider implications from it.⁷⁴ The department suggested that, although countries were under no obligation to accept this interpretation of what the ICCPR meant (as opposed to the need to accept the more formal statements of rights that exist within the ICCPR itself)⁷⁵ the issue of privacy was a peg on which to hang various claims:

'...we saw that decision as very much based on the privacy article and the interference with privacy in an arbitrary way.'⁷⁶

3.63 To a degree, the Commonwealth legislation, the *Human Rights (Sexual Conduct) Act 1994* ratified this viewpoint, since its only main section referred to a right to freedom from arbitrary invasion of privacy.⁷⁷

'Sex' or 'Other Status'

3.64 Some parties have developed arguments suggesting that the various bases on which one may *not* discriminate are fairly wide, especially the 'other status' category.⁷⁸ Australia as the relevant State party involved in the Toonen case,⁷⁹ was provided with the communication

⁷² Sarah Joseph 'Gay Rights Under the ICCPR - Commentary on *Toonen v Australia*', *University of Tasmania Law Review*, October 1994, pp. 392-411.

⁷³ Joseph, *op.cit.* p 396.
See also *Evidence*, Mr W Morgan, p 277.

⁷⁴ *Evidence*, Commonwealth Attorney General's Department, pp. 10-11.

⁷⁵ See above Paragraph 3.44 and
Evidence, Commonwealth Attorney General's Department, p. 13.
See also *Submission*, Ms K Walker, Vol. 5, p. 949.

⁷⁶ *Evidence*, Commonwealth Attorney General's department, p. 10.

⁷⁷ See Chapter 4; this legislation, however, was unsuccessful in that it did not define 'arbitrary' - see *Evidence*, Tasmanian Gay and Lesbian Rights Group, p. 365.

⁷⁸ See above, Paragraphs 3.47-3.58

⁷⁹ The state ratifying the treaty or covenant is the responsible body (Article 50). In this instance, although both Tasmania and Australia were able to submit material, they took notably different directions. See Joseph, *op. cit.*, pp.393-394.

and, *inter alia* requested the UN Human Rights Committee to determine whether 'sexuality' could be included under the heading of 'other status':⁸⁰

'We as the Australian government at the time sought the views of the committee on that specific question of whether sexual preference was embraced by the term; 'other status' and my understanding is that the committee in a sense ducked that issue.'⁸¹

3.65 In its response, the UN Committee suggested that 'sexual preference' discrimination *could* be included under discrimination based on 'sex'. There was some dissent from this argument by one of the members of the Committee, not because of any desire to limit the number of categories of persons subject to protection, but because it was considered that the more appropriate status was 'other':

'The committee stated that the word 'sex' in article 26 should be taken to include sexual orientation. There was, of course, a dissenting report from one member of that committee, which actually said that sexuality was different but that it was nonetheless covered by the covenant. The ultimate effect is that sexuality is covered in all the contemporary jurisprudence with respect to the covenant and, in particular, article 26 of that instrument.'⁸²

3.66 The Tasmanian government itself had agreed that 'sexuality' would more appropriately be classed as an 'other' status, although it did not necessarily argue that Australia had an obligation to protect those who could come under 'other' status.⁸³

3.67 Although the UN view was unusual (given that 'sex' usually means 'gender'), this interpretation at least provides some area for future complainants to refer to. However, it does avoid the main issue of the inclusive or exclusive nature of the ICCPR principles, and is not a view widely shared:

'...while there were remarks that sexual preference could be embraced within sex as a ground of discrimination, our view is that that remark is not particularly well-founded as a matter of international jurisprudence - that sexual preference equates with sex as a ground of non-discrimination.'⁸⁴

⁸⁰ Evidence, Commonwealth Attorney General's department, p. 11.

⁸¹ Evidence, Commonwealth Attorney General's department, p. 11.

⁸² Evidence, Victorian Council for Civil Liberties, p. 808.

⁸³ See Evidence, Tasmanian Gay and Lesbian Rights Group, p. 378.

⁸⁴ Evidence, Commonwealth Attorney General's department, p. 11. The Toonen case actually refers to legislation that proscribed not only male homosexual activity but female homosexual activity and forms of heterosexual sexual activity, as noted above at Chapter 1, Footnote 12. However, it is not apparent from the UN decision if this factor affected the decision to refer more to privacy than to sexuality.

Transgender

3.68 The status of transgender people has received less attention in the sexuality debate and certainly as far as the decisions of the United Nations Human Rights Committee is concerned. However, given that transgender status is primarily an issue relating to gender identity,⁸⁵ there would be greater justification in considering that gender identity would be included within 'sex', since 'sex' is primarily seen as 'gender' in conventions and anti-discrimination law.

3.69 This argument is given some weight by the case referred to by HREOC from the European Court of Justice, where transsexuals were included under the category of 'sex', although it is not clear just what is covered by the term 'transsexual':

'In a recent case before the European Court of Justice concerning whether rights guaranteed under the European Union Equal Treatment Directive apply to transsexuals, the Advocate-General was firmly of the view that protection from discrimination [on] the grounds of sex should be given its widest possible interpretation "including all situations in which sex appears to be a discriminatory factor" and found that the Directive could and should apply to transsexuals. A similar approach is likely to be taken towards the inclusion of transgender identity within the areas of protection of the Covenant.'⁸⁶

3.70 The Victorian Council for Civil Liberties believed that transgender would also be covered by 'our international obligations' although this may be more on the grounds of the Council's adherence to all-inclusive categories in the ICCPR than on a belief that transgender or transsexual status relates to 'sex'.⁸⁷

3.71 It is worth noting, though, that the Commonwealth Attorney General's department believed that transgender status would be more likely covered under 'other status' in the covenants, assuming that this 'status' was more or less permanent.⁸⁸ This point about 'other status' was also accepted by other witnesses, some of whom noted the very broad issues which could be subsumed within 'other status':

'The reason why I mentioned past cases is in reference to the broad interpretation which the Human Rights Committee has given to

⁸⁵ Evidence suggested that there could be a range of sexuality identifications by transgender people, partly depending on the range of those considered transgender - see Chapter 1, Paragraphs 1.54, 1.58-1.59. However, these issues would be considered under sexual orientation not gender status.

⁸⁶ Submission, HREOC, Vol. 7, p. 1564. Gender identity may in fact be more permanent than being 'transsexual' in some instances (e.g. being transvestite), see Chapter 1, Paragraphs 1.51-1.52, and Chapter 5.

⁸⁷ Evidence, Victorian Council for Civil Liberties, p. 800.

⁸⁸ Submission, Commonwealth Attorney General's Department, Vol. 7, p. 1516. In short, 'status' is seen as a permanent feature or characteristic - one is always of a particular race and (usually) gender, national origin and so on. The opposition of the department to including transvestites in the term transgender must be seen in this context.

articles 2.1 and 26 of the convention. In past cases, for instance, they have said that whether you go to a private school or a public school would come under the other status of those articles in the convention. In other words, they give a very broad interpretation of what is covered under article 2.1 and article 26.⁸⁹

Domestic Powers of the Constitution

3.72 The domestic powers of the Constitution allow for the development of Commonwealth human rights legislation which would apply to a number of areas including employment, access to goods and services, and freedom from vilification, harassment and violence.⁹⁰ These powers include:

- S 51(i)- trade and commerce;
- S51(xiii) banking;
- S51(xiv) insurance;
- S 51(xx) corporations;⁹¹
- S52(ii) public service matters;
- S61- the Executive power;
- S x - the incidentals power;⁹²
- S122- the Territories power.⁹³

3.73 Few witnesses referred specifically to the taxation power but it is through this that the Commonwealth is able to regulate superannuation, an issue which was of considerable concern to many witnesses.⁹⁴ The Human Rights and Equal Opportunity Commission also referred to divorce and matrimonial causes, including parental rights, 'custody' of children, guardianship (S 51(xxii)); marriage(S51(xxi)); provisions of sickness and hospital benefits

⁸⁹ *Evidence*, Mr W Morgan, p. 278.

⁹⁰ See Chapter 2.

⁹¹ *Submission*, Mr W Morgan, Vol. 7, p. 1377:

'The broad scope of the corporations power has been recently confirmed by the High Court. It will support legislation governing the acts and activities of corporations (not limited to trading or financial corporations). It would thus support legislation prohibiting all corporations from engaging in sexuality or transgender discrimination. Note that the banking and insurance power would also support such legislation in the banking and insurance industries.'

See also *Submission*, Ms K Walker, Vol. 5, p. 952.

⁹² *Submission*, Mr W Morgan, Vol 7, p. 1377:

'The incidentals power is particularly relevant to the issue of transgender discrimination. As outlined above, Australia's international obligations with respect to transgender identity are less clear than those concerning sexual orientation. Given this, and given the close connections between sexuality discrimination and transgender discrimination, it would seem to be a logical and constitutionally valid exercise of the incidentals power to include transgender discrimination in a Bill dealing with sexuality discrimination.'

⁹³ *Submission*, Commonwealth Attorney General's department, Vol. 7, p.1514.

Submission, Mr W Morgan Vol. 7, pp. 1377-1378,

Submission, Ms K Walker, Vol. 5, p.953.

⁹⁴ See below, Chapters 4, 5 and 6.

and medical and dental services (S51(xxiv)), and the public Acts and records, and the judicial proceedings of the States (S51(xxv)).

'Acts done by or on behalf of the Commonwealth (or a Territory) or by a body established for a public purpose by a law of the Commonwealth (or of a Territory) and exercising power conferred by a law of the Commonwealth or of a Territory can also be supported by the power implicit in the legislative and executive power to establish the body or confer the power concerned. A power encompasses everything incidental to the exercise of the of the main purpose of the power, including incidental effects in areas beyond the legislative powers of the Commonwealth.'⁹⁵

3.74 Without recourse to the external affairs power, Commonwealth legislation, using the domestic provisions outlined above, can affect the following areas:

- employment, except State employment and intra State non-incorporated employment;
- goods and services, except those provided by a state, including transport;
- banking except that wholly confined to a State;
- education and training provided by the Commonwealth;
- insurance and superannuation, except those services deemed to be intra State ;
- payment of various benefits, such as social security and veterans pensions and allowances;
- payment of pharmaceutical and medical services.⁹⁶

3.75 There was little argument in submissions or in evidence to the Committee which challenged the use of certain domestic powers to develop some form of anti-discrimination legislation. The main issues raised were the extent to which sufficiently broad and comprehensive legislation could be developed using these provisions without utilising the external affairs power; and exactly what detail could be provided through use of the external affairs power.

3.76 Although HREOC suggested that the domestic provisions of the constitution had been the basis for much of the *Disability Discrimination Act 1992* and the *Sex Discrimination Act 1984*⁹⁷ it is likely that the strength of that legislation comes mostly from the external affairs power.⁹⁸ With respect to matters of sexuality and gender, the domestic powers would provide a basic protection, according to the Attorney General's department;⁹⁹ however, detail could

⁹⁵ *Submission*, HREOC, Vol. 5, p. 1570.

⁹⁶ Traditionally, in anti-discrimination legislation, the Commonwealth has provided exemptions which acknowledge religious and privacy concerns and the concerns of those in business that various changes could be too expensive or in other ways detrimental to the operation of business. In this way some employers and service providers may be exempt from conforming with the legislation. See Chapter 4.

⁹⁷ *Submission*, HREOC, Vol. 7, p. 1570.

See also *Evidence*, Commonwealth Attorney General's department, pp. 3,5, and *Submission*, Vol. 7, p, 1514.

See also O'Neill and Handley, *Retreat From Injustice*, p. 29. However, the detail of the *Disability Discrimination Act* may owe more to the *Rights of Disabled Persons* than to the Australian Constitution.

⁹⁸ *Rights of Disabled Persons*, and *Elimination of All Forms of Discrimination Against Women*.

⁹⁹ See *Submission*, HREOC, Vol. 7, p. 1514:

only be provided by reference to the broad (or narrow, depending on one's point of view) benefits outlined in treaties or other forums.¹⁰⁰

3.77 Few submissions specified the ways in which they believed domestic-based legislation would be limited and the areas in which the external affairs power was essential. However, a number of those witnesses who did discuss this issue considered that while the domestic powers of the constitution were important as a base the real force of legislation would only be realised if the external affairs power was utilised.

3.78 In part this argument reflected a belief that, while a number of domestic powers had been reinforced and ratified by recent High Court decisions,¹⁰¹ use of the external affairs power was a means of giving validity to a number of issues which would be more difficult to support if one was dependent only on domestic powers.

3.79 However, a more substantial consideration was the extent to which the Commonwealth would use the external affairs power to develop a series of rights and then seek to override State legislation in order to impose uniform anti-discrimination legislation.¹⁰² In its current form, the *Sexuality Discrimination Bill 1995* primarily affects Commonwealth legislation. While it does seek to regulate State public sector employment and does utilise the corporations power effectively in order to minimise exemptions from its application in employment and in the provision of services; and while Section 109 of the Constitution enables the provisions of State anti-discrimination legislation to be overridden where incompatible,¹⁰³ much other legislation remains unchanged.

3.80 The Attorney General's department, as noted, saw that the domestic powers of the constitution would provide a number of rights and certain goods and services, but would not support certain other benefits which depended on an agreed principle of general equality. The department also believed that the external affairs power would be necessary to cover non-incorporated intra state employment¹⁰⁴ (presumably on the grounds that employment

'The powers outlined above could be relied on as a basis for laws which sought to ensure that those living in same sex relationships were treated in the same way as those in married and opposite sex relationships. Similarly, they could be used to ensure that transgender persons were not discriminated against on account of their transgender status.'

¹⁰⁰ See *Evidence*, Ms K. Walker, p. 276.

Although it is accepted that the corporations, banking and territories powers are appropriate for this type of legislation, they were seen as being unable to support 'comprehensive anti-discrimination law'. See also *Evidence*, Commonwealth Attorney General's department, p. 10.

As noted, the Attorney General's department, and others, were also more conservative about the extent to which the external affairs power itself would be able to provide some benefits: if these were not specified in a covenant, not the subject of notable jurisprudence, and not the focus of an appropriate level of international concern, rights in some areas might not be covered.

¹⁰¹ See *Submission*, Mr W. Morgan, Vol. 7, p. 1377.

¹⁰² This issue is discussed in more detail in Chapter 6.

¹⁰³ See Chapter 6.

¹⁰⁴ *Submission*, Commonwealth Attorney General's department, Vol. 7, p. 1514.

confined to a State was within the basis of State control if the corporations power could not operate), and that the definition of transgender in the draft legislation might be too broad.¹⁰⁵

3.81 As well, the department expressed a belief that the Commonwealth marriage power only permitted marriage between a man and a woman, which would affect some transgender marriages¹⁰⁶ and all same sex marriages. Even an appeal to the external affairs power would not deal with all these matters.¹⁰⁷ 'Our advice is that a union of a homosexual couple would not be covered by the power.'¹⁰⁸ The same view was given in oral evidence.¹⁰⁹ Although acknowledging that certain benefits could be given to people in a same sex union the department nonetheless distinguished such relationships from marriage.¹¹⁰

3.82 Similarly, the department advised that the marriage power did not permit a marriage between a couple one at least of whom was formally transgender - that is, had undergone re-assignment surgery.¹¹¹ Nonetheless, the department acknowledged it was possible that at some time in the future, given acceptance of the status of transgendered persons in respect of payment of Commonwealth benefits (such as social security) the marriage power might extend to such relationships:

'...the Department considers that it would be conceivable that courts would hold that the marriage power extended to the union of a post operative 'masculine to feminine' transgender person with a male or a post-operative 'feminine to masculine' transgender person with a

¹⁰⁵ *Evidence*, Commonwealth Attorney General's department, p. 6.

Also the department was sceptical about the use of the external affairs power to provide a range of benefits which had not been spelled out in the relevant conventions and were not deemed to be the object of a sufficient level of international concern to justify inclusion in legislation: 'It is not a right provided by law; hence there may be some doubts as to whether it would extend that far.' Similarly the department believed that no convention specifically mentioned incitement to hatred, therefore it would be difficult to include in legislation.

¹⁰⁶ *Evidence*, Commonwealth Attorney General's department, p. 5.

The department's view was that 'a person cannot change their sex by surgery or otherwise. The marriage power would, therefore, not facilitate the marriage of persons who have undergone sexual surgery.' While logically this would not prevent a male to female transgender, for example, marrying a female the marriage would be registered as between a man and a woman; there would be no formal recognition of the transgender status or of a same sex marriage. Transgender people who have documents stating their re-assigned gender may 'marry', but this marriage is not currently legal. This issue raised some of the problems involved in providing appropriate documentation. See *Evidence*, Dr Finlay, p.391. See also Chapter 6.

¹⁰⁷ Intra state employment could be addressed through the external affairs power. A more careful definition of 'transgender' could create more clarity, and therefore assist in determining which people of a more permanent transgender status were entitled to protection; and any change to the marriage power was not currently feasible.

¹⁰⁸ *Submission*, Commonwealth Attorney General's department, Vol. 7, p. 1517.

¹⁰⁹ *Evidence*, Commonwealth Attorney General's department, p. 5.

¹¹⁰ *Evidence*, Commonwealth Attorney General's department, p. 5, and *Submission*, Vol. 7, p. 1520.

¹¹¹ *Evidence*, Commonwealth Attorney General's department, p. 5, and *Submission*, Vol. 7, p. 1517.

female if general developments in the States and Territories and other areas such as social security are such that increasingly gender reassignment procedures are recognised by the law as changing the gender of the person.¹¹²

3.83 The department did not specifically refer to external sources which might affect the view of marriage, possibly consciously limiting change in this area to an Australian environment rather than one influenced by external theories. It is to be noted also that the department is not stating that constitutional change cannot occur, only that there appear to be no grounds for stating that society is ready for such change at present.

3.84 Other witnesses were more sanguine about not only the interpretation of the external affairs power but also of the extent to which the domestic powers were being interpreted more flexibly. In respect to marriage, one witness believed that the connotation of marriage, among other things, has changed over time. This change has been recognised and could lead to a more extensive interpretation of marriage, specifically with respect to same sex couples:

'We do not really know how the High Court would interpret the marriage power but there is a very good argument that the marriage power would extend to the marriage of same sex couples. ... other members of the court have adopted a far more liberal approach to constitutional interpretation, seeing the document as a living tree, a blueprint for our society that does not necessarily leave us in the moral and social era of 1900 but that does permit change with time.'¹¹³

3.85 Reference was made by a number of witnesses to the fact that marriage had changed in a number of countries, including those countries to which Australia refers in expanding its understanding of international human rights issues. However, since the ICCPR is quite specific about marriage being a right for men and women, the convention itself cannot be used as a basis for argument. Further, what is often referred to as a more flexible system of marriage in other countries is often rather a form of church or state recognition which continues to be distinguished from marriage.¹¹⁴

¹¹² *Submission*, Commonwealth Attorney General's department, Vol. 7, p. 1518. However, see also *Submission*, Ms C Ronalds, Vol. 2, p. 302:

'In my view the refusal of permission to marry or to recognise as valid a marriage made otherwise[than] under the terms of the Marriage Act 1961 would not be 'in direct compliance' of that law. Similarly, decisions on eligibility and payability pursuant to the Social Security Act 1991 would not be in 'direct compliance' of that Act if they denied access to payments to a pre-operative transgender on the ground that she or he was a transgender and hence not a 'married person'. These would both be policy decisions based on parameters or factors other than those set out in the legislation.' See also Chapter 6.

¹¹³ *Evidence*, Ms K Walker, p. 285.

¹¹⁴ For example, the National Church in Denmark offers a form of religious recognition, which differs from marriage.

States Rights

3.86 The discussion concerning the right of the Commonwealth to utilise the external affairs power also raised the issue of states rights, and the degree to which State powers might be abused by the development of national anti-discrimination legislation.

3.87 Given that a majority of the States and Territories had developed sexuality discrimination legislation, and some had developed gender discrimination legislation, prior to the Commonwealth's *Sexuality Discrimination Bill 1995*, and the *Human Rights (Sexual Conduct) Act 1994*, states rights were not the subject of much explicit debate in the Committee's hearings. Nonetheless, the issue of states rights is an integral part of the debate on the use of the external affairs power, a point made openly by one witness:

'The use of the external affairs power has certainly raised considerable debate, particularly in Tasmania and outlying states in recent years. A number of comments have been made about the use and potential abuse of the external affairs power for political purposes in past years ... All this is raising the point of whether you see this legislation overriding state laws and making totally redundant the state laws with respect to sexual discrimination or sexuality discrimination, and whether it is in fact a constitutionally valid law of the Commonwealth.'¹¹⁵

3.88 Although witnesses in favour of Commonwealth legislation believed that the gaps in various State and Territory legislation meant that Commonwealth legislation was required for the sake of uniformity and at least minimal coverage,¹¹⁶ the extension of the legislation to the State public sector raised the problem of whether the Commonwealth sought to protect the rights or wishes of some over longer established principles of States' independence. In particular, the constitutional requirement not to fetter the effective operation of States was raised:¹¹⁷

'Inherent in the Constitution are certain limits on Commonwealth constitutional power, deriving from federalism. These implied limits prevent the Commonwealth from discriminating against a state (or the states generally) by imposing some special burden, and prevent the Commonwealth from impairing the continued existence of a state or its capacity to function. Passing sexuality discrimination legislation clearly does not discriminate against any of the states. Nor does it threaten their continued existence.'¹¹⁸

¹¹⁵ *Evidence*, Baptist Churches of Tasmania, p. 411.

¹¹⁶ *Evidence*, Mr W Morgan, p. 273.

¹¹⁷ See *Evidence*, Baptist Churches of Tasmania, pp. 411-412.

¹¹⁸ *Submission*, Mr W Morgan, Vol. 7, pp 1377-1378. See also: *Evidence*, Ms K Walker, p. 279:

'Commonwealth legislation cannot discriminate against a state or be directed at a state in such a way as to prevent that state from continuing to function effectively as a state. That doctrine, which is really the only doctrine that I can think of that could be invoked once the external affairs power is activated, would have very limited impact on this bill.'

3.89 Nonetheless, the concept of States rights was not seen as an excuse for neglecting international obligations:

'The Commonwealth is charged with implementing Australia's international obligations and the so-called 'States rights' argument is not a valid reason for the Commonwealth to abdicate its international responsibility in this area.'¹¹⁹

3.90 Another witness suggested that there could be some areas where a state may challenge overriding Commonwealth legislation especially in the operation of a state public service and in the operation of employment policies and conditions.¹²⁰ The witness predicted that anti-discrimination legislation would not be found to invade states' capacity to function, an opinion he considered would be maintained by the High Court:

'There may be an arguable point concerning whether such legislation impairs a state's capacity to function, in that it restricts a state's capacity to regulate its own public service¹²¹ and set employment policies and conditions...However, it is unlikely that the High Court would hold that anti-discrimination legislation offends this restriction, as such legislation will not affect the economic position of the states (in deciding the size of their public service) nor in setting required qualifications for employment (given that sexuality could never be considered relevant to the issue of qualifications).'¹²²

3.91 A similar conclusion was reached by another commentator who believed that, although 'there is an argument that such a restriction would fall foul of the implied prohibition as applied in the *Education Union Case* ... the prevention of discrimination on irrelevant grounds ... will not be affected by the Court's reasoning in that case.'¹²³

Conclusion

3.92 In spite of profound ideological differences between parties on the coverage of issues, there was some general agreement that although the domestic constitutional powers can provide a framework for anti-discrimination law, the external affairs power can be broad and may provide a range of detail for legislation. The extent to which detail is accepted varies

according to the interpretation of various covenants, and, to some extent, the weight that is given to other sources of influence.

3.93 Access to human rights, and the content of human rights legislation, is therefore subject to considerable debate. Although various parties would like a definitive interpretation, favouring their particular point of view, this is highly unlikely given that societies are forever defining themselves and the rights available to their citizens and others.

¹¹⁹ *Submission*, Ms K. Walker, Vol. 5, pp. 940-941.

¹²⁰ *Submission*, Mr W. Morgan, Vol. 7, pp. 1377-1379.

¹²¹ *The Sexuality Discrimination Bill 1995* affects state public sector employment - see Chapter 6

¹²² *Submission*, Mr W. Morgan, Vol. 7, pp. 1377-1378.
See decision *Re Australian Education Union; Ex parte Victoria* (1995), *Victoria v Commonwealth* CLS 1996 H6 134.

¹²³ *Submission*, Ms K Walker, Vol. 5, p. 954.

CHAPTER FOUR

PROVISIONS OF STATE AND TERRITORY SEXUALITY AND GENDER STATUS ANTI-DISCRIMINATION LEGISLATION

Introduction

4.1 A number of witnesses argued that there was little need for Commonwealth legislation, given the protection available through State and Territory criminal and other law, and given also that most States and Territories had specific anti-discrimination legislation addressing sexuality and, to a lesser extent, gender status.¹ Six of the eight Australian States and Territories prohibit discrimination on the grounds of sexuality and four, namely New South Wales, South Australia, the Australian Capital Territory and the Northern Territory, prohibit discrimination on the grounds of transgender identity.² The ACT also has the *Domestic Relationships Act 1994*, which covers a wide range of arrangements and enables people to make formal financial arrangements in respect of relationships.³

4.2 In 1994 the Commonwealth *Human Rights (Sexual Conduct) Act* was passed in order to comply with the ruling of the United Nations Human Rights Committee that Tasmanian legislation was in contravention of the ICCPR in respect of privacy. The provisions of existing Tasmanian legislation, the Criminal Code, were subsequently challenged in the High Court as contrary to Federal human rights legislation and therefore invalid under S109 of the Constitution.⁴ In late February 1997 the High Court ruled that the Commonwealth legislation had precedence.⁵ Tasmania, although repealing sections of its Criminal Code in April 1997, did not develop broader discrimination legislation, and effectively covers only sex

¹ All States and Territories have some form of anti-discrimination legislation, and in most cases this includes some protection against discrimination on the basis of sexuality or gender status. The relevant legislation is: the New South Wales *Anti-Discrimination Act 1977*; the Queensland *Anti-Discrimination Act 1991*; the South Australian *Equal Opportunity Act 1984*; the Victorian *Equal Opportunity Act 1995*; the Tasmanian *Sex Discrimination Act 1994*; the Western Australia *Equal Opportunity Act 1994*; the Australian Capital Territory *Discrimination Act 1991*; and the Northern Territory *Anti-Discrimination Act 1992*.
Submission, HREOC, Vol. 7, pp. 1574-1575.

² The Queensland Anti Discrimination Commission noted that it had advised the Queensland Anti-Discrimination Act did not provide any coverage for transgender persons *per se* (see *Submission*, Queensland Anti-Discrimination Commission, Vol 2, p. 237.) since the legislation only refers to 'sex', 'lawful sexual activity' and 'impairment' as grounds. As noted by HREOC and other witnesses such grounds provide very little coverage for transgender people, often because of the terminology utilised. - see Chapters 5 and 6. See opinion on this issue by *Submission*, Queensland Anti Discrimination Tribunal, Vol 2, pp. 241-246.

³ See below, Paragraphs 4.8-4.9, 4.44-4.45 The ACT also passed the *Administration and Probate (Amendment) Act 1996*, allowing access by homosexual and de facto partners to deceased estates of partners etc, and amended the *Family Provision Act 1969* to allow a range of partners to contest a will - see Paragraph 4.9. See *Submission*, HREOC, Vol 7, p. 1586.

⁴ *Submission*, HREOC, Vol 7, pp. 1559-1560.

⁵ *Croome and Toonen v Tasmania*, CLS 1997 HC 5.

discrimination, pregnancy, marital status and parental status, through its *Equal Opportunity Act*.⁶

4.3 Western Australia anti-discrimination legislation covers sex, race, age, marital status, pregnancy, family responsibilities and impairment,⁷ and extensive special measures are allowed under Clause 35K of the legislation. In 1996 the *Equal Opportunity Amendment Bill* was introduced which would have mirrored many provisions available in other States and provided extensive protection to people specifically in respect of sexuality discrimination.⁸ However this legislation was defeated in September 1996.⁹ Sexual intercourse between males was decriminalised in 1989.

4.4 There was support for non-heterosexual and transgender people taking advantage of existing legislation such as that prohibiting assault and violence in general.¹⁰ At the same time, some witnesses indicated, it was necessary to have specific anti-discrimination legislation in order to make it obvious to the community that actions which might be thought acceptable were in fact prohibited.¹¹ In such instances, part of the purpose of specific sexuality or gender discrimination legislation was education.¹²

4.5 However, it was apparent that specific sexuality and gender status legislation was also supported in order to ensure that certain actions, including physical violence, could be identified as reflecting a response to sexuality or gender status. There are a number of reasons for this, but the major ones are to demonstrate the extent of discrimination, and to identify the extent of more subtle support of discrimination. The outcome of this may include vindication of affirmative action or reverse discrimination; support for certain policies, including access to sexuality-specific clubs and organisations; and information that may affect the extent or continuation of exemptions from the effects of legislation (such as exemptions for religious and some educational bodies).¹³

Provisions of State and Territory Legislation

4.6 Much of the State and Territory legislation that exists has the mechanisms required to meet the multiple objectives of anti-discrimination legislation, which are to:

- prohibit discrimination in specific areas;

⁶ Evidence, Tasmanian Gay and Lesbian Rights Group, p. 359.

⁷ Technically the wording of the definition of 'family responsibility or family status' would not exclude same sex couples.

⁸ Submission, Gay and Lesbian Counselling Service of WA Inc., Vol 1, pp. 147-148.

⁹ See below, Paragraph 4. 24.
Evidence, Dr Vivienne Cass, p. 522.
Evidence, Commissioner for Equal Opportunity Western Australia, p. 534.

¹⁰ Evidence, HREOC Tasmanian Office, pp. 353-354.
See Chapter 2, Paragraphs 2.45 - 2.47.

¹¹ See Chapter 2, Paragraph 2.47.

¹² See Chapter 5, Paragraph 5.176.

¹³ See below, Paragraphs 4.183-4.193 and Recommendation 8.

- ensure access to benefits and services on the same terms as the rest of the community;
- educate the community about discrimination; and, in some instances,
- undertake positive action in respect of past loss and discrimination.

4.7 Nonetheless, there are some differences between the States and Territories that reflect different concerns, and ultimately affect the extent to which the above objectives are met. These include:

- groups covered by legislation - variations between States and Territories mean some sexualities and gender status are not protected;
- the range of areas where discrimination is prohibited (such as employment and the provision of goods and services). Variations may mean seriously disparate situations for people on the basis of their living in a particular State or Territory;
- exemptions from the provisions of legislation, which may affect employment and education in particular; and
- the inclusion of affirmative action or positive discrimination sections.

Groups Covered by Legislation

Australian Capital Territory

4.8 The ACT probably provides the widest coverage both in coverage of sexualities and associates/family and in the type of protection extended. The ACT *Discrimination Act 1991* uses the terms 'sexuality' and 'transsexuality'. Sexuality includes 'heterosexuality, homosexuality (including lesbianism) or bisexuality'. "Transsexual" is separately defined as meaning a person of one sex who assumes the bodily characteristics of the other sex whether by medical intervention or otherwise or identifies himself or herself as a member of the other sex or lives, or seeks to live, as a member of the other sex. The definition of transsexual is very broad, and equivalent to 'transgender' in other legislation. There is no meaningful distinction between *recognised* transgendered persons and other transgendered persons as there is in the NSW legislation.

4.9 Other relevant ACT legislation includes:

- *The Domestic Relationships Act 1994*
- *The Family Provision Act 1969*, amended by the *Family Provision (Amendment) Act 1996*; and
- *The Administration and Probate Act 1929*, amended by the *Administration and Probate (Amendment) Act 1996*

4.10 This legislation does not refer to sexuality or gender, but expands the nature of partnerships to include same sex partners and provide to them many of the rights available to other spouses, married or de facto.

New South Wales

4.11 New South Wales anti-discrimination legislation in this area refers to discrimination on the grounds of 'homosexuality' and 'transgender'. While 'homosexual' is defined by the legislation as male or female homosexual, it is recognised that it would be preferable to use the terms gay and lesbian in order to encourage lesbians to perceive the legislation as providing protection to them as well as to male homosexuals,¹⁴ a point made by several other submissions from other States in respect of the proposed Commonwealth legislation.¹⁵

4.12 Although the legislation covers transgender people it does not specifically assist bisexual people,¹⁶ unless they identify as homosexual. Heterosexuals are not covered under this legislation, and asexuality is not specified.

4.13 In May 1996, the New South Wales Parliament passed the *Transgender (Anti-Discrimination And Other Acts Amendment) Act* which amended the *Anti-Discrimination Act* to additionally prohibit discrimination on transgender grounds. Whilst this legislation differentiates between "recognised transgender persons" (the record of whose sex has been altered) and "transgender persons" (who have not undertaken any reconstruction surgery and may never do so), it operates to provide anti-discrimination protection to both groups, with one notable exception, in the area of status recognition.¹⁷ The legislation allowed for consequential amendments to a substantial number of NSW Acts, including the *Crimes Act* and the *Wills, Probate and Administration Act*.

4.14 The NSW *Anti Discrimination Act* includes amongst transgendered persons a person who 'being of indeterminate sex, identifies as a member of a particular sex'.¹⁸ The provision was intended to assist persons whose biological sex is not clearly either male or female (e.g. hermaphrodites).¹⁹

South Australia and the Northern Territory

4.15 South Australia and the Northern Territory both use the term "sexuality". In both Acts sexuality is defined as meaning heterosexuality, homosexuality, bisexuality or transsexuality (or "transsexual" in South Australia). This is somewhat confusing given that

¹⁴ Evidence, Anti Discrimination Board of New South Wales, p 110.
Submission, Anti-Discrimination Board of NSW, Vol 8, p. 1823.

¹⁵ See Chapter 1, Paragraphs 1.18-1.21.

¹⁶ Evidence, Anti Discrimination Board of New South Wales, p.111.

¹⁷ See Chapter 2, Recommendation 1.
Chapter 4, Paragraphs 4.95-4.102.

¹⁸ New South Wales *Anti Discrimination Act 1977*, Section 38A(c).

¹⁹ Evidence, Dr Finlay, p. 387.

transgender issues are about gender and not sexual orientation,²⁰ and transsexuals may be seen by some people as a sub-group of transgendered persons, not vice-versa.²¹

4.16 Transsexuality is not further defined in the Northern Territory legislation. South Australia defines 'transsexual' as meaning a person of one sex who assumes characteristics of the other sex, but does not determine the meaning of the term "characteristics".

4.17 In theory, protection for transsexuals in South Australia includes prohibition of direct and indirect discrimination. It is not clear how the test for indirect discrimination would work in respect of transgender persons. The test requires a person not being able to comply with a requirement with which a substantially higher proportion of persons of a different *sexuality* can comply and which is not reasonable in the circumstances. Strictly speaking this would require that persons of either male to female status, or female to male status (formal or otherwise) be compared with any group in the community which was not transgender. This does not take into account the confusion caused by the word 'sexuality' in this context, nor is there any distinction between male and female transgender people.²²

4.18 The *Northern Territory Anti Discrimination Act* prohibits discrimination only on the basis of a person treating another person less favourably (Section 20) because of any of the specified attributes, and does not have an indirect discrimination clause.

4.19 The South Australian *Sexual Reassignment Act 1988* regulates the practice of sexual reassignment surgery and the subsequent alteration of documents such as recognition certificates (Part III). Neither the *Act* nor the *Regulations under the Sexual Reassignment Act 1988* deal with issues of people refusing to acknowledge a change of gender.

Queensland and Victoria

4.20 Queensland and Victoria both use the term "lawful sexual activity", but this is not defined; and logically speaking could not include transgender people except on the basis of their sexual orientation.²³ Organisations in both states have acknowledged that transgender

²⁰ Submission, South Australian Commissioner for Equal Opportunity, 'I feel that when a person identifies as or assumes the characteristics of the other sex this is an issue of gender or sexual identity, it is not an issue of sexuality or sexual orientation.' Vol 2, pp. 251-252.
Evidence, Queensland Anti Discrimination Commission, p. 686.

²¹ See Chapter 1, Paragraphs 1.38-1.44.
Evidence, Australian Transgender Support Association, p. 790.
Submission, Ms A Hughes, Vol 6, pp. 1284-1295.
Submission, Ms N May-Wilby, Vol 8, pp. 1890-1895.
The main issue is that transsexuals are seen as persons who have undergone sexual reassignment surgery, and the term transsexuals includes both transsexuals and also other people who have not undergone surgery, and are not pre-operative (intending to have surgery).

²² The NSW legislation also requires that the transgender person be compared with persons who are not transgender (Section 38B (1) (b)). In both cases, the test of 'reasonableness' may be the deciding factor. Alternatively, unfavourable treatment on the basis of characteristics may be a more clear-cut means of determining discrimination.

²³ Evidence, Queensland Anti Discrimination Commission, p. 683.
Evidence, Australian Transgender Support Association Inc, pp. 790-791.

people are not covered by their legislation.²⁴ There was some suggestion that aspects of transgender issues might be covered under 'sex' provisions of legislation. However, most sex discrimination legislation tends to exclude people of transgender status, though not intentionally, through the terminology used and the grounds of discrimination:

'...in so far as transgender issues do not relate to a sexual orientation they will not come under the lawful sexual activity provisions. In so far as transgender issues relate to someone who identifies as a particular gender, they cannot lodge a complaint under another gender.'²⁵

4.21 In both States the term "lawful sexual activity" has been interpreted to include homosexuality and heterosexuality, and implicitly includes bisexuality insofar as this is not unlawful, although it does not specifically mention this nor refer to asexual status.²⁶ As noted above, the term 'lawful sexual activity' was seen as inappropriate by some witnesses because it defines people by sexual activity rather than by any other qualities.²⁷ The intention of the Victorian legislation appears to have been to provide people with a greater sense of identity:

'In introducing the legislation the Attorney General explains that the term was intended to cover identity and status. So it is not just a question of activity; it is a question of identity and status, and that is the status of being homosexual, lesbian and/or heterosexual.'²⁸

4.22 However, the term 'lawful sexual activity' has also been criticised not only on the basis of its defining people by sexual activity, but because it does not clearly define what is meant by sexual activity. Physical contact which is not explicitly sexual but may be indicative of a sexual relationship (such as holding hands) may not be a protected activity. Conversely, it is not clear if it is an offence.²⁹

Tasmania

4.23 In Tasmania, certain sexual acts were proscribed under the *Criminal Code Act 1924*, including male and female homosexual acts and some heterosexual sexual activity.³⁰ These sections were repealed in 1997,³¹ which effectively means that such activity between

²⁴ Evidence, Queensland Anti-Discrimination Commission, p.682.
Evidence, Victoria Equal Opportunity Commission, p. 230.

²⁵ Evidence, Victoria Equal Opportunity Commission, p. 230.

²⁶ Evidence, Victoria Equal Opportunity Commission, pp 221, 225.

²⁷ See Chapter 1, Paragraphs 1.30-1.35.

²⁸ Evidence, Victorian Equal Opportunity Commission, p. 228.

²⁹ Evidence, Australian Federation of AIDS Organisations, p. 716.
See below, Paragraph 4.169.

³⁰ See Tasmania, *Criminal Code Act 1924*, Sections 122 and 123. The relevant sections cover a number of acts 'against nature' such as male and female same sex activity and heterosexual anal sex.

³¹ Tasmania, *Criminal Code Amendment Act 1997*.

consenting adults is not unlawful. However, there is no anti-discrimination legislation which provides any protection to non heterosexuals in respect of employment, education, access to goods and services, and so forth, and discrimination in these areas is not prohibited.³² The only anti-discrimination legislation in Tasmania is the *Sex Discrimination Act 1994*, which specifically refers to 'sex' in terms of 'gender'. As is the case with other sex discrimination legislation, the interpretation of 'sex' or the phrasing of the legislation, or both, would exclude coverage for people of transgender status.³³

Western Australia

4.24 In Western Australia, the *Equal Opportunity Amendment Bill 1996* sought to amend the 1984 *Equal Opportunity Act* by including sexuality as a ground of discrimination. Sexuality included 'bisexuality, heterosexuality, homosexuality, lesbianism or transsexuality', and similar provisions to other State and Territory legislation were made regarding employment, education, access to goods and services, access to places and vehicles, clubs and organisations, sport, land, superannuation and provident funds and insurance (with provisos regarding actuarial data), and special measures for equality, such as sexuality-specific clubs and accommodation. The usual exemptions were proposed regarding religious organisations, and private accommodation. Access to reproductive services (such as IVF) could be limited except on the basis of race. This bill, however, was rejected.³⁴ In August 1997 a similar bill was introduced into the parliament by the Democrats and at the time this report was completed was being considered by a Parliamentary Committee.

4.25 Changes were also sought to the WA Criminal Code which currently explicitly rejects homosexuality as an acceptable practice even though it is no longer criminal.³⁵ Some evidence given to the Committee during its hearings in Perth stated that as a result of the preamble to the decriminalisation legislation, organisations had experienced loss of funding since measures seen as supporting homosexuality were not permitted.³⁶ Reference was made during the Committee's hearings in Perth to State legislation permitting transsexual people to change their status legally,³⁷ but this legislation was subsequently withdrawn.

Reasons given for excluding some sexualities from coverage

4.26 Discrimination on the basis of being heterosexual or bisexual is prohibited in the ACT, NT, South Australia, Queensland and Victoria, but not in NSW. Heterosexuals appeared not to have been included in the NSW legislation mostly on the grounds that they

³² Evidence, Tasmanian Gay and Lesbian Rights Group, pp. 359-360.

³³ See Paragraphs 4.149-4.156 below.

³⁴ Submission, Dr K. Franklin provides comments on the 1996 legislation, Vol 1, pp. 147-148.

³⁵ Evidence, Western Australian Equal Opportunity Commission, p. 545.
Evidence Australian Council for Lesbian and Gay Rights (W.A.), p. 564.
Evidence, PFLAG, p. 655.

³⁶ Evidence, Gay and Lesbian Counselling Service of Western Australia, p.554.
Evidence, Australian Council for Lesbian and Gay Rights (W.A.), p. 564.

³⁷ Evidence, Western Australian Equal Opportunity Commission, pp. 545-546.

were not discriminated against on a systemic basis.³⁸ The exclusion resulted from an earlier need to provide some protection for homosexuals relative to heterosexual persons, 'because of the overwhelming weight of evidence that homosexual people are subjected to significant and exceptional levels of discrimination. There was little or no evidence of people being discriminated against on the basis of their heterosexuality.'³⁹

4.27 Although there appeared to be no clear reason for the lack of coverage for bisexuals in New South Wales, some bisexuals indicated there was prejudice in the gay and lesbian community against them.⁴⁰ The Anti Discrimination Board of New South Wales considered that some bisexuals would have been excluded from cover under the state legislation 'as they do not identify themselves as gay or lesbian.'⁴¹ Consequently, there was some consideration that the New South Wales *Anti Discrimination Act 1977* should be amended to cover heterosexuality and bisexuality, and operate in conjunction with Commonwealth legislation,⁴² although still providing special measures for homosexuals.

4.28 The Committee believes that there should be specific protection for bisexuals.

Recommendation 1

That bisexuality be retained as a distinct sexuality in the definition of 'sexuality' in Clause 5 of the *Sexuality Discrimination Bill 1995*.

4.29 The Committee has also recommended, at Recommendation 2 of Chapter 1, that bisexual and transgendered persons have access to services provided by government funded organisations.

4.30 A similar opposition to coverage for heterosexuals was expressed by some witnesses in other States. There was concern that the inclusion of 'heterosexual' in the definition of 'sexuality' would effectively weaken the provisions of the legislation, by extending protection to all as a philosophical view which clashed with reality: 'I think we have to be very careful when we are creating legislation such as this not to give the illusion that there is a level playing field.'⁴³ For others, there was a belief that while heterosexuals could be included in

³⁸ *Submission*, Anti Discrimination Board of New South Wales, Vol 8, p. 1821. *Evidence*, Ms K Walker, pp. 279-280.

³⁹ *Submission*, Anti Discrimination Board of New South Wales, Vol 8, p.1821.

⁴⁰ See Chapter 1, Paragraphs 1.22-1.24. Chapter 2, Footnote 56. *Evidence*, Australian Bisexual Network, pp 671,672, 676.

⁴¹ *Submission*, Anti Discrimination Board of New South Wales, Vol 8, p. 1822.

⁴² *Submission*, Anti Discrimination Board of New South Wales, Vol 8, p. 1821-1823. *Evidence*, Anti Discrimination Board of NSW, in respect to bisexuality, 'there is almost no evidence or research on this question whatsoever. In that sense, therefore, it is in there for the sake of completeness rather than anything else.' p. 111.

⁴³ *Evidence*, Gay Men and Lesbians Against Discrimination (GLAD), p. 339. *Evidence*, Queensland AIDS Council, p. 716.

some areas, to counter community perceptions of bias, special measures or positive discrimination action should not be extended to heterosexuals.⁴⁴

4.31 Recommendation 4 in Chapter 1 recommends the retention of 'heterosexuality' as part of 'sexuality'. In its further consideration below of the issue of exemptions and of exceptions to the provisions of legislation, the Committee has noted its general objection to the exclusion of any group from publicly funded services.⁴⁵

4.32 Insofar as New South Wales anti-discrimination legislation provides substantial compensation, generally well above that paid through HREOC, a failure to amend State and Territory legislation to cover heterosexuals and bisexuals may effectively exclude some categories of people from access to appreciable compensation, or any other specific benefit of legislation.⁴⁶

4.33 No legislation in Australia currently specifically refers to asexuality, although there was little resistance to this being excluded from coverage.⁴⁷ Recommendation 3 in Chapter 1 includes 'asexuality' in the definition of 'sexuality'.

Additional Coverage Through Disability Status (including HIV/AIDS)

4.34 Anti-discrimination legislation in all states and territories except Tasmania prohibits discrimination on the basis of disability or impairment, and the definition of impairment or disability is important. Queensland, NSW, Victoria, ACT, NT and South Australia all include within the definition a term such as 'the presence within the body of organisms that may cause disease'. Although, practically speaking, this could include almost everyone, the usual interpretation has been limited. The definition has been seen as of particular relevance to people with HIV/AIDS and covers situations where it could be claimed that it is not the sexuality of a person but their health status that is the cause of discrimination. Of particular importance in this definition is the phrase 'capable of causing disease' or an equivalent, a phrase which may provide a basis for current discrimination on the basis of assumed status in the future.⁴⁸

4.35 It is not clear if the term used in the Western Australian legislation ('any defect or disturbance in the normal structure or functioning of a person's body')⁴⁹ would also cover HIV/AIDS.

⁴⁴ *Evidence*, Dr Vivienne Cass, p. 524. Chapter 5, Paragraphs 5.110-5.123. Although heterosexual organisations are not prohibited from requesting permission to operate special services, they would have to demonstrate need.

⁴⁵ See below, Paragraph 4.131. Chapter 5, Paragraph 5.123.

⁴⁶ See below, Paragraph 4.175.

⁴⁷ *Evidence*, Australian Bisexual Network, 'If a person chooses to identify as asexual, in that they are not attracted to any person or any gender, then that could be legitimate grounds for having that included.' p. 673. *Evidence*, Queensland Anti Discrimination Commission, p. 686.

⁴⁸ See Chapter 4, Paragraphs 4.80-4.84, 4.88.

⁴⁹ *Western Australia, Equal Opportunity Act 1984*, Section 4 Interpretation.

4.36 Only the NSW *Anti-Discrimination Act 1977* specifically refers to HIV/AIDS. In that legislation there are specific provisions in respect of vilification on the basis of HIV/AIDS status. However, as this status is either presumed or actual, and in the present, it cannot cover future presumed status, which, as noted, would have to be developed through the separate disability/impairment provisions in the same legislation.⁵⁰

4.37 In Queensland there has also been some utilisation of disability provisions in the anti-discrimination legislation since there is no specific protection of HIV/AIDS status under sexuality:

'...discrimination on the basis of sexuality to some extent is picked up ... through the impairment disability provisions of the act, with the HIV people in particular using it under that heading rather than the specific headings around gay and lesbian identity.'⁵¹

4.38 The Commonwealth *Disability Discrimination Act 1992* provides Commonwealth coverage on the grounds of a range of disabilities, and would cover HIV/AIDS.

Employment of People With A Disability Or Impairment

4.39 All legislation which prohibits discrimination on the basis of disability or impairment does allow certain exemptions in respect of the cost or extent of special services or accommodation in the workplace that would be required. On these grounds it would be possible to exclude from employment anyone whose status required adaptation or services which it was not reasonable to expect an employer to provide.

Associates and Family

4.40 Most legislation which provides protection to people based on sexuality or gender status also provides some protection to the associates and family of people who are non-heterosexual or transgender. These provisions are similar to those available in other anti-discrimination legislation which covers the family and/or associates of a person with the relevant attributes.

4.41 The benefits of these provisions are that they can provide a remedy to people who are discriminated against because they have an association with an individual. This enables action to be taken by a parent or guardian in respect of any under age person or a person who may have a disability or impairment affecting their capacity to take such action. It also allows those who have been affected by the actual or presumed standing of an associate or family member to take action.

4.42 However, there can also be disadvantages depending on the structure of the relevant legislation. For example, a wide definition of 'relative' may mean that a fairly broad exemption in respect of accommodation or employment is available (thus excluding more people from access to some forms of accommodation). However, if the same definition of

⁵⁰ See below, Paragraphs 4.82-4.84.

⁵¹ Evidence, Queensland Anti Discrimination Commission, p. 682.

family or relative is retained in all parts of the legislation, a wider range of people may claim to have been affected by discrimination in an area.

4.43 A further benefit of some legislation - primarily that of the ACT - is that the concept of partner or relationship is broad, allowing for coverage of same sex relationships and other partnerships. However, there is no necessary express prohibition of discrimination against people in these relationships, but this may not be necessary given the very wide anti-discrimination legislation in the ACT.

Family

4.44 In the ACT *Discrimination Act 1991*, the relevant terms are de facto spouse; near relative; and relative. A de facto spouse is a person of the opposite sex, thus limiting the operation of discrimination in respect of marital status to persons of opposite sexes. A near relative is a spouse, de facto spouse, a parent, child, grandparent, grandchild, brother or sister. A 'relative' is a person related by blood, marriage, affinity or adoption and a spouse or de facto spouse of any of these. Affinity is not defined, but could be read broadly given that usual categories of relative are listed separately. The NSW *Anti Discrimination Act 1977* includes both 'relative' and 'near relative' which include the same categories of persons as the ACT legislation.

4.45 The South Australian *Equal Opportunity Act 1984* refers to near relatives (spouse, parent, child, grandparent, grandchild, brother and sister) but not to 'relative'. The legislation also refers to 'spouse' but does not define this except to say that a putative spouse is included. The Northern Territory *Anti Discrimination Act 1992* refers to de facto spouse, spouse, parent and parenthood, as well as 'near relative' (comprising the same categories, except spouse, as the South Australian *Equal Opportunity Act*), but not 'relative'.

4.46 The Victorian *Equal Opportunity Act 1995* refers to de facto spouse (opposite sex), parent and 'relative'. The term 'relative' includes a wide range of people including those who in other states would be in 'near relative' categories, and their spouses, de facto or otherwise.

4.47 The Queensland *Anti Discrimination Act 1991* refers to de facto spouse, parent, and parental status. The term 'relation' is comprehensive in coverage:

'...relation to the person by blood, marriage, affinity or adoption, and includes a person who is wholly or mainly dependent on, or is a member of the household of, the first person.'⁵²

4.48 The ACT *Family Provision Act 1969* as amended refers to 'domestic partner' and 'domestic relationship', and includes as a 'spouse' an 'eligible partner', thus recognising same sex relationships on certain conditions and the eligibility of members of those relationships to various benefits. The ACT *Administration and Probate Act* as amended also accepts an 'eligible partner' as a 'spouse', with similar acceptance of same sex relationships. The ACT *Domestic Relationships Act 1994* clearly includes same sex relationships and relationships between people of different households, and children within these relationships.

⁵² Queensland *Anti Discrimination Act 1991*, Section 4.

Effect of the Family Provisions in Legislation

4.49 The effect of these provisions is extensive. In terms of accommodation, the ACT exempts accommodation to be used by the individual or near relatives, which is a smaller category of persons than in other states - thus, the provision actually limits the exemption (Section 26). There is no exemption in respect of family based employment or small businesses employing family members as well as others, although in theory it would be possible for a person to discriminate against a person's sexuality through using the impairment provisions of Section 49. Employment within a person's home is exempt from any provision.

4.50 In New South Wales, employment in a person's home is exempt; an exemption in relation to accommodation is available only in respect of that accommodation being also used by the person or a 'near relative' (Section 38N(3), transgender, and Section 49 ZQ(3), homosexuality). There is an exemption in respect of small business (see Section 38C(3) in respect of transgender persons and Section 49ZH(3) in respect of homosexuals). Obtaining an exemption in employment with respect to disability relating to HIV/AIDS would be difficult since the exemptions relating to employment of people on disability grounds are more stringent than in other States.

4.51 Although the South Australian Act refers to 'near' relatives in terms of exemptions, the broad nature of this category ensures that the exemption is equally broad (Section 40(3)). Employment within a person's home is exempt (Section 34(1)), but although there is no specific reference to small business or family based business exemptions, South Australia does allow discrimination in respect of some partnerships.⁵³ In the Northern Territory, there is an exemption in respect of employment in a person's home (Section 35(2)), and the exemption in respect of accommodation is as broad as that in the South Australian legislation.

4.52 In both the Victorian and Queensland legislation employment in a person's home is exempt (Victoria, Section 16 and Queensland Sections 26 and 27). Victoria, however, has special exemptions also for family employment and small businesses which can exclude people from employment .

4.53 Section 20 of the Victorian legislation states that 'An employer may limit the offering of employment, in a business carried on by him or her, to people who are his or her relatives.' Section 21 of the legislation gives an exemption in respect of small business which is defined as being no more than five people on a full-time basis, including those to whom employment is offered, but not including relatives. The broad definition of relative in Victoria means that these exemptions are also broad, as is the exemption for shared accommodation (Section 54). Victorian legislation also allows discrimination in respect of partnerships of under five persons (Section 32). Other exemptions in relation to partnerships, including 'reasonable and genuine requirements' of partnership may extend discrimination on other than 'family' grounds.⁵⁴

⁵³ South Australia *Anti Discrimination Act 1984*, Section 33.

⁵⁴ See below, Paragraphs 4.194-4.197.

4.54 In Queensland it is also possible to discriminate in respect of partnerships of under six people (Sections 16-18). In the Queensland legislation there is a broad definition of relation, but no definition of 'near relative'. However, 'near relative' is the term used in the accommodation exemption (Section 87), which may cause some problems in this field.

Next of Kin

4.55 One of the most common complaints made by witnesses to the inquiry was their exclusion from various important stages of life because of the limited provisions of the law in respect of family relationships:

The consistent theme in current legislation that discriminates against persons in same-sex relationships is one of interpretation of legislative definitions. The main qualifier to the inclusion of and legitimacy of persons in same-sex relationships is the use of 'spouse' and 'relative'. These definitions can either overtly or inadvertently discriminate against same-sex couples.⁵⁵

4.56 The coverage offered by the term 'affinity' is not specified in any of the legislation which refers to association by affinity.⁵⁶ In most cases mentioned by witnesses, the established role of family and relatives in various situations took precedence, and partners in same sex relationships were excluded. This situation could also occur in States where the definition of 'relative' was sufficiently flexible to include same sex partners.⁵⁷

4.57 The areas of exclusion included:

- advice of an accident or emergency concerning a partner;
- decisions concerning health care;
- autopsies;
- funeral arrangements;
- compensation payable in respect of a crime or accident.

4.58 The status of individuals in respect of the above matters is based on assumptions about their standing in relation to the relevant individual. All relationships have been assumed to exist through blood or marriage, and legislation reflects this. The limited status of others - such as same sex partners, or people in a range of different household arrangements - results from the law's inability to recognise relationships outside these grounds and the fact that it has not allowed 'marriage' to certain groups. Although de facto heterosexual partners now have an established legal status in respect of the above issues, this is not invariably the case for same sex partners. Where there is no legal support for them - through being included as a 'relative', for example - their status depends on the attitude of the recognised family. In some instances - and this is an area for state legislation to clarify - organisations such as police and hospitals may still maintain a traditional understanding of 'next of kin' or 'relative', regardless of legislation:

⁵⁵ *Submission*, Homodefactors Association Inc, (emphasis in original), Vol 10, p. 2430.

⁵⁶ *Submission*, Homodefactors Association Inc, Vol 10, p. 2431.

⁵⁷ Example, *Evidence*, Queensland Association of Gay and Lesbian Rights, pp. 722-723.

'Intensive Care Units allow next of kin to visit. If your partner's family arrive and don't wish you to visit they can prevent you being admitted. As next of kin are always notified first if someone is involved in an accident or becomes seriously ill, there is every possibility that you may not be notified at all.'⁵⁸

4.59 Although the ACT legislation on domestic relationships allows for a wide range of such arrangements, it does not make any specific reference to the status of people within such relationships regarding other matters. No legislation in force in any other jurisdiction addresses such issues. The ACT *Administration and Probate Act* as amended does address the issue of intestacy, and makes provision for partners, including same sex partners, as well as for legal spouses.

4.60 One of the suggestions made to address this problem was that legislation be reviewed to make various terms gender neutral or more comprehensive:

'The adjustments required are that:

- a determination be made that all instances of '**spouse**' be interpreted as including individuals in defacto relationships regardless of their gender....
- a determination be made that all instances of the terms '**next of kin**', '**relative**' or '**near relative**' have the same implications for a '**spouse**' of the same gender as currently exists for those of an opposite gender.'⁵⁹

4.61 As far as Commonwealth legislation is concerned, this could be done as part of the legislative review process.⁶⁰ Some states are already undertaking reviews of their legislation, but the extent of review will depend on the nature of the anti discrimination legislation in place; this may mean that legislation does not extend benefits to some individuals or groups.

4.62 Clause 107 of the *Sexuality Discrimination Bill 1995* requires Commonwealth legislation to reflect the status of same-sex couples as de-facto heterosexual couples. However, as noted by many witnesses, this will not provide access to a range of services for same sex couples. Furthermore, unless a broader definition of 'associate' is accepted, or specific amendments made to cover transgender relationships, the protection for transgendered persons will also be limited. This matter has been addressed by the Committee at Chapter 6.⁶¹

⁵⁸ *Submission*, Ms Thompson and Ms Connor, Vol 5, p. 930.

⁵⁹ *Submission*, Homodefactors Association Inc. (emphasis in original), Vol 10, p. 2432.

⁶⁰ See Chapter 6, Paragraphs 6.34-6.35 and Recommendation 1.

⁶¹ See Chapter 6, Paragraph 6.69 and Recommendation 5.

Same Sex relationships

4.63 The ACT legislation provides a range of protection for people in same sex relationships and in other relationships. Queensland's definition of relative is sufficiently broad to include a same sex relationship, although it is not known if this was intended and the Western Australian legislation also has a wide definition. The New South Wales *Anti Discrimination Act* definition of 'associate' could include a same-sex relationship.⁶²

4.64 However, no State or Territory provides in its anti-discrimination legislation any specific protection in respect of property and other arrangements for members of a same sex relationship and any children. The protection that is available would be in respect of the sexuality or transgender status of the persons, and discrimination experienced on this ground.

4.65 Nonetheless, each state may have sufficient flexibility within other legislation to provide some coverage for same sex couples. In New South Wales, for example, the laws relating to family provision, especially in respect of members of households, allow same sex couples to claim membership of a household, although some form of dependency must also be established.⁶³

Marital Status

4.66 No legislation includes same sex couples under 'marital status', thus limiting some areas of discrimination protection.⁶⁴

Associates

4.67 An associate is not defined in the *ACT Discrimination Act 1991*, although there is reference to a carer; discrimination on the grounds of 'association' 'whether as a relative or otherwise', is proscribed (Clause 7). The term associate is not used in the South Australian *Equal Opportunity Act 1984*, and no protection is offered to persons who are associates of a person with specific attributes. The Northern Territory *Anti-Discrimination Act* includes among attributes 'association with a person who has, or is believed to have, an attribute referred to' (19(1)). The NSW *Anti Discrimination Act 1977* refers to associates in broad terms as:

'...any person with whom the person associates, whether socially or in business or commerce, or otherwise; and

any person who is wholly or mainly dependent on, or a member of the household of, the person.'⁶⁵

⁶² See below, Paragraphs 4.67, 4.69.

⁶³ Anthony Dickey, *Family Provision After Death* (1992), p. 43.

⁶⁴ *Submission*, Queensland Anti Discrimination Board, Vol 2, p. 238. *Submission*, Australian Council of Trade Unions Queensland Branch, Vol 11, p. 2440.

⁶⁵ New South Wales, *Anti-Discrimination Act 1977*, Section 4(1).

4.68 The Victorian *Equal Opportunity Act 1995* does not refer to associates, but does include 'carer' in its definitions and lists 'status as a parent or carer' in attributes. It also includes in attributes 'personal association, (whether as a relative or otherwise), with a person who is identified by reference to any of the above attributes.' The Queensland *Anti Discrimination Act* does not refer to 'carer' but does state that 'association with, or relation to, a person' with an attribute is deemed to be protected (7(1)).

Effect of Associates Provisions in Legislation

4.69 All States except South Australia provide protection to people on the grounds of their being an associate of a person. The New South Wales legislation's definition of associate includes a category of person (member of household of, or dependent on, a person) the same as the ACT definition of a 'relative'. In New South Wales legislation, social relationships are specifically included whereas in other legislation social relationships can be inferred from the term 'personal' association.

4.70 Personal or social association may in fact cover a wide range of relationships, thus providing protection to a number of people who are not relatives but may be closely involved with a person. Business associates are covered by all legislation, except South Australia, and South Australia specifically allows discrimination on the basis of sexuality (including transgender status) in respect of partnerships of less than six persons.⁶⁶ Other States and Territories do not refer to 'sexuality' or gender status in providing exemptions in respect of partnerships.

4.71 In the *Sexuality Discrimination Bill 1995*, the definition of 'associate' is somewhat limited. It only provides protection to persons based on their dependence on others. Evidence provided to the Committee suggested that in some relationships financial dependence or interdependence may be less common than emotional dependence or interdependence. Membership of the same household may not adequately define the relationship of other people or explicitly accommodate the situation of those who have more than one significant other. This situation could be covered by the term 'relative' which means 'another person to whom the person is related by blood, marriage, affinity or adoption'; however, the term 'affinity' is not defined and hence may not explicitly cover a number of persons who may nonetheless be directly affected by discriminatory behaviour.

4.72 If the intention of the bill is to provide protection to persons who are discriminated against because they are a partner of a person or in some way related to the person or the partner, this intention should be clearly stated.

Recommendation 2

That in the *Sexuality Discrimination Bill 1995* subparagraph (b) of the current definition of 'associate' be amended as follows:

Clause 5, Definitions
'associate, (a)

(b) another person who is a partner of, or who is wholly or mainly dependent on a partner or on a member of the household of, the person;

4.73 The objective of the change is to ensure that persons who are partners (same sex or otherwise) are able to seek the protection of the legislation with respect to harassment, vilification etc., regardless of the financial relationship between them - see, for example, sub clause 6(1) which refers to the sexuality of the 'aggrieved person, or of a relative or associate of the aggrieved person'. If partners are not deemed to be either an associate or a relative (by affinity or through being a 'spouse'), then there is no basis for them to take action in respect of discrimination. Similarly, others, such as the children of partners, should also have this protection.

4.74 An alternative would be to define the meaning of 'affinity' in the term 'relative' or to include partners as 'spouses'. This latter alternative will come into effect in respect of Commonwealth legislation (see Clause 107). However, as the intention of the legislation is to provide coverage in a much wider area the change to Clause 5 is also required.

Perceptions of Sexuality and Gender Status

4.75 Some current anti-discrimination legislation provides protection to people, and, in some cases, the associates or family of people, who are discriminated against through being *believed* to be non-heterosexual or transgender. The extent of coverage for transgender people depends on whether transgender status is recognised as an attribute in legislation; thus, there is no protection for transgender people in the Queensland and Victorian legislation.

4.76 In the ACT, the *Discrimination Act 1991* refers to attributes 'that a person is presumed to have (Section 7(2)), which would cover both sexuality and gender status, as well as protect an associate or relative. The South Australian *Equal Opportunity Act 1984* refers to unfavourable treatment on the basis of 'a presumed sexuality' (29(3)) which would have to cover, at least in theory, not only sexuality but transgender people.⁶⁷ The Northern Territory *Anti Discrimination Act* refers to association with a person 'who ... is believed to have' an attribute and also states that discrimination takes place 'if a person treats or proposes to treat another person who has or had or believed to have or had ' an attribute (Section 20(2)).

4.77 The NSW *Anti Discrimination Act 1977* makes provision for those who are 'thought of as a transgender person' (Section 38A)'whether the person is, or was, in fact a transgender

⁶⁶ South Australia *Equal Opportunity Act 1984*, Section 33(2).

⁶⁷ Given that transsexual is a category covered under sexuality.

person' and also for those who are thought to be homosexual or whose relatives or associates are thought to be homosexual, whether they are or not.⁶⁸ Under the provisions relating to discrimination on the basis of disability in the NSW legislation, there is a provision in respect of a presumed disability, a disability occurring in the future, and a disability that is presumed to occur in the future:

'A reference in this Part to a person's disability is a reference to a disability:

(a) that a person has; or

(b) that a person is thought to have (whether or not the person in fact has the disability) or

(c) that a person had in the past, or is thought to have had in the past (whether or not the person in fact had the disability); or

(d) that a person will have in the future, or that it is thought a person will have in the future (whether or not the person in fact will have the disability).⁶⁹

4.78 The disability provisions can cover a wide range of disabilities or assumed disabilities. Further protection is provided in NSW to people with HIV/AIDS or those assumed to have this status, with the anti-vilification provisions of the legislation.⁷⁰ This point was made by the Inner City Legal Centre in reference to a case of vilification.⁷¹

4.79 The Victorian *Equal Opportunity Act* refers to discrimination occurring in respect of an attribute 'that a person is presumed to have', 'or to have had it at any time' (Section 7(2)(d)), but not to a future presumed status. The Queensland *Anti Discrimination Act* refers to an attribute that a person is presumed to have or to have had (Section 8), but not to one they may have in the future, or may be presumed to have in the future. As Queensland and Victoria do not provide any protection to transgender persons, except in respect of their 'lawful sexual activity', there is no specific protection available to them in respect of presumed status.

Effects of Perceptions Provisions in Legislation

4.80 Insofar as discrimination may occur in respect of assumed status as well as actual status, these provisions provide a ground for action. All six States and Territories with anti-discrimination legislation relating to sexuality or gender status make some provision for current or past presumed status. For Victoria and Queensland, this can only refer to sexuality and not to gender status.

⁶⁸ NSW *Anti Discrimination Act 1977*, Sections 49ZF and 49 ZG.

⁶⁹ NSW *Anti Discrimination Act 1977*, Section 49A.

⁷⁰ NSW *Anti Discrimination Act 1977*, Section 49 ZXB.

⁷¹ *Submission*, Inner City Legal Centre, Vol 12, p. 2741.

4.81 Future assumed or presumed status is most likely to refer to discrimination in respect of assumed future disorders or ill-health resulting from sexual activity:

'For some time I worked with one of the large Christian care organisations here in Sydney and I heard some of my good Christian colleagues discuss[a potential resident] and the fact that they had the understanding that he was a homosexual and that they did not think he was a proper person to have in that health care hostel, not particularly because he was a homosexual, but that because he was a homosexual he would have problems with anal retention and that they would have to change the sheets too often.'⁷²

4.82 In terms of future assumed status, only New South Wales provides unequivocal protection and this is only in relation to disability and not to transgender status or sexuality. This may mean it is possible to discriminate on the ground that a person had a health problem or a particular status that was not classified as an impairment. However, the wide definition of impairment would probably limit the options of discriminating in this way.

4.83 Another way in which to limit discrimination would be to consider that all discrimination, whether relating to the present or to possible future situations, was based on characteristics of sexuality or gender status, and was therefore prohibited.⁷³

4.84 There is little specific consideration of the extent to which associates and family or relatives are also covered by future assumed status. In all cases where both associates and/or family/relatives are protected, and where future status is also protected, it is likely that coverage will extend to associates and family/relatives in the future. However, only New South Wales currently provides this protection and only in relation to disability.

Protection on the basis of previous action or status

4.85 Some anti -discrimination legislation provides protection for a status that one has had or is presumed to have had in the past. This was not an issue that was discussed in any detail in submissions or verbal evidence, although it was raised briefly in another context: the awareness of discrimination resulting from a person changing sexuality.⁷⁴

4.86 New South Wales provides protection in respect of past status. However, it is not clear how far past status reflects possibly ongoing status as well (such as bisexuality) or if people are likely to take action on the ground of previously having been of a particular sexuality.

4.87 The Committee believes that assumed as well as actual status should be protected especially because people may suffer severe discrimination through being assumed to have a

⁷² *Evidence*, Mr Smith Metropolitan Community Church, p. 172.

⁷³ See below, Paragraphs 4.89-4.93.

⁷⁴ *Evidence*, Senator Murray, p. 560.

status or through a connection with a person assumed to have a status, either as regards sexuality or gender.

Recommendation 3

That Clause 6 of the *Sexuality Discrimination Bill 1995* retain the reference to 'perceived' sexuality of the 'aggrieved person' and his or her relative or associate (6(1), and to an 'aggrieved person or a relative or associate' being discriminated against because of being 'transgender' or because of being 'thought to be transgender' (6(3)).

4.88 Protection in respect of past or future status or assumed, perceived or presumed status is provided in respect of sexuality, which is defined in Clause 5 of the bill as including sexuality 'that presently exists, existed in the past, or may exist in the future'. Although there was limited evidence provided as to transgendered persons moving from one gender to the other on a regular basis, there is no reason not to specify that past or future status should not also be protected for transgendered persons through an additional section being added to the *Sexuality Discrimination Bill 1995*.

Recommendation 4

That past or future status of transgender persons also be protected in the *Sexuality Discrimination Bill 1995*, as follows:

Clause 5, Definitions

'transgender status: a reference to transgender status includes a reference to past or future status or perceived status'

Characteristics of a Sexuality or a Gender Status

4.89 In all anti-discrimination legislation reference is made to various characteristics that are assumed to be a part of the qualities of distinct categories of people. Generally, although these features are not detailed for each individual group, they are deemed to be qualities or features which are seen as detrimental insofar as they have been used in the past to exclude people from access. They are variously described as 'characteristics' or 'imputed characteristics', and are classified as part of the 'attributes' which are proscribed grounds of action. An example of this is seen in the *ACT Discrimination Act 1991*:

'A reference in this Act to an attribute.. shall be read as including a reference to:

- (a) a characteristic that persons with that attribute generally have.⁷⁵

⁷⁵ *ACT Discrimination Act 1991*, Section 7(2). Examples of such characteristics range from interrupted employment patterns or unreliability in the workforce because of child rearing (women); dress and manner (homosexuals and transgender people); unreliability and lack of productivity (people with disabilities in respect of employment).

4.90 Most anti-discrimination legislation prohibits discrimination on the basis of such characteristics, primarily on the grounds that it is not appropriate to categorise people in this fashion even though some people in the relevant group may have some of those characteristics.

4.91 In some legislation, however, it is possible to see some concessions made in favour of the broader community in respect of the supposed characteristics of non-mainstream groups. Two specific instances in the case of State and Territory sexuality and gender legislation are discrimination in respect of employment in services dealing with young people and children (Northern Territory, Victoria, and Queensland) and dress and appearance (South Australia and Victoria).⁷⁶ The first of these exemptions appears sufficiently wide to allow discrimination against persons working in schools and other services as well as in child care. The second exemption is so broad that it gives employers a wide power to discriminate.

4.92 In these instances, preconceptions or stereotypes are permitted to operate, rather than being a basis for a complaint:

'These exemptions signal a bitter irony in that the very statutes which are meant to assist in overcoming discrimination are actually busy entrenching it, by explicitly positing that lesbians and gays pose a threat to children.'⁷⁷

4.93 No legislation specifically permits a stereotype or characteristic of transgender persons, but as transgender people are included in the definition of sexuality in some legislation, then they are also excluded from protection in some areas of employment. This is the case in the Northern Territory and South Australia:

Refusal to accept a status

4.94 One of the main areas of discrimination for transgender people, and to some extent, bisexual people, is that their status is not recognised or is devalued as indeterminate. This can take the form of:

- refusing to treat the person as a person of the sex with which they identify, or as a transgender person;
- refusing to ensure that all transgender people are treated appropriately. Not to do this is effectively to say that all transgender people are transgender, and are not men or women or people who wish to be seen as men or women. Inadvertently, this flaw can occur in legislation,⁷⁸ and
- refusing to acknowledge that bisexuality is a status rather than an interim or imperfect situation.

⁷⁶ See below, Paragraphs 4.203-4.213, especially 4.211.

⁷⁷ *Submission*, Ms J Millbank, Vol 1, p. 119.

⁷⁸ See Chapter 5, Paragraphs 5.76-5.95.

Transgender

4.95 One of the main features of the NSW legislation is the provision of protection in respect of *recognised* transgender people not being accepted as a member of the sex with which they identify:

'A person (the perpetrator) ... discriminates ... if ... the perpetrator:

(c) treats the aggrieved person, being a recognised transgender person, as being of the person's former sex or requires the aggrieved person, being a recognised transgender person, to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex comply or are able to comply...⁷⁹

4.96 The reason for this distinction between recognised transgender people and other transgender people is not clear, although it may be that it is easier for formally transgendered persons to provide documentation as to their status. The effect of the provision would be that post operative transgender people had the right to be seen as men or women, as distinct from being seen or treated as 'transgender' or as a person of their original sex.⁸⁰

4.97 The same protection does not appear to be available in the NSW legislation to persons who are pre-operative or non-operative. In the *Sexuality Discrimination Bill 1995*, there is provision for those who are 'pre-operative' but not for those who are 'non operative'.⁸¹ Nonetheless, many such persons also wish to also be considered as a member of the sex with which they identify.

4.98 One witness noted that the proposed legislation did not provide any protection when a transgender person 'is being required to act as if they were not transgendered':

'For instance, a male to female transsexual might be required to wear male clothing to work. The employer would argue that this was no different from the requirement imposed on his non-transgendered male employees.'⁸²

4.99 This issue is also a problem in terms of indirect discrimination,⁸³ and the proposed Commonwealth legislation currently has no clause relating to indirect discrimination against transgender persons. A clause equivalent to that regarding indirect discrimination against

⁷⁹ NSW *Anti-Discrimination Act 1977* Section 38B (1) (c).

⁸⁰ *Submission*, HREOC, 'there is some support in overseas cases for the view that a failure to recognise legally the reassigned sex of post-operative persons of transgender identity may breach certain human rights obligations pursuant to the European Convention on Human Rights. It has also been suggested that denial of legal recognition could constitute a breach of the ICCPR.', Vol 7, p. 1590.

⁸¹ The current provision is included in the definition of transgender. The proposed changes to this definition (see Recommendations 5 and 6 of Chapter 1) cover both non-operative and pre-operative transgenders.

⁸² *Submission*, Ms S. C. Else, Vol 2, p. 339.

⁸³ See Chapter 5, Paragraphs 5. 65- 5.68.

non-heterosexual persons (Clause 6(2) of the bill) would meet this need. However, it is still important to take into account the differences between transgendered persons themselves:

'...care must be taken to distinguish between the two groups of transgendered persons people (male to female and female to male), because aggregating them, and then talking about proportions, produces anomalous results.'⁸⁴

4.100 This issue is discussed further in Chapter 5 where a recommendation concerning indirect discrimination is made.⁸⁵

4.101 The South Australian Equal Opportunity Commissioner also noted that the current draft of the proposed Commonwealth legislation did not cover all issues relating to discrimination against transgender people, only prohibiting discrimination of transgender when compared with non-transgender persons. It does not take the next step and prohibit the discrimination that occurs when status is not accepted:

'...the Bill does not address the central issue which is that to treat transgender people in a non-discriminatory way means to accept them as a member of their acquired identity rather than as a "transgender".'⁸⁶

4.102 In practical terms there is good reason for this gap in the *Sexuality Discrimination Bill 1995* in that it is more difficult to prove a potential offender knew without doubt of the preference for male or female status of a transgender person. Nonetheless, where a person meeting the definition of a transgender has made his or her preferences known in respect of documentation, ordinary manner of address and so forth, a refusal to accept this preference should be seen as harassment.

Recommendation 5

That transgender persons who have clearly identified as a man or a woman be acknowledged as such

The *Sexuality Discrimination Bill 1995* has accommodated this change at new Clause 6 (5).

Bisexual

4.103 Evidence from representatives of the Australian Bisexual Network provided evidence that they felt discriminated against by both heterosexuals and homosexuals, and were often not accepted by any community:

⁸⁴ *Submission*, Ms S.C. Else, Vol 2, p. 339.

⁸⁵ See Chapter 5, Paragraph 5.68 and Recommendation 3.

⁸⁶ *Submission*, South Australian Equal Opportunity Commissioner, Vol 2, p. 252.

'The dominant ideology in society is that you are straight or you are gay ... Bisexuals are not gays and lesbians, nor are they transgendered persons. The ideology is that bisexuals are gay or lesbian or that they are experimenting heterosexuals. That idea is also prevalent in the gay and lesbian community, that bisexual people are ones that just have not come out as gay or lesbian or as homosexual. While a small percentage may be going through a transition from heterosexual through bisexual to homosexual, a vast majority are truly bisexual in orientation and also in personal identity.'⁸⁷

4.104 Insofar as bisexuals believed they were discriminated against by both heterosexual and homosexual groups, anti-discrimination legislation may need to make more explicit statements on the importance of status recognition for bisexual people.

4.105 The exact nature in which this can be done is not clear insofar as much of the discrimination or harassment may occur in a setting not easily regulated. Recommendation 2 of Chapter 1 has suggested that all organisations provide access to bisexuals who choose to use health, legal and other services. Recommendation 1 of Chapter 2 refers to 'harassment' and can be expanded to include harassment through refusal to accept bisexual status.

Recommendation 6

That the *Sexuality Discrimination Bill 1995* add refusal to accept bisexuality as a distinct sexuality as a ground of discrimination, as follows:

Clause 6(5)(c) Harassment of a person on the grounds of bisexuality includes a refusal to accept bisexuality as a distinct sexuality.

4.106 The *Sexuality Discrimination Bill 1995* includes clauses relating to perceptions of sexuality and transgender status, including that of associates and relatives (Clauses 6(1) and 6(3)).⁸⁸ However, as noted, it does not cover all issues relating to discrimination against transgender people. These issues are considered in further detail in Chapter 5.

Areas Covered by State and Territory Legislation

4.107 In theory State and Territory powers in terms of human rights legislation are extensive, and can cover a range of subjects. The States and Territories that have legislation to prevent discrimination on the basis of sexuality or gender status extend protection to areas such as employment; training, education; insurance and superannuation; access to goods and services,⁸⁹ State and Territory government and local government services and programs

⁸⁷ Evidence, Australian Bisexual Network, p. 671.

⁸⁸ Submission, Gay and Lesbian Lawyers (GALL), 'a provision covering imputed sexuality [should] be included ... irrespective of whether presumptions about the person's sexuality are correct. It is not the sexuality of the victim that should be an element in proving the discrimination, but rather the perceptions or actions of the discriminator.' Vol 3, p. 480.

⁸⁹ See Chapter 2.

including transport services, and access to buildings and vehicles. Recognition of partnerships and family relationships can come under State control, as do probate and intestacy arrangements; determination of the coverage of 'next of kin'; and, possibly, the provision of gender-appropriate services such as accommodation in prisons. States and Territories can develop special measures programs or positive discrimination/affirmative action services; overrule existing discrimination in their own legislation; and create exemptions and exceptions. They may forbid discriminatory measures by trade unions, bodies entitled to assess or grant qualifications, clubs and organisations. They are responsible for the operation of a wide range of public sector services including medical services, education services and the police.

4.108 State and Territory legislation cannot affect Commonwealth employees relative to workplace issues; Commonwealth goods and services, Commonwealth programs including payment of benefits such as social security, veterans affairs, Medicare payments, or superannuation and insurance operated for Commonwealth employees or which is primarily of an inter-State nature.⁹⁰ Commonwealth legislation, based on the external affairs power, can override State and Territory legislation, legislating in areas where the domestic powers of the Constitution would ordinarily not allow Commonwealth jurisdiction. The Commonwealth may also choose to exempt its own laws or State and Territory laws from the effects of anti-discrimination legislation generally, or for a period of time.

4.109 Essentially, there are few areas where States and Territories cannot act. Many of the day to day issues of discrimination occur in arenas which are primarily under State and Territory government control, a point made in many submissions.⁹¹ Employment and access to certain goods and services are obviously crucial issues, and these will be considered in some detail.

Employment

4.110 In all States and Territories with anti-discrimination legislation there is a prohibition of discrimination in employment and related matters such as granting of qualifications. Employment covers public and private sector employment within the control of State government, including small business, family business and small corporations as well as large organisations; and education services, public, private and religious.

4.111 However, this prohibition is modified by various exemptions of a general or specific nature. All States and Territories had exemptions regarding the employment of people in partnerships, although sexuality was only specifically mentioned in the South Australian legislation, with size of a partnership being the relevant factor in other legislation (this is in keeping with such provisions in respect of discrimination on the basis of sex, disability and so on, and is not peculiar to sexuality or gender status).

4.112 Three states specifically limit the opportunities of people working in child care, or with young people, as well as in education services, and these exemptions appear specifically

⁹⁰ See Chapter 3, Paragraph 3.74.

⁹¹ Example, Submission, Ms J Millbank, Vol 1, p. 123.

directed to people of non-heterosexual status. Of these limitations, the most comprehensive were those available in Victoria.

4.113 All states allow exemptions in relation to the training or employment of priests or ministers or equivalents. However, exemptions which allow people seeking to teach in religious schools to be discriminated against on the basis of their sexuality (among other factors) would extend restrictions on employment opportunities somewhat more widely, for reasons which are not directly related to sexuality or gender status:

'Someone's sexuality does not impact on their ability to teach science or grammar or any other field. If there is a religious instruction component in the classes, then the question should be whether or not the teacher preaches the required doctrine, not the very fact of their sexuality.'⁹²

4.114 Employment opportunities were also seen to be limited not so much through exemptions *per se* as through the fact that people were deprived of role models in various areas and learned that they might be excluded from employment in specific fields.⁹³

4.115 The extent to which discrimination which affected a person's own business (as distinct from his employment in another business) was referred to by one witness. In this case, a number of parties, including the local government, appeared to have discriminated against the individual.⁹⁴ The availability of remedies in this instance was not apparent, since vilification provisions in respect of homosexuality were not available in the Queensland legislation.

Accommodation

4.116 Accommodation also covers a very broad category of residential services, including hotels, motels, aged care services, young people's services, refuges, accommodation for the homeless, boarding houses, apartments, flats, houses, community based services for a range of people including those with disabilities, halfway houses, services run by church and charity groups and by voluntary organisations of all types, mobile homes, and caravans. Some of this accommodation can be classified as private (houses, apartments, boarding houses), some as public especially hotels and motels, and some as available to particular categories of people, such as the homeless or the aged. Most accommodation is subject to various regulations and is under the control of State and local governments.

⁹² *Submission*, Gay and Lesbian Rights Lobby, Vol 5, p. 1027.
Evidence, ACTU, 'if someone takes on a position in a religious school, part of that undertaking is to uphold the ethos in employment and do all of that, but we say that these exemptions have nothing to do with that.' p. 318.
Evidence, Ms Walker and Mr Morgan, pp 281-282.
 See Chapter 5, Paragraphs 5.30-5.35 on systemic discrimination.
Submission, Australian Catholic Bishops Conference, stated that although there was no specific section in the draft legislation regarding exemptions equivalent to S38 of the *Sex Discrimination Act 1984*, an undertaking had been given that religious schools would be exempt, Vol 4, p. 719.

⁹³ See Chapter 2, Paragraphs 2.7, 2.13-2.17.

⁹⁴ *Submission*, Mr D. More, Vol 1, pp. 163-167.

4.117 Most anti-discrimination legislation necessarily provides exemptions regarding accommodation, usually so that special purposes and needs can be met⁹⁵ or so that individual choices in respect of shared accommodation can be met.⁹⁶

4.118 There was some concern expressed in relation to access to accommodation and this was on a number of grounds. The first was the refusal of access to accommodation⁹⁷ and this included some opposition to exclusion of heterosexuals from 'private' accommodation.

4.119 There was also some concern relating to various definitions of accommodation, with a belief that some definitions would be so broad that people might be unable to obtain any form of accommodation such as a room at a hotel. However, distinctions are clearly made in all legislation between private and public accommodation, and between accommodation services which may seek an exemption on the grounds of size, number of places available, and the cost of providing a service for persons of the opposite gender to those usually accommodated. Some small hotels, motels, boarding houses and holiday type accommodation may well be exempt, depending on size and on the number of family members residing on the premises. However, it is unlikely that most such commercial accommodation would fall into this category.

4.120 Private accommodation for rent such as houses and flats are not exempt from the legislation in most cases unless the accommodation is fairly small and the owner/individual or family members will be on the premises.⁹⁸ In respect of the sale of such accommodation, the usual provisions apply. One witness referred to discrimination in respect of private accommodation already secured.⁹⁹ Such actions are contrary to legislation unless any of the above exemptions apply, or unless some agreement was made regarding conditions of tenancy.

Goods and Services

4.121 Access to various goods and services and to insurance and superannuation were also matters raised by a number of submissions.¹⁰⁰ Many of these goods and services are matters which are under State jurisdiction, and this was noted by many witnesses.¹⁰¹ For this reason, a number of submissions or oral evidence stated the importance of any Commonwealth legislation having the power to override State laws which allowed discrimination in service provision.¹⁰²

⁹⁵ See below, Paragraphs 4.192-4.202.

⁹⁶ See below, Paragraph 4.202.

⁹⁷ *Submission*, Ms. L. Darling, Vol. 1, p. 153.

⁹⁸ See above, Paragraph 4.42.

⁹⁹ *Evidence*, Lesbian and Gay Community Action, where reference was made to a woman's property being removed from her rented accommodation presumably because she was lesbian, p. 462.

¹⁰⁰ See also Chapter 2 and Chapter 6.

¹⁰¹ *Evidence*, Gay and Lesbian Rights Lobby, p.185.

¹⁰² See Chapter 6, Paragraphs 6.22-6.24.

4.122 As noted in Chapter 2, an extensive range of goods and services is available to the mainstream community, and a number of groups believed that their access to such services was compromised, or that the services which were available were inappropriate, or both.¹⁰³ Hence, there was a demand both for increased access and for the structuring of services to meet special needs, an issue which is also brought out in the discussion on the need for special services.¹⁰⁴

4.123 Those services most complained of included education, police, and medical services.¹⁰⁵ In some cases there had been a considerable change for the better in attitude, often as a result of groups working together. In addition, various services such as a medical services had been developed by the communities themselves, generally with little if any funding from governments in order to ensure appropriate services were available.¹⁰⁶ However, sexuality specific services can only be provided in limited areas such as medical and legal services, and only to relatively small numbers of people.¹⁰⁷ Although these specialist services may be preferred by community groups, it will not always be possible to fund them and generic services may have to be used instead.

4.124 In some instances it was thought that the very approach to service provision reflected discriminatory attitudes:

'We believe the medicalisation of transgender needs to be examined; proper counselling and not just assessment as to whether or not a person is transgendered or not is very important; and that educating patients and so enabling them to make informed choice [is] far more desirable.'¹⁰⁸

4.125 Discrimination in respect of other goods and services of a general nature is generally prohibited, allowing people to access clubs,¹⁰⁹ sporting organisations,¹¹⁰ and membership of local government administration¹¹¹ - insofar as the latter may also constitute employment,

¹⁰³ *Submission*, Blue Mountains Lesbian/Gay Community Committee, Vol. 1, p. 178.

¹⁰⁴ See below, Paragraphs 4.220-4.223.

¹⁰⁵ See Chapter 2, Paragraphs 2.6-2.34.
Submission, Mr Levi, Vol. 1, p. 180.

¹⁰⁶ For this reason many witnesses were opposed to the idea of having to accept heterosexuals into services which had been developed for non-heterosexuals, and hoped for an exemption on a special needs basis - See below, Paragraphs 4.223-4.225.

¹⁰⁷ *Submission*, Ms Thompson and Ms O'Connor, Vol. 5, p. 932.

¹⁰⁸ *Submission*, Ms Peters and Ms Langley, Vol. 1, p. 12.

¹⁰⁹ New South Wales, Victoria, Queensland, the Northern Territory and the Australian Capital Territory prevent discrimination in relation to clubs and club membership, although there are usually exemptions in respect of club membership allowing sexuality-specific organisations to operate, partly as an affirmative action or positive discrimination measure. The definition of 'club' is important in limiting access, see Paragraphs 4.129-4.130.

¹¹⁰ Nonetheless, there are some limitations. While there can be no discrimination in relation to administration, there are exemptions in respect of participation in competitive sport. See below, Paragraphs 4.132-4.137.

¹¹¹ Queensland, New South Wales and Victoria prevent discrimination in relation to membership of local government administration.

this is an important protection. In its *Discrimination Act 1991* the Australian Capital Territory prevents discrimination in relation to access to premises, and this may affect both enjoyment of goods and services and employment.

Clubs and Societies

4.126 Access to clubs and organisations is a complex area. As noted below, there is a general interest in increasing access to organisations which provide general services, such as cultural, sporting, and entertainment services.

4.127 However, there is also a recognition that the actual purpose or objective of an organisation can be to maintain a culture or way of life which may be perceived as being threatened by having a membership which has little interest in or capacity to contribute to the maintenance of the objectives of the organisation. For this reason, as well as for a more specific interest in developing a level playing field or 'creating' equality, access to some organisations may be limited:

'...the Board is concerned that the fact that the [Sexuality Discrimination] Bill covers heterosexuality discrimination as well as homosexuality and bisexuality discrimination should not lead to an assumption that there is currently a level playing field ... a high level of discrimination that continues to be suffered by homosexual and bisexual persons means that it should not be unlawful to form a club or incorporated association which has as its principal object the provision of benefits for persons who are homosexual or bisexual ... Although the actions of such clubs ... may be covered by "special measures" provisions, the Board is of the view that it is preferable to specifically exempt them from the operation of the discrimination provisions.'¹¹²

4.128 Safety and security and a sense of belonging were identified as the main reason why non heterosexuals and transgendered persons wished to maintain social and other clubs.¹¹³ However, there was also a belief that sexuality and gender specific organisations should be allowed to provide appropriate and informed services in other areas such as health, counselling and legal services.¹¹⁴

4.129 In the *Sexuality Discrimination Bill 1995* a club is defined as:

Clause 5,

'club means an association (whether incorporated or unincorporated) of at least 30 people associated together for

¹¹² *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1829.
Evidence, GLAD, pp 339-340.

¹¹³ *Evidence*, GLAD, p. 340.

¹¹⁴ *Evidence*, Gay and Lesbian Rights Lobby, p. 183.

social, literary, cultural, political, sporting, athletic or other lawful purposes that:

- (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and
- (b) sells or supplies liquor for consumption on its premises'

4.130 Clubs and incorporated associations are forbidden to exclude people on grounds of sexuality or gender status,¹¹⁵ which would both increase access to mainstream organisations and also to organisations which may currently be gender-specific or sexuality-specific. However, organisations which are neither incorporated nor defined as a 'club' are not affected by such provisions. Further, the special measures provision at Clause 27 may enable those bodies which are defined as incorporated bodies or as clubs, to seek an exemption.

4.131 At Recommendation 2 of Chapter 1, it is recommended that all organisations receiving Commonwealth funding provide access to bisexual and transgender people. This recommendation has been made to improve access to appropriate services for minority groups who may not receive sufficient funding to operate such services themselves. In general the Committee believes that services and organisations funded by the Commonwealth should not exclude anyone.

Sport

4.132 Access to sporting organisations is complex in that access to membership of an organisation may not necessarily enable an individual to participate in sport or competitive sport. State legislation relating to sexuality does not expressly prohibit discrimination on the basis of sexuality as far as sport is concerned; but it is assumed that sport and sporting organisations are included in the range of goods and services which must be available to all.

4.133 The main area of potential problem lies in access by people of transgender status to competitive sport.¹¹⁶ Most legislation that deals with this issue makes a distinction between sport and competitive sport, as well as between belonging to a sporting club and playing sport. The NSW legislation does not specifically exclude recognised transgender people from playing competitive sport as a member of the sex with which they identify; however, a specific exclusion prohibits other transgender people from competing on the same terms.¹¹⁷

4.134 Most prohibitions that do exist in the area of sport do not refer specifically to gender but rather to physical attributes. Thus, while they may have been drafted to acknowledge differences between men and women they can be used to exclude transgender people from playing in teams or competing against people of the gender with which they identify.

¹¹⁵ *Sexuality Discrimination Bill 1995*, Clause 21.

¹¹⁶ *Evidence*, Women in Sport Foundation, p. 201.

¹¹⁷ *Evidence*, Anti Discrimination Board of New South Wales, p. 116, see also *Evidence*, Australian Transgender Support Association Inc., pp. 795-796.

4.135 The extent to which sport is a major concern varied according to witnesses. The Anti Discrimination Board of New South Wales believed that sport was of limited concern to transgender people,¹¹⁸ but this was challenged by the Women in Sport Foundation. The Foundation believed that the proposed legislation would effectively destroy female sport, if there was no exemption. Transgender people would be allowed to compete and it would only be when they reached international competition that they would be excluded, thus disadvantaging genuine females who might otherwise have been chosen to compete at this level.¹¹⁹ This suggested that a larger number of transgender or transexual people might be involved in sporting activities. Another witness suggested that those who were not genuinely transgender (that is, who did not live on a permanent basis as a person of the biological sex with which they identified) could be prosecuted for fraud if they entered sport on a 'temporary' basis for gain.¹²⁰

4.136 The author of the *Sexuality Discrimination Bill 1995* saw no reason why an individual organisation could not exclude a (male to female) transgender person if they believed that person was still assisted by biology ('still has physical characteristics which to a large extent belong to their former gender').¹²¹ The South Australian Equal Opportunity Commissioner believed that given the complexity of the issue, there may need to be 'some guidance in the Bill as to the point at which a transgender person should be treated as a member of their acquired identity.'¹²²

4.137 In the *Sexuality Discrimination Bill 1995* the intention appears to have been to ensure that people could not be excluded from playing sport as a person of a specific gender. A male to female transgender person presumably would wish to play sport as a woman, and a female to male as a man. The current version of the legislation prohibits a transgender person from being discriminated against because of being transgender.

Insurance and Superannuation

4.138 Most anti-discrimination legislation seeks to address the issue of discriminatory treatment in the provision of superannuation and insurance. However, all States and Territories do have exemptions relating to both these services. Queensland, for example, allows discrimination on the basis of sex or marital status in relation to superannuation if such discrimination is allowed under the *Commonwealth Sex Discrimination Act 1984 (SDA)* (Section 59), or on the basis of age and impairment in complying with the Commonwealth superannuation legislation (Section 64), or any other Commonwealth Act (Section 65). In respect of superannuation, it is also possible to discriminate on the basis of impairment

¹¹⁸ *Evidence*, Anti Discrimination Board of New South Wales, p. 109.

¹¹⁹ *Evidence*, Women in Sport Foundation, p. 205.

¹²⁰ *Evidence*, Transgender Law Reform Association, p. 298. *Submission*, Team Sydney, Vol. 2, pp. 231-232.

¹²¹ *Evidence*, Mr Sid Spindler, p. 241.

¹²² *Submission*, South Australian Equal Opportunity Commission, Vol. 2, pp. 252-253.

¹²³ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1829.

(Section 61) and this may include people of HIV/AIDS status. The only limits on such discrimination relate to use of appropriate data or reasonable data/information. Similar restrictions also affect insurance (Sections 73-75).

4.139 South Australia generally prohibits discrimination in the area of superannuation unless this is related to actuarial or statistical data. However, it does allow specific discrimination in favour of legal spouses relative to de facto spouses (Section 44). Discrimination based on sex is also allowed in insurance (Section 49), and this may affect people of transgender status.

4.140 At Section 43 of the *Victorian Equal Opportunity Act 1995*, discrimination is allowed in respect of sex and disability, under the provisions of the SDA and the DDA, actuarial data or reasonable data in relation to the provision of insurance. With respect to superannuation, discrimination is allowed on the ground of sex, marital status and disability if it is allowed under Commonwealth legislation (see Section 73(2)).

4.141 In its general exemptions, the ACT legislation allows discrimination in insurance (Section 28) and superannuation (Section 29) based on appropriate information. In respect of superannuation, discrimination is allowed in order to comply with the provisions of Commonwealth legislation.

4.142 In New South Wales legislation discrimination is allowed in the provision of superannuation and insurance to transgender people. Section 38Q allows a transgender person to be treated as a person of their original sex in respect of superannuation, even if they are a recognised transgender person.

4.143 In the NSW legislation there are no specific statements about homosexual persons in respect of either superannuation or insurance; these areas may be covered by the general goods and services provision (Section 49ZP) prohibiting discrimination. Any areas of exemption may occur only in the general exemptions (Section 54, Acts Done Under Statutory Authority) or under discrimination based on sex (Sections 36 and 37). Discrimination in insurance and superannuation is allowed in respect of people with a disability if the grounds are actuarial and statistical or other reasonable data (Section 49Q).

4.144 There is no provision prohibiting discrimination in these areas in respect of bisexual persons.

4.145 The Northern Territory allows discrimination in respect of insurance and superannuation if the discrimination is based on actuarial or statistical data or is necessary to comply with provisions of Commonwealth legislation.

Effects of exemptions for insurance and superannuation

4.146 Although it may appear that some States prohibit discrimination, these prohibitions are restricted either in order to comply with State legislation or with Commonwealth legislation. In respect of Commonwealth legislation, this ranges from the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*, to the various superannuation acts. Certain of these effectively limit the power of trustees to make payments, or to make payments to attract the maximum tax benefit. In many instances, therefore, the prohibition of

discrimination would actually have very little effect, and changes are required in the Commonwealth arena. This is discussed further in Chapter 6.¹²⁴

4.147 A more detailed study of each State's legislation in relation to State controlled superannuation schemes (that is, those subject to State regulation) would be required to determine if any benefits have been provided through State anti-discrimination legislation, or whether people are excluded on the basis of their sexuality or gender status from various schemes.

4.148 At first glance, however, the possibility of sexuality based discrimination in insurance and superannuation is limited, if the issue of access to schemes is considered. The main areas of discrimination in access are likely to occur in relation to HIV/AIDS, and would be less direct. The payment of benefits in State regulated legislation may be affected by principles which exclude people on the basis of sexuality, or marital or relationship status.

Sex or Gender based discrimination in superannuation and insurance

4.149 Although there is little specific comment on the possible effects of discrimination based on gender in State legislation, it is likely that such discrimination would have an effect on transgender people including transsexuals. The NSW legislation, which is the only one to specifically address the issue of superannuation for transgendered persons, allows discrimination which relates to the original sex of a person, given that actuarial data do note some substantial differences in life expectancy generally on the basis of sex. However, other factors would also be taken into account, including lifestyle.

4.150 This does lead to some difficulty in treating people in a consistent fashion. Aside from the problems of legislation which consider gender to be a sexuality issue, allowing distinctions based on biology in, say, sport and superannuation, would affect the right of a person to be considered as a member of the sex with which they identify. The Gender Council of WA stated that scientific data, including actuarial and statistical data were often incorrect or incorrectly used:

[There is] a blanket refusal to accept reassigned sex for the purposes of sport, although there is no evidence that male DNA in itself conveys any sporting advantage ... Another such error ... is that persons reassigned as female may be considered to be male for purposes of superannuation. Since such persons lack major sources of male cancer and maintain a female hormonal regime their actuarial data would clearly not model that of a male. Since they also lack certain female cancer sites they may well be shown to be healthier than normal females once the stress inducing persecution ends. In the interim the onus should be on the insurance companies to treat this tiny group on an individual basis...¹²⁵

¹²⁴ See Chapter 6, Paragraphs 6.105-6.132.

¹²⁵ *Submission*, Gender Council of W.A. Inc, Vol. 5, p. 1273.

4.151 States that do discriminate or have not granted access to superannuation benefits for same sex couples, are likely to refer to Commonwealth legislation which currently specifically prohibits payments to other than approved recipients¹²⁶ and defines 'approved' in limited terms which relate to dependency. Dependency may also have to be demonstrated in more detail by same sex couples than would be the case for heterosexual couples, de facto or married.¹²⁷

4.152 In jurisdictions where discrimination in respect of insurance and superannuation is prohibited a distinction is to be made between eligibility to *join* a scheme without unreasonable restrictions, and *access to the benefits* of a scheme. It is still possible to make rules and regulations concerning membership of insurance and superannuation schemes, and the terms and conditions on which one joins, but these terms and conditions must be applied on an individual basis and supported by actuarial material. General assumptions (such as that a gay man must be HIV positive) cannot be applied unless the individual's lifestyle supports this:

'It is legitimate to discriminate on the basis of activity; it is not legitimate to discriminate on the basis of sexuality. There is nothing wrong with having a requirement in exactly the same way as it is legitimate to discriminate against smokers on the basis that statistically and actuarially they constitute a higher risk...If you want to have a statistical or actuarial exclusion which seeks, for example in relation to HIV, to ask the questions as to whether people engage in certain types of sexual behaviour which puts them at greater risk and to statistically and actuarially use the activity as the basis of a discriminatory arrangement, then the law recognises that, but the assumption that all people who fit into a particular category behave in a particular way which has a particular risk factor is an act of blatant discrimination.'¹²⁸

4.153 Such statistical data are less likely to be applied in respect to payments of benefits. Thus, while members of a same sex couple or a single person may be obliged to join a superannuation scheme and obliged to pay a certain rate of superannuation, they are deprived of the benefits of some schemes on the grounds that they have no real dependants. The favourable taxation rates available to heterosexual couples, allowing the surviving member of a heterosexual couple to receive payments at a lower tax rate, are not available to others.

4.154 This issue has been dealt with by others, including the Senate Select Committee on Superannuation in its report *Super and Broken Work Patterns*.¹²⁹ However, there have been few developments allowing for same sex couples or single people to benefit from their contributions, even though the former at least may be able to demonstrate some level of

¹²⁶ Evidence, Anti Discrimination Board of New South Wales, p. 118.

¹²⁷ See Chapter 6, Paragraphs 6.124 - 6.132.

¹²⁸ Evidence, Anti Discrimination Board of New South Wales, pp. 117-118.

¹²⁹ Senate Select Committee on Superannuation, Seventeenth Report, Canberra, November 1995.

dependency. A Recommendation relating to the recommendations of the Select Committee's report is in Chapter 6.¹³⁰

4.155 *The Sexuality Discrimination Bill 1995* allows discrimination in respect of superannuation and insurance on the grounds of sexuality or transgender status, if the discrimination is based on actuarial data and is reasonable (Clause 30). The Anti Discrimination Board of New South Wales recommended that this clause be removed.¹³¹ Another witness believed that people affected by such information should also have access to it.¹³²

4.156 The Committee believes that the exemptions in the *Sexuality Discrimination Bill 1995* allowing discrimination in respect of superannuation and insurance are ambiguous enough to allow an insurance or superannuation organisation to utilise material which may not be relevant. For example, there may be little information available on the life expectancy of transsexuals, or on the different life expectancies of male to female and female to male transsexuals. Similarly, there may be little information on the extent to which transsexuals and other transgendered persons are affected by different illnesses, some of which may relate to their birth gender. Consequently, the Committee has recommended changes which reflect these concerns.

Recommendation 7

That Clause 30 (1) and 30(2) of the *Sexuality Discrimination Bill 1995* be amended to read:

30(1) (f) and 30 (2) (f): 'if the discrimination is based on relevant actuarial and statistical data; or
30(1)(g) and 30(2)(g): is reasonable, having regard to other available relevant material; and

30(1)(h) and 30(2)(h): the person so discriminated against may appeal to the Human Rights and Equal Opportunity Commission for assessment of the basis of the decision, and must be provided with the information on which the decision was based.'

Documents and Information

4.157 A number of witnesses indicated that they had difficulty in providing information of a personal nature and some believed that the requirement to do so was unnecessary and in fact discriminatory, especially for a range of documents.¹³³

'When a non-transsexual person is asked their gender, they are not being asked to reveal more than that single fact. On the other hand,

¹³⁰ See Chapter 6, Paragraph 6.132, and Recommendation 8.

¹³¹ Submission, Anti Discrimination Board of New South Wales, Vol. 8, p. 1832.

¹³² Evidence, North Melbourne Legal Service/Federation of Community Legal Centres, p. 326.

¹³³ Submission, Ms Peters and Ms Langley, 'We believe gender should be removed from all but medical documentation.' Vol. 1, p. 12.

when the transsexual is asked, they are being required to reveal considerable information about their history and their current life style.¹³⁴

4.158 Most identification through documentation comes under State or Territory control (birth certificates, registration of marriages, drivers licences); and the remainder is primarily private sector (e.g credit cards, insurance, superannuation). The extent to which the Commonwealth is able to monitor such documentation is unclear except through the corporations power. State based documentation, which is regulated through State legislation unaffected by the *Sexuality Discrimination Bill 1995*, would need to be the subject of review by State authorities to determine if gender was essential information.

4.159 Another concern related more to the problems that people had in defining their needs or in having to make statements about a relationship that may be taken for granted in respect of other relationships, rather than to problems arising from denial of access to a service:

'Perhaps the most insidious and pervasive discrimination exists in the area of goods and services provision. It is unimaginable for most people, that they should have to reveal their domestic relationship to a complete stranger, in the course of obtaining a service for which they are paying.'¹³⁵

4.160 However, this issue is one that depends on education and people feeling less concerned about identifying such needs. Over a period of time such practices may become more common and therefore produce fewer problems.

4.161 The issue of documentation is considered further in Chapter 6.¹³⁶

Improving service provision

4.162 In order to improve access to those services available to the rest of the community, substantial changes would have to be implemented by service providers and by relevant government authorities. Such changes include:

- extending a range of benefits to all people in the same circumstances;
- ensuring services are provided on the same terms and conditions as for others - that is, provided in a non-discriminatory way; and
- identifying problem areas (such as gender status) in the provision of services, for example, tickets issued in a man's name for a male to female transgender person.

4.163 The heterosexual and family oriented structure of many services, referred to above, is generally obscured. However, as a result of complaints about inequity and discrimination, a number of these services are being restructured to provide similar benefits to people in similar

¹³⁴ *Submission*, Ms S C Else, Vol. 2, p. 338.

¹³⁵ *Submission*, Ms Thompson and Ms Connor, examples given were checking into a motel and as a same sex couple wanting a double bed; or getting a bank loan and explaining why one might not be getting married or having children, Vol. 5, p. 930.

¹³⁶ See Chapter 6, Paragraphs 6.95-6.98.

circumstances. There is not necessarily any explicit recognition of the basis of the original service provision in such changes. Some evidence suggested that the extension of benefits was due to a greater awareness of equity :

'In terms of some of the particular benefits that are on the homosexual lobby's agenda, as I understand it - superannuation, intestacy, property division and so on - we have got no objection in principle to those things being worked out on the normal basis of the laws of equity. My understanding ... is that there has been significant advance in the laws of equity so that some things such as emotional dependency and other things can be taken into account, for example, in property and separation. We have no objection to that.'¹³⁷

4.164 These changes have often not been reflected by governments, certainly not at the Federal level, where equal treatment in some areas is deemed to be too expensive to afford.

4.165 The Committee heard evidence also that there could be a decrease in services in some instances. An example was provided by the Gay and Lesbian Counselling Service of Western Australia, which was to be excluded from receipt of funding previously available:

'...our organisation is kept running by donations and small grants. With the current discriminatory legislation it means that outside agencies exclude GLCS [the Gay and Lesbian Counselling Service] from seeking funds from the community on the grounds that GLCS represents something unlawful...

This leaves GLCS with the ongoing difficult search for financial support being once again exacerbated, not only by legislation but also by policy.'¹³⁸

4.166 Some changes are gradually occurring in areas such as health insurance, when different groups are recognised for cheaper memberships,¹³⁹ although others may be excluded from benefits such as the pharmaceutical safety net because of definitions of 'family'.¹⁴⁰ Medicare Benefits Schedule payments for procedures such as reassignment surgery have also been rationalised,¹⁴¹ thus reducing some of the discrimination previously experienced.¹⁴²

¹³⁷ *Evidence*, Australian Family Association WA, p. 588.

Evidence, Anglican Social Responsibilities Commission where reference is made to the belief that the age of consent should be uniform, p. 599.

¹³⁸ *Evidence*, Gay and Lesbian Counselling Service of Western Australia, pp. 548-549.

¹³⁹ See *Hope and Anor v NIB Health Funds Ltd 1995*; in this case the definitions allowed a gay couple access to a certain rate of insurance because of one being a contributor and another a dependent. *Submission*, Ms J Millbank, Vol. 1, p. 118.

¹⁴⁰ *Evidence*, Department of Health and Family Services, p. 846.

¹⁴¹ *Evidence*, Department of Health and Family Services, pp 845-846.

¹⁴² *Submission*, Ms C Ronalds: 'In my view, this is a denial of access to a benefit which should be available to a person who requires or requests reassignment surgery, with the appropriate medical safeguards now

However, this does not mean that there is greater access for people who have limited financial resources; the changes introduced only mean that there is a schedule for a wider range of procedures so that benefits are payable for procedures that were previously excluded. This may still be of assistance only to people with private health insurance and in a fund which covers re-assignment surgery.¹⁴³

4.167 In other areas, changes are also occurring without the existence of specific legislation. In referring to a case of harassment at work, one witness noted that the employer had taken action supporting the victim:

'...the employer pulled in the people who had done the bullying, and who had been vicious, and said to them that they had to change their ways .. The employer used that kind of company policy to do that.

It is clearly happening in quite a number of organisations that I have heard of. But, it seems to me, almost as if organisations have been told that they must treat people better, and concern themselves with equal opportunity. And having done that, they do not make a distinction between certain groups having that and some groups not.¹⁴⁴

4.168 Insofar as some of these changes have occurred in the private sector they may come under the control of State or Commonwealth legislation. At state and local government level there appear to have been few approaches to ensuring consistency. Notable exceptions have been New South Wales which has introduced a review of all State legislation to ensure that any inconsistencies are identified,¹⁴⁵ and which also amended a range of legislation with the introduction of the transgender anti-discrimination legislation. Victoria is also reviewing all legislation; however, the somewhat broader range of exemptions and exceptions in Victorian legislation will have an impact on the amount of change required.

4.169 Difficulties in the provision of these general community services may lie not so much in getting access but getting access on the same terms and conditions as other people. Some of the examples of abuse and discrimination may arise because of a desire to humiliate, or may also occur because people are not sure if certain actions are allowed, or if protection is offered in all circumstances:

'... there was a recent case in Queensland where two men holding hands in public were not afforded protection under the current Queensland act because their behaviour did not relate to lawful sexual activity. A similar example might be, say, two people trying

in place. The current system means that a person with independent financial resources and medical insurance can have the benefit of the surgery while a person without such resources is denied access to that benefit.' Vol. 2, p. 299.

¹⁴³ Evidence, Department of Health and Family Services, p. 851.

¹⁴⁴ Evidence, Dr Vivienne Cass, p. 525.

¹⁴⁵ New South Wales, *Anti Discrimination Act 1977*, Section 121.

to book a motel room together. Does that relate to their sexual activity, and, if they were discriminated against on that basis, then would they be covered?¹⁴⁶

4.170 A number of services appeared to have been provided in a manner or at a level which differed substantially from the manner or level available to others. All State and Territory legislation specifically prohibits services from being provided differently (except in order to provide them appropriately). However, a number of inbuilt factors have meant that the quality or nature of the service has not been seen as wanting except by those who feel disadvantaged.

Harassment and Vilification

4.171 There is limited discussion in State and Territory legislation about harassment, and sexual harassment is the most common type of harassment prohibited. Definitions of sexual harassment refer to the unwelcome nature of the actions, and consider that the actions (usually unwelcome advances or other 'unwelcome conduct') are made 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.'¹⁴⁷ Many witnesses considered that harassment was a major problem for non-heterosexual and for transgender people¹⁴⁸ and 'harassment' has been included in the definition of discrimination at Clause 6 of the bill. However, given that harassment covers all forms of sexuality as well as transgender, it necessarily proscribes harassment on the grounds of heterosexuality as well.

4.172 Laws relating to vilification in Australian legislation, including that of the states, is limited and relates mostly to racial vilification. Although little effort has been made to make a clear distinction between harassment and vilification, vilification is generally understood to be public, and to be of a nature sufficient to cause people serious concern. The Anti Discrimination Board of New South Wales defined vilification as 'generally any public act that incites hatred towards, serious contempt for or severe ridicule of a person or group of persons'.¹⁴⁹ The overlapping of 'incitement to hatred' and vilification was referred to by witnesses, but not explored in detail.¹⁵⁰

4.173 Both the Commonwealth and New South Wales both prohibit racial vilification. Queensland prohibits racial and religious vilification, although one witness believed the provision was so complex that in reality there was limited protection. This model was therefore not seen as useful:

'Those provisions are as good as useless because they are so onerous in terms of the test that they simply cannot be relied upon to afford any protection to people vulnerable to racial and religious

¹⁴⁶ Evidence, Australian Federation of AIDS Organisations, p. 716.

¹⁴⁷ Commonwealth *Sex Discrimination Act 1984* Section 28A.
Victoria *Equal Opportunity Act 1995* Section 85

¹⁴⁸ See Chapter 2, Paragraphs 2.36-2.41.

¹⁴⁹ Submission, Anti Discrimination Board of New South Wales, Vol. 8, p. 1818.

¹⁵⁰ See Chapter 2, Paragraph 2.46.

hatred; and the same issues would obviously apply to vilification on the basis of sexuality. If the exemptions are too broad, and if they are not very carefully worded, then the redress functions for vilification are notional only.¹⁵¹

4.174 Only the New South Wales *Anti-Discrimination Act 1977* contains anti-vilification provisions on sexuality and transgender grounds and in respect of HIV/AIDS status. Protection in respect of sexuality does not extend to people in respect of being heterosexual, bisexual or asexual, although AIDS/HIV protection is not linked to gender or sexuality. The NSW anti-vilification legislation has been utilised in two cases which have received considerable public attention, some of it also unfavourable. The first case related to the vilification and public harassment of a man by a couple over a period of time. The individual who was homosexual and HIV positive was awarded compensation:

'The decision sends an important message to the community that public acts of vilification against lesbians, gay men and people who are HIV positive or assumed to be so, will not be tolerated.'¹⁵²

Exemptions and Exceptions from Provisions of the Legislation¹⁵³

4.175 State and Territory legislation that prohibits sexuality or gender discrimination provides for both general and specific exemptions.

4.176 General exemptions usually cover all provisions of the legislation, allowing various groups to avoid compliance. On occasion, general exemptions will run for a specific time period, allowing existing legislation to continue operation, or allowing an organisation a period of time in which to make arrangements for change.

Exemptions for Existing Legislation

4.177 All States and Territories provide exemptions in respect of existing legislation, especially in areas such as superannuation and insurance where Commonwealth laws come into play. In cases where the discriminatory provisions of State and Territory laws continue, the effect of anti-discrimination legislation may be limited.

4.178 The *Sexuality Discrimination Bill 1995* currently only exempts laws of the Commonwealth for a six-month period, and does not refer to State or Territory legislation

¹⁵¹ *Evidence*, Queensland Anti Discrimination Commission, pp. 683-684.

¹⁵² *Submission*, Inner City Legal Centre. The second case concerned a school student unable to attend school because of harassment on grounds of sexuality, Vol. 12, p. 2741.

¹⁵³ Although most witnesses did not make any distinction between an exemption and an exception, the submission of the Anti Discrimination Board of New South Wales pointed out that Clauses 28-30 of the proposed legislation were exceptions, and Clauses 31-34 were exemptions, Vol 8, p. 1812. In this context, what are called general exemptions in other legislation would be called general exceptions. This is added to later in the submission, p. 1831 where a distinction is suggested between the General Exemptions of Part 2, Division 5 of the proposed legislation (to become Exceptions), and the Exemptions which the Commissioner would be able to grant, Vol. 8, pp. 1812, 1831.

(Clause 29(2)). It could be amended to include State and Territory legislation 'making discrimination unlawful regardless of whether it is necessary to do the relevant act in order to comply with a State law.'¹⁵⁴ The Anti Discrimination Board of New South Wales suggested that the proposed Commonwealth legislation should exempt both State and Commonwealth laws from compliance, but only for a set period.¹⁵⁵ This would enable time for some changes to be made and for State laws, possibly, to be amended to reflect anti-discrimination processes.

4.179 It was suggested by the Anti Discrimination Board of New South Wales that exemptions were often given without much thought:¹⁵⁶

'... acts should not be exempt unless it is *necessary* to do the act to comply with a law. Clause 29 of the bill currently uses the term "in direct compliance" with a law. This terminology is ambiguous - the exercise of a *discretion* may be in direct compliance with a law or regulation.'¹⁵⁷

4.180 A number of witnesses agreed with this approach and submitted that exemptions should be considered in more detail. The Anti Discrimination Board of New South Wales also believed it was important to clarify the meaning of terms such as courts, asking whether an order made by a tribunal such as the Equal Opportunity Tribunal of NSW would be included.¹⁵⁸ In the various State and Territory legislation, exemptions are also given for acts of tribunals and courts.

Religious Bodies

4.181 General exemptions usually apply to religious bodies¹⁵⁹ and to the services which they provide, including education. The effect of this is to enable religious organisations to exclude people from office, employment, education or, sometimes, access to other services, on the basis of their sexuality or gender status.

4.182 The Victorian anti-discrimination legislation, for instance, refers to religious beliefs or principles and allows discrimination 'if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.'¹⁶⁰ Such broad exemptions were criticised by witnesses, not so much in respect of the nature of the religious belief but in respect of allowing that belief to adversely affect others.¹⁶¹

¹⁵⁴ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1831.

¹⁵⁵ *Submission* Anti Discrimination Board of New South Wales, Vol. 8, p. 1813.

¹⁵⁶ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1813.
Evidence, Anti Discrimination Board of New South Wales, pp. 106-107.

¹⁵⁷ *Submission* Anti Discrimination Board of New South Wales, Vol. 8, p. 1831.

¹⁵⁸ *Evidence*, Anti Discrimination Board of New South Wales, p. 106.
Submission, Anti Discrimination Board of New South Wales, Vol. 8, p. 1813.

¹⁵⁹ *Evidence*, Equal Opportunity Commission Victoria, p. 234.

¹⁶⁰ *Victoria Equal Opportunity Act 1995*, Section 77.

¹⁶¹ *Evidence*, Ms K Walker, p. 282.

4.183 These exemptions are often worded so as to use the 'susceptibilities'¹⁶² of church members as the main guide of action. In theory, this could mean that the religion would need to demonstrate that its stated principles did not permit acceptance of non-heterosexual people and/or the practice of their sexuality. In reality the proviso may enable religions to state that substantial aspects of their operations, including the provision of community services such as accommodation, counselling and employment services (some possibly funded by government) should be exempt from legislation.

4.184 Although none of the major churches tolerate homophobia or violence against non-heterosexual people, they clearly do not all accept that it is possible to either have non-heterosexual people as providers of religious services¹⁶³ or as providers of educational and other services, because there is no separation between aspects of life: 'This is the thing that concerns me the most, the divorce between what some people see as sacred and secular. The Christian view of life affects all of life...'¹⁶⁴

4.185 Some witnesses indicated that churches already have sufficient protection available in employment matters because they could use current 'behaviour' legislation to justify dismissal.¹⁶⁵ However, this would possibly only apply to the employment of people in education and other services, and not to the employment of people as ministers or priests. It appears from some evidence that many religious groups, while not excluding non-heterosexual people from congregations,¹⁶⁶ would not wish to employ them in a range of areas.¹⁶⁷ Hence both employment as well as dismissal rights are relevant:

'The problem with this bill is that it could provide for some people an offence against their conscience born of their religious convictions, especially in the area of employing people for which they are not given any protection. It would seem that this ingredient of the bill could conflict with that part of the constitution which prevents the Commonwealth from making any law prohibiting the free exercise of any religion.'¹⁶⁸

4.186 Another witness was opposed to the way in which the proposed religious exemption was framed, suggesting that it would put the onus on the organisation 'to prove injury to the susceptibility of their adherents':

¹⁶² Evidence, ALSO Foundation, pp. 321-322.

¹⁶³ Evidence, p. 240. The use of the word 'susceptibility' was questioned during the Committee's hearings. In evidence, the author of the bill, former Senator Spindler, stated that 'We were intent to find an expression which encompassed convictions, but also feelings - that it was a bit wider, in a sense, than simply strictly teachings or tenets, that that is how people themselves, directly and personally, were affected by it'.

¹⁶⁴ Evidence, Baptist Churches of Tasmania, pp. 417-418.

¹⁶⁵ Evidence, Baptist Churches of Tasmania, pp. 416, 420.

¹⁶⁶ Evidence, ACTU, p. 315.

¹⁶⁷ Evidence, Baptist Churches of Tasmania, p. 421.

¹⁶⁸ See below, Paragraphs 4.196-4.197.

¹⁶⁹ Evidence, Baptist Churches of Tasmania, pp. 406, 413.

'...which, from a freedom of religion point of view, appears to go close to violating section 116 of the constitution by essentially making the content of the religion and the state of mind of its adherents a matter of scrutiny by the courts.'¹⁶⁹

4.187 This is not to say that all churches or religious groups approved of exemptions or supported the proposed exemptions for the *Sexuality Discrimination Bill 1995*: 'we disagree with discrimination in any form at all against any person, in any place, for any reason.'¹⁷⁰ There are two distinct reasons for this. The first is that some religious groups, and other bodies, believe that churches will not learn to be tolerant if they are always able to gain exemptions from the operation of legislation.¹⁷¹ In this argument, the need to distinguish between secular and religious activity was emphasised, contrary to the approach of some religious bodies which did not believe it was possible to make a distinction.

4.188 The second reason was that a religious group could be sufficiently opposed to the legislation to argue that it should not proceed. In this case, exemptions were not necessary. A development of this argument was to seek no exemption but, possibly, to leave open the issue of unconstitutionality in respect of legislation which seemed to go against religious freedom. A further aspect noted by some religious groups was that the exemptions had only been put in as an afterthought and this discriminated against churches by making them appear to be bigoted; further, there was no guarantee that such exemptions would not in time be repealed:

'We would like to put on the record our concern about exemptions and the use of exemptions in bills such as this, and in any such bills, for religious institutions, because it is probably fair to say that we are of the view that, in due course, we will be victimised, we will be called bigots, we will be called names which are untasteful and we will be seen as different because we have exemptions under this legislation or any legislation.'¹⁷²

4.189 Another viewpoint was that there should not be blanket exemptions, but that organisations should have to request to be excepted from provisions:

'I have to say my preference would be to not have the exemptions, as a beginning, there in the bill, but rather to perhaps have some facility ... for ... organisations appealing for exemption, rather than providing a wholesale exemption.'¹⁷³

4.190 One witness also raised the possibility of people using the religious belief exemption in order to express their own prejudices:

¹⁶⁹ Evidence, Australian Family Association, pp. 593-594.

¹⁷⁰ Evidence, Anglican Social Responsibilities Commission, p. 598.

¹⁷¹ Evidence, Metropolitan Community Church, p. 171.

¹⁷² Evidence, Baptist Churches of Tasmania, pp. 420, 421.

¹⁷³ Evidence, Dr Vivienne Cass, p. 532.

Evidence, Western Australian Commissioner for Equal Opportunity, p. 539.

'My concern is more that people who are homophobic for irrational reasons might claim under the act that they discriminated on the grounds of their religious belief despite not having any religious belief. It may be difficult in some cases to determine that that person has discriminated on the grounds of their religious belief.'¹⁷⁴

4.191 Clause 23 of the *Sexuality Discrimination Bill 1995* prohibits discrimination in respect of the operation of Commonwealth programs, and Clause 28 of the Bill requires a religion to demonstrate that either its principles will be breached or the susceptibilities of its adherents will be offended, by certain acts. The Committee believes that Clause 28 must be subject to the provisions of Clause 23. While a 'body established for religious purposes' has a right to its religious doctrines, provision of funding from the Commonwealth government, either directly or indirectly, for certain services including employment, training, refuges, health, counselling is to be subject to Clause 23.

Recommendation 8

That a body established for religious purposes may not exclude a person from the receipt of services which are funded directly or indirectly, in whole or in part, from Commonwealth funding, on the grounds of the person's sexuality or gender status.

Clause 23 (1)...

23(2) A person or an organisation may not claim an exemption from this provision on the grounds of religious belief

Clause 28. 'Subject to Clause 23, Divisions 1 and 2 ...'

Charitable and Voluntary Groups

4.192 Similar exemptions to those available for religious organisations may be available for various charitable, not-for profit or voluntary organisations, and it is possible that some services provided by religious organisations may also be covered under these. However, many of the exemptions available to these organisations are intended to preserve the existing rights of the organisations. Organisations established for the purpose of providing accommodation or other services for women, for example, may well be exempt from providing such services for men (and, possibly, for transgender persons); and organisations established to provide health services for bisexual people for example, would not necessarily be obliged to provide these services for others. Thus, some exemptions may include an affirmative action component, recognising special needs.

4.193 Voluntary or charitable organisations which provide services to the general community may have less freedom to exclude people on the basis of sexuality or gender status.¹⁷⁵ In the NSW anti-discrimination legislation, the term 'voluntary organisation' is

¹⁷⁴ Evidence, Australian Council for Lesbian and Gay Rights (WA), p. 566.

¹⁷⁵ See Chapter 2, Paragraph 2.102.

strictly defined, and does not include credit unions and sporting clubs. As these provide important services, they cannot be allowed to exclude members of the public on grounds which have little if any connection with the purposes for which the organisation was founded. In the Victorian legislation, charities are exempted under Section 74 of the act, and 'charitable benefits' means benefits exclusively charitable according to Victorian law.'

Business

4.194 Some State and Territory legislation allows exemptions in respect of employment where the employing body is a small business and employs no more than a set number of people excluding family members. The Victorian legislation has an exemption both for small business and also for a family business.¹⁷⁶

4.195 Such exemptions are not specifically linked to religious beliefs. The basis of such exemptions, also available in respect of partnerships, is practicality and a recognition of the more personal and intimate nature of a small workplace.

4.196 In respect of the proposed Commonwealth legislation an exemption was sought by organisations representing people who were in small businesses, sometimes within a religious context. However, witnesses who were members of different religious organisations did express a concern that they be allowed a somewhat broader exemption based on the Victorian model, affecting employment of people in small businesses, especially home-run employment:

'I think the question should be: should small businesses and home-run businesses especially have the right to choose whom they would like to have in their employment? ... I think they should not be denied the right to say who would be the best for their position.'¹⁷⁷

4.197 Another organisation, the Brethren, believed that a conscience clause should be available which exempted employment both in homes and in businesses, based on religious belief. Exemptions do exist in most State legislation regarding employment in the home,¹⁷⁸ and this is based on privacy and choice considerations, not religion. Although the Brethren did not rent housing, they were also prepared to argue on behalf of others that privately owned housing should also be exempt.¹⁷⁹ This approach was supported by another organisation.¹⁸⁰

'...we wish to just request that at least a conscience clause could be provided for persons such as ourselves which could easily be

¹⁷⁶ Evidence, Brethren Victoria, p. 270. *Equal Opportunity Act 1995*, Section 21(1); NSW *Anti-Discrimination Act 1977*, Sections 38C(3)(c) and 49ZH(3)(6).

¹⁷⁷ Evidence, Focus on the Family, p. 265.

¹⁷⁸ That is, providing domestic or child care services, as distinct from employment in a commercial operation which is operated from a person's home.

¹⁷⁹ Evidence, Brethren, p. 270.

¹⁸⁰ Evidence, Australian Family Association WA Branch, pp. 593-594.

provided ... extending to us to cover the situation where we are faced with this problem in our homes and particularly in our businesses.¹⁸¹

Other 'General' exemptions

4.198 The Northern Territory has general exemptions in relation to sport and public health, whereby people may be excluded from areas or be subject to various limitations depending on physical attributes or impairments; or depending on an understanding of what was 'reasonably necessary' to protect public health. Similar general exemptions exist in the Queensland legislation.¹⁸²

4.199 Insofar as the public health provisions are seen as directed against homosexual men, some evidence suggested that issues of public health could be better addressed by having less discriminatory treatment of homosexual groups.

4.200 All legislation also provides that the relevant individual, such as the Equal Opportunity Commissioner (or equivalent) or the Minister may grant additional exemptions.

Specific exemptions

4.201 Specific exemptions are limited to particular areas of anti-discrimination legislation and are intended to meet specific demands, objections or issues. However there are substantial variations between States and Territories in specific exemptions, and what may be a specific exemption in one State may be a general exemption in another.

Employment and Accommodation

4.202 Some legislation allows exemptions in the area of accommodation or employment in a private household, or employment in a small business. In this context a small business is one which employs around five to six people. Private accommodation generally means a household in which the person providing accommodation, or a relative or near relative,¹⁸³ also resides. This appears to meet the need for privacy and choice. Accommodation such as nursing homes and hostels may also be exempt, although primarily because it has been established for people of a particular group or gender rather than specifically excluding transgender people or homosexual or bisexual people.

¹⁸¹ Evidence, Brethren, p. 267. Representatives stated that they had already obtained an exemption under the *Industrial Relations Act*, p. 269.

¹⁸² See Queensland *Anti Discrimination Act 1991*, Section 107. Evidence, Victorian Equal Opportunity Commission, p. 230.

¹⁸³ Definitions of relative and near relative vary - See above, Paragraphs 4.44-4.48.

Working With Children and Young People

4.203 The Northern Territory allows an exemption in respect of sexuality where employment concerns the care of children and young people, as do both the Queensland legislation¹⁸⁴ and the Victorian legislation.¹⁸⁵

4.204 These broader exemptions are phrased in such a way as to cover not only young children but all 'minors'. For example, the Northern Territory legislation states:

'A person may discriminate against another person on the grounds of sexuality in the area of work where :

(a) the work involves the care, instruction or supervision of children; and

(b) the discrimination is reasonably necessary to protect the physical, psychological or emotional well-being of children, having regard to all the relevant circumstances of the case including the person's actions.'¹⁸⁶

4.205 Logically then the exemption covers not only pre-school age, but children and young people up to the age of 16, which would affect teaching and other duties in *all* schools, even though in some cases there are separate provisions in respect of private education. It may also affect guardianship and similar situations, including (presumably) people who are responsible for the care of children and young people in a range of services such as refuges, hostels, community housing, and other state and private services such as training programs, other educational services, and juvenile detention centres. In the Victorian legislation it is specifically stated that the exemption does not apply to TAFE or post secondary education.

4.206 Ostensibly, these exemptions may work to exclude people of *any* recognised sexuality (lawful sexual activity) from the care of children and young people because of the potential harm to the child. Gay men and lesbians, however, believe it is directed against them - 'Such exemptions are highly discriminatory and cater to ill-informed prejudices.'¹⁸⁷

4.207 The ACT permits an exemption in respect of the care of children when employment is in 'the place where the child resides'. This could be read as including places other than a private household, although this may not have been intended. This is to be distinguished from the Queensland legislation which specifically interprets 'residential' care to be care 'at the person's home' (Section 27).

4.208 The *Sexuality Discrimination Bill 1995* does not support the exclusion of people from a range of activities on the grounds of their sexuality or gender status. Insofar as employment in state public sectors is covered by the *Sexuality Discrimination Bill 1995*, and employment

¹⁸⁴ Queensland, *Anti Discrimination Act 1991*, Sections 27 and 28.

¹⁸⁵ Victoria, *Equal Opportunity Act 1995*, Section 25.

¹⁸⁶ Northern Territory, *Anti-Discrimination Act 1992*, Section 37.

¹⁸⁷ *Submission*, Coalition of Activist Lesbians (COAL), Vol. 3, p. 616.

in other areas is also covered by the bill, many of the provisions of current state legislation will be limited in their effect.

Dress and Behaviour

4.209 The South Australian and Victorian legislation have provisions in respect of appearance such as dress and behaviour:

'An employer may set and enforce standards of dress, appearance and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment.'¹⁸⁸

4.210 Although the Victorian provisions sound unexceptionable, some witnesses believed that they were directed against people who either were non-heterosexual or who might appear to be non heterosexual. The South Australian provisions are clearly linked to sexuality.¹⁸⁹ The provisions could also apply to people of transgender status as they are not limited in respect of sexuality or gender.

'If you assume that you can identify a person's sexuality by how they dress, anyone who does not dress according to a particular standard norm is actually put at risk of violence for being assumed to be gay or lesbian. I think that puts everybody in the community at risk if they do not dress appropriately.'¹⁹⁰

4.211 As was noted by the South Australian Equal Opportunity Commission, 'there is little case law as to the meaning of "characteristic" and it may be that the general public will assume that dress codes are characteristics of sex or gender'.¹⁹¹ To some degree this is a reasonable assumption in terms of gender, although it may be more difficult to distinguish fashion from dress codes peculiar to a sexuality. One of the likely problems arising from any discrimination regarding dress was that assumptions about dress could also affect people who were not transgender or not of a specific sexuality.

4.212 The *Sexuality Discrimination Bill 1995* does not consider the issue of dress, although it may do so indirectly in the reference to 'characteristics' in the definition of transgender. However, the emphasis in that definition is not only on dress but also on physical characteristics.

¹⁸⁸ Victoria, *Equal Opportunity Act 1995*, Sections 24 and 40, employment and education respectively; South Australia, *Equal Opportunity Act 1984*, Section 29(4).

¹⁸⁹ 'Where - (a) a person discriminates against another on the basis of appearance or dress; (b) that appearance or dress is characteristic of, or an expression of, that other person's sexuality; but (c) the discrimination is reasonable in all the circumstances, the discrimination will not, for the purposes of Division II, be taken to be discrimination on the ground of sexuality.' South Australia *Equal Opportunity Act 1984* Section 29(4)

¹⁹⁰ *Evidence*, p. 465 Lesbian and Gay Community Action

¹⁹¹ *Submission*, South Australian Equal Opportunity Commission, Vol. 2, p. 253.

4.213 The Committee considers that it is necessary for the *Sexuality Discrimination Bill 1995* to raise the issue of dress in order for any other provisions in State or Territory anti-discrimination legislation to be overridden especially with respect to employment of persons.

Recommendation 9

That the *Sexuality Discrimination Bill 1995* specify that discrimination on the basis of dress or appearance is prohibited.

Clause 6

(6) Discrimination includes a failure to offer or continue employment, or to provide access to goods and services, on the basis that a person's dress or appearance suggests he or she is of a particular sexuality or is a transgender person, or is thought to be of a particular sexuality or to be a transgender person, or has a relative or associate who appears to be, or is thought to be of a particular sexuality or to be a transgender person.

4.214 Specific exemptions may also be required in order to enable people to state that a specific sexuality is an integral part of criteria for employment.¹⁹² This would enable people of a sexuality other than heterosexual to gain access to specific types of employment. This type of measure could also be seen as affirmative action or positive discrimination.

4.215 At this time, there are no such provisions in legislation, although these are available in the grounds of sex - see, for example, the New South Wales *Anti-Discrimination Act 1977*, (Section 31), and age (Section 49ZYJ).

Effect of Exemptions

4.216 A number of witnesses believed that the exemptions in State and Territory legislation were either excessive in number or so broad that they limited the effect of legislation. One of the problems with broad exemptions was that they could impose substantial barriers to a person wishing to make a complaint:

'...exemptions need to be very carefully considered ... They can have the impact of making the legislation of very limited use indeed. I draw your attention again in that context to section 126 of the Queensland legislation, which is the section that addresses racial and religious hatred. Those provisions are as good as useless because they are so onerous in terms of the test that they simply cannot be relied upon to afford any protection to people vulnerable to racial and religious hatred, and the same issues would obviously apply to vilification on the basis of sexuality. If the exemptions are too broad, and if they are not very carefully worded, then the redress functions for vilification are notional only.'¹⁹³

¹⁹² *Submission No. 173*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1823.

¹⁹³ *Evidence*, Queensland Anti Discrimination Commission, pp. 683-684 and 688,694.

4.217 The Queensland Anti Discrimination Commission considered that a one-part exemption test would be more practical and satisfactory for complainants.¹⁹⁴

Affirmative Action or Measures to Achieve Equality

4.218 The majority of the States and Territories that have legislation to prevent sexuality discrimination provide for measures intended to achieve equality, a recognition of the fact that discrimination on the basis of gender or sexuality has caused some loss or disadvantage - 'special measures exist primarily in order to overcome past historical disadvantage.'¹⁹⁵ At the same time, they may also allow for certain exemptions or for acts of discrimination, which help to establish or maintain separate services.¹⁹⁶

4.219 Different terms are used for these provisions. The Australian Capital Territory provides for measures intended to achieve equality. The Northern Territory provides for 'special measures'(Section 57), noting that there is a time limit on these 'until equality of opportunity has been achieved'. Victoria provides for 'special needs' (Section 82) and 'particular attribute' service provision:

'An employer may limit the offering of employment to people with a particular attribute in relation to the provision of services for the promotion of the welfare or advancement of people with the same attribute, if those services can be provided most effectively by people with that attribute.'¹⁹⁷

4.220 This form of provision would allow sexuality specific medical and other community services.

4.221 Queensland provides for 'welfare measures' (Section 104) and 'equal opportunity measures' (Section 105), although there is a time limit on these, which, as with the Northern Territory legislation, is not specified. Queensland also makes provision for clubs being established to cater for minority cultures and disadvantaged people (Section 97). South Australian legislation does not refer to special measures, but notes that the Equal Opportunity Tribunal is able to make further exemptions which, *inter alia*, 'have regard (where relevant) to the desirability of certain discriminatory actions being permitted for the purpose of redressing the effect of past action.'¹⁹⁸

'The special measures [exemption] is something we particularly approve of because we do not have it in our state act. The Commissioner has very recently gone in front of the state tribunal to get a tribunal exemption, for example, to assist gay men who wanted to set up a housing cooperative and, in doing that, to deny

benefits to heterosexual people. The special measures provisions in our act do not apply to sexuality...'¹⁹⁹

4.222 These special measures are not considered in detail in any of the legislation, which allows scope for expanding coverage in a sympathetic climate, although also leaving the option open to reduce special measures in a less sympathetic environment.

4.223 As noted above, there was some support for the idea that the creation of special measures could be seen as merely a means of overcoming problems created by having too broad an interpretation of sexuality in the first place. In short, that if the word 'sexuality' was used, or heterosexuality was included within sexuality, then special measures would be required to maintain some services and organisations for non heterosexual persons:

'...if we have legislation that says no-one should discriminate anywhere, that would only apply in a world where there was no pre-existing suffering, and that is clearly not the situation. If we have this purely normative situation where we have legislation that says that no-one shall discriminate in any way at all and we apply that in a situation where people are suffering extremely through the structural imbalances, the legislation will try to have us living in this fantasy land basically. We need to protect the people who are being discriminated against but also at the same time there needs to be positive discrimination in order to protect those people in the few pockets of community which they do have.'²⁰⁰

4.224 This was seen by some people as a somewhat convoluted process which could be dealt with by removing all reference to heterosexuality. However, having the two processes was not necessarily seen as an insurmountable problem:

'...while on the one hand I recognise that there is a huge difficulty with discrimination against lesbians, gays, bisexuals and transgender people and I think we really have to place considerable focus on righting the wrongs that exist, at the same time, I think that if we look to the future, and if we look at the current historical change from minority group to commonalities that I was suggesting is happening now ... I think inevitably, we have to use sexuality to include all sexualities.'²⁰¹

4.225 In Section 47 of the South Australian legislation there is a provision to develop affirmative action programs, but these appear to be based on 'gender'. The extent to which this gender provision would assist people of transgender status is not obvious. The legislation, while allowing for single sex clubs, does not provide specifically for clubs and organisations based on sexuality. It is not clear if single sex clubs can exclude people on the basis of

¹⁹⁴ Evidence, Queensland Anti Discrimination Commission, p. 694.

¹⁹⁵ Evidence, Anti Discrimination Board of New South Wales, p. 111.

¹⁹⁶ Evidence, Tasmanian Gay and Lesbian Rights Group, p. 364.

¹⁹⁷ Victoria *Equal Opportunity Act 1995*, Section 19, and also see Section 55.

¹⁹⁸ South Australia, *Equal Opportunity Act 1984*, Section 92(6)(a).

¹⁹⁹ Evidence, South Australia Equal Opportunity Commission, that is, the legislation did not have a separate section on 'special measures' and did not include sexuality in any of the special exemptions, p. 450.

²⁰⁰ Evidence, Gay Men and Lesbians Against Discrimination (GLAD), p. 342.

²⁰¹ Evidence, Dr Vivienne Cass, p. 524. However see also below Chapter 5, Paragraphs 5.49 - 5.52.

transgender status. Section 27 of the ACT Legislation allows for action to provide equal opportunity for people designated under the Act which covers both sexuality and transgender.

4.226 In the Northern Territory, special clubs may be established 'to preserve a minority culture; or to prevent or reduce disadvantage suffered by people of that group'²⁰² and in Queensland similar measures apply. It is not clear how broadly the concept of minority culture can be taken and if it is to include people from different sexuality groups and from the transgender communities. A similar provision exists in the Victorian legislation, and would clearly operate to protect sexuality specific clubs or clubs:

'A club ... may exclude from membership a person who is not a member of a group of people with an attribute for whom the club was established if the club operates principally--

(a) to prevent or reduce disadvantage suffered by people of that group; or

(b) to preserve a minority culture.'²⁰³

4.227 The absence from the Victorian legislation of any reference to transgender people mean that there is no protection for transgender organisations.

4.228 There are no specific provisions in the NSW legislation for special needs measures or for continuing existing organisations and services which provide services especially for transgender people or for gays and lesbians.

4.229 Equal opportunity programs or affirmative action programs need to be reported on regularly in order to determine if the legislation has made any appreciable difference. This would be the case especially where a time limit has been imposed in the legislation, as with Queensland and the Northern Territory. Nonetheless, there are very few formal provisions in any of the anti-discrimination legislation for measuring and assessing this type of information. It is assumed that these would be included in the reports that Commissioners are obliged to provide on a regular basis.

4.230 The Committee considers that special needs measures or any affirmative action programs or services should be carefully scrutinised. While there is room for some sexuality and gender specific organisations, limited resources may require that services be available to a wider section of the community.²⁰⁴

4.231 Where affirmative action programs or services are approved, the Human Rights and Equal Opportunity Commission should review and report on these every second year, noting in particular:

- the need for such services;
- the benefits of providing such services; and

²⁰² Northern Territory, *Anti Discrimination Act 1992*, Section 47(1)(a) and (b).

²⁰³ Victoria, *Equal Opportunity Act 1995*, Section 61.

²⁰⁴ See above, Paragraph 4.131.

- the cost effectiveness of such services.

Recommendation 10

That, where affirmative action programs or services are approved, the Human Rights and Equal Opportunity Commission should review and report on these every second year, noting in particular:

- the need for such services;
- the benefits of providing such services; and
- the cost effectiveness of such services.

Table 1.

| Jurisdiction | Terms used for 'sexuality' | Heterosexuality or Bisexuality included? |
|--------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|
| ACT | Sexuality, defined as including homosexuality (including lesbianism) Transsexuality | Yes |
| NT | Sexuality, defined as including homosexuality and transsexuality | Yes |
| SA | Sexuality, defined as including homosexuality and transsexuality | Yes |
| NSW | Homosexuality, defined as meaning male or female homosexuals Transgender grounds | No |
| VIC | Lawful sexual activity Not defined but the Equal Opportunity Commission suggests homosexuals and lesbians included but not transgendered persons | Not defined but Equal Opportunity Commission suggests heterosexuals are included |
| QLD | Lawful sexual activity Not defined. The Queensland Anti Discrimination Commission suggests homosexuality included but not transgender | Not specified but heterosexuality and bisexuality are included according to the Queensland Anti Discrimination Commission |
| TAS | Not applicable | Not applicable |
| WA | Not applicable | Not applicable |

CHAPTER FIVE

THE NATURE OF ANTI-DISCRIMINATION LEGISLATION

Introduction

5.1 However detailed the proposed legislation, its effectiveness may be limited if the mechanisms by which it operates are clumsy, drawn out, expensive and effectively loaded against the individual complainant.

5.2 Many witnesses to the Committee indicated some considerable dissatisfaction with the process and procedure of existing anti-discrimination legislation, both State/Territory and Commonwealth. Certain concerns were clearly related to the existence of anti-discrimination legislation itself, especially that it was unnecessary; that it duplicated existing legislation; that it provided privileges to a few, and took away the rights of the majority especially to free speech. It was also believed that it emphasised rights rather than responsibilities;¹ that it established too many rights;² and that it also took away rights and values which the community as a whole valued.³

5.3 A number of complaints, however, concerned the structure and process of anti-discrimination legislation and its location within the various anti-discrimination commissions. These complaints, reflecting opinion from a number of different groups, were concerned with:

- the basic structure of legislation, which is primarily complaints-based;
- the existence and extent of exemptions; and
- the roles and responsibilities of anti-discrimination commissions or tribunals.

Structure of the legislation

Complaints based approach

5.4 All anti-discrimination legislation in Australia, whether Commonwealth or State/Territory, is described as complaints based, meaning that individual actions are only generated by the making of a complaint by the person or persons who believe they have been discriminated against.

5.5 One of the major objections to complaints-based legislation is that it is seen as favouring those who have resources and time, and that aggrieved individuals rarely have

¹ Evidence, Association of Catholic Parents, p. 738.

² Evidence, Association of Catholic Parents, p. 740.

³ Evidence, Association of Catholic Parents, p. 738.

either.⁴ While there is no automatic correlation between such legislation and the need for substantial input by the complainant, it seems that a number of factors have resulted in a high workload coupled with a long waiting time for a hearing, especially in respect of Commonwealth legislation.

5.6 This situation may change given the substantial changes recommended in respect of the operation of the Human Rights and Equal Opportunity Commission.⁵ At the time of the Committee's hearings, however, several witnesses stated that the number of complaints made, and the existence of both State and Commonwealth legislation (which led to some confusion about the better jurisdiction) were factors affecting the effectiveness of existing forms of anti-discrimination legislation.⁶

'It takes a lot of energy for a person to make a complaint in the first place and to pursue a complaint. I often explain to people, 'If you are going to embark on this course, it is going to require you to put some energy into it', because often there are ways and means [by] which people stall off things in an attempt to allow time to pass and to let the thing fade out, and so on. In some senses, when you are making a complaint, you need to be in reasonably good shape to make it. If you have some of those underlying uncertainties - and, perhaps, intimidation - hanging over your head, then you are much less inclined to go ahead with the process.'⁷

5.7 Another witness raised a problem which affected all States especially but may have had more disadvantage for Western Australia:

'...I am concerned with HREOC being basically administered out of New South Wales ... I find this a bit onerous for individuals, firstly, to lodge the complaint and, secondly, for it to be dealt with...

For individuals to be doing this across Australia is very difficult. For them to come across for conciliation conferences et cetera is

⁴ Thornton, *The Liberal Promise, Anti-Discrimination Legislation in Australia*, pp. 182-183.

⁵ See below, Paragraphs 5.155-5.160.

⁶ Commonwealth anti-discrimination legislation is administered in four States and Territories by the relevant State or Territory anti-discrimination board, which is also responsible for the administration of its own legislation Victoria (*Evidence*, pp. 221-222), ACT, Western Australia, South Australia. The State body investigates the issue and seeks to resolve it by conciliation. Should conciliation fail, the matter is then referred back to the federal body (HREOC) for further work (*Evidence*, p.222, Equal Opportunity Commission Victoria). In 1996, changes to HREOC processes were recommended, affecting these operations - see below, Paragraphs 5.155-5.160). In NSW, HREOC looks after Commonwealth legislation and the Anti Discrimination Board looks after State legislation; and in Queensland, at the time of this Committee's hearings, the Commonwealth Human Rights Commissioner had responsibility for both (*Evidence*, Queensland Anti Discrimination Commission, p.685); in Tasmania, the Regional Director of HREOC also looked after State legislation (*Evidence*, p. 355).

⁷ *Evidence*, Tasmanian Regional Office HREOC, pp. 354-355.

very difficult ... it has to be accessible to the community, or else ... go through the state equal opportunity commission.⁸

Numbers of Complaints

5.8 Although a very small percentage of complaints ever reached the stage of a hearing, numbers of complaints made per annum were increasing.⁹ Each of these had to be dealt with in some way, through discussion, conciliation, withdrawal or hearing, and this process was time-consuming. 'The gay and lesbian community in WA have lodged a claim of discrimination with HREOC against the WA museum over an issue which happened a year ago but HREOC has not yet even opened that case because it is so snowed under with work.'¹⁰

5.9 Other witnesses stated that one could not measure the need for (or the value of)¹¹ legislation by the number of complaints - in many cases, people did not bother to complain because of a lack of jurisdiction by a discrimination tribunal or authority:

'It is a very well known fact that there is no point in contacting the Equal Opportunity Commission [in Western Australia] for there is nothing that we can do.'¹²

5.10 In other cases people did not make complaints but in itself this was no indication of a lack of problems. It was more indicative of a lack of ability to take the necessary steps:

'...those who are most marginalised, and most in need of protection from the law, are the least likely to trust or have contact with complaint bodies.

when they do come forward they are among the least likely in the community to be able to comply with the procedures to establish their case;

⁸ *Evidence*, Mr Anthony Hosken, p. 628.

⁹ *Evidence*, Tasmania, pp. 347, 355.
Submission, Anti Discrimination Board of New South Wales, Vol. 8, p. 1819 and *Evidence*, p. 115.
See *Evidence*, Equal Opportunity Commission Victoria, p. 223.

¹⁰ *Evidence*, Australian Council for Gay and Lesbian Rights, p. 566 and also p. 574.
Evidence, Queensland Association for Gay and Lesbian Rights, p. 731.
See also *Evidence*, Mr Anthony Hosken, p. 628.

¹¹ The absence of complaints might mean that legislation was fulfilling its objectives in many cases- 'one of the significant indicators is not so much the number of complaints that come but the number of problems that are solved simply because people are able to draw attention to their rights under legislation', *Evidence*, Queensland Anti Discrimination Commission, pp. 682-683.
See also *Evidence*, HREOC Tasmanian Regional Office, pp. 348-349.

¹² *Evidence*, Equal Opportunity Commission of Western Australia, p. 536.

the nature of the alleged unlawful conduct may be such that individuals affected are less likely to complain, due to concern about publicity of the incident exposing them to further discrimination or harassment;

the systemic or endemic nature of the alleged unlawful conduct is such that changes in practice will not be achieved through the resolution of individual complaints.¹³

5.11 The Anti Discrimination Board of New South Wales also noted that, although a number of potential formal complaints were averted because of the Board's or Commission's role in providing information and working through a situation,¹⁴ these necessarily added to the Board's work. A similar situation was reported in Queensland, where information and education services averted formal complaints but did deal with difficult situations on a less formal basis:

'...we should not make too much of the fact that the percentage of complaints is low. The ethnic communities, the indigenous communities and the gay and lesbian communities also will tell you over and over again that one of the significant indicators is not so much the number of complaints that come but the number of problems that are solved simply because people are able to draw attention to their rights under legislation ... So, while the statistics are low, our feedback consistently from the communities that utilise the legislation is that its mere existence is a significant influence on behaviour in the community.'¹⁵

Two or more jurisdictions

5.12 The existence of two jurisdictions in some states could create some problems,¹⁶ especially where there was some overlap between the legislation. In some cases a complainant might have to balance up the benefits and disadvantages of using the Commonwealth or the State/Territory legislation:

'...in the areas of overlap, my view is very strongly that there should be consistency. It makes for unnecessary pain and expense for complainants and for people such as ourselves who administer this legislation to weave our way through technical difficulties around, for example, the fact that "lawful sexual activity" are the words in Queensland and "sexual preferences" are the words somewhere else; or that "sexual harassment" means this in Queensland and something else in New South Wales.

¹³ *Submission*, Inner City Legal Centre, Vol. 4, p. 762.

¹⁴ See *Evidence*, Anti Discrimination Board of New South Wales, p. 115.

¹⁵ *Evidence*, Queensland Anti Discrimination Commission, pp. 682-683.

¹⁶ See also below, Paragraph 5.130, and Chapter 6.

There are also different technical requirements about lodgment dates and timelines for various procedural steps and so on. This all makes the choice of jurisdiction complex and difficult, but then that choice of jurisdiction can have a significant impact on the eventual outcomes.¹⁷

5.13 It was also noted by witnesses that other legislation might exist at a State or Commonwealth level which could duplicate existing or proposed legislation - for example, legislation in States could provide some protection in respect of incitement to hatred¹⁸ and, as many witnesses pointed out, the law of libel and assault could be used to cover a number of issues complained about.¹⁹ Some anti-discrimination legislation therefore ran the risk of duplicating an existing service and thereby perhaps devaluing its contribution.²⁰

5.14 A somewhat different problem with multiple jurisdictions was also highlighted in the Committee's hearings. It was noted that people might consider a state was well served because it had access to at least two sets of legislation and would fail to take into account the possibility of some of that legislation either being removed or having little value:

'No doubt the committee would have heard evidence ... from the anti-discrimination commissioner that the legislation is no longer safe. It is certainly under threat in Queensland; only last week we saw it rejected by the Western Australian government and Tasmania has still refused to enact that legislation. So I think that nexus between state and Commonwealth legislation needs to be removed. I do not think you can connect the two of them.'²¹

5.15 In a similar vein - although not suggesting the demise of state legislation - the Victorian Equal Opportunity Commission advised that the content of any proposed Commonwealth legislation should not be directly related to state coverage:

'We have put the view that any Commonwealth legislation should not operate on the basis of the lowest common denominator. It should not seek to remove any benefits that already exist in state legislation. To that extent it should not be narrower than any existing state legislation, so that the highest level of protection is maintained.'²²

¹⁷ *Evidence*, Queensland Anti Discrimination Commission, p. 687, and see also p. 682.

¹⁸ See Chapter 4, Paragraphs 4.171-4.172, and below Paragraph 5.159, and also *Evidence*, Victorian Council for Civil Liberties, p. 803.

¹⁹ See Chapter 2, Paragraphs 2.89 - 2.90.

²⁰ See also below, Paragraph 5.159.

²¹ *Evidence*, Queensland AIDS Council, pp.710-711.

²² *Evidence*, Equal Opportunity Commission Victoria, pp. 225-226.

5.16 The Anti Discrimination Board of New South Wales also supported the idea of both State and Commonwealth legislation operating.²³

Intent

5.17 'Intent' has a limited place in most Australian anti-discrimination legislation, and this necessarily affects the nature of the evidence that may be admitted. Actions can be determined to be discriminatory regardless of intent, and systemic discrimination is by its nature without conscious intent, although it could be argued that there is a well established intent or desire to maintain a *status quo* behind systemic or institutionalised discriminatory practices. The major objective of the study of systemic discrimination is to make people aware of the factors which may be influencing their actions and those of an organisation, and to demonstrate there must be a more conscious desire to change, or to implement less discriminatory practices.²⁴

5.18 Intent in most cases is also extremely difficult to demonstrate. In the New South Wales *Anti Discrimination Act 1977* Section 20B, the anti-vilification provisions do require some assessment of intent and knowledge:

'Definition of "public act"

In this Division, "public act" includes:

(c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons ...²⁵

5.19 The first case brought under this provision relied substantially on the issue of awareness of the defendants that their words and actions were detrimental to the individual. Awareness of the provisions of the legislation, however, was not required.

5.20 The relevant clause in the *Sexuality Discrimination Bill 1995* (Clause 26) does not raise the issue of intent. Evidence to the Committee from the Law Institute of Victoria suggested that a specific statement concerning the irrelevance of motive would be useful:

'Section 10 [of the Victorian Equal Opportunity Act 1995] ... provides that 'In determining whether or not a person discriminates, the person's motive is irrelevant.' It makes it clear that a person who does not 'mean' to discriminate, or does not realise they are doing so, can still be found to have discriminated unlawfully if action is taken on a prohibited ground. We believe

the provision clarifies the fact that discrimination can be conscious or unconscious.²⁶

5.21 The Committee believes that this type of provision is useful and should be added to the Bill.

5.22 Given that information on sexuality and gender anti-discrimination issues will need to be provided, especially in the workplace, the Committee believes that priority should be given to information and education programs on the implications of the bill.

Recommendation 1

That a clause be added to the *Sexuality Discrimination Bill 1995* which makes motive irrelevant.

Clause 6(7)

'In determining whether or not a person discriminates, the person's motive is irrelevant.'

Formality of Processes

5.23 In order to improve access to available legal processes, there has been an emphasis in much anti-discrimination legislation on having as informal a process as possible. The intention is primarily to encourage an environment in which issues are discussed and worked through without the need to use expensive legal resources:

'We try to make [the complaints] process as user friendly as possible for all sides. Obviously, at the conciliation stage that is probably easier, but also at the hearing stage the commission has tried to keep an emphasis on being as non-legalistic as possible and on assisting both complainants and respondents and other witnesses to be able to deal with the matter in the least stressful way possible.'²⁷

5.24 With the changes to the operation of HREOC arising from the Brandy case it was possible that greater formality would occur. However, given that the greater part of HREOC's work involved dealing with complaints rather than with formal hearings it was hoped that the relatively informal atmosphere would be able to be continued.²⁸

5.25 The informality of hearing proceedings is generally assumed to benefit the complainant, and this is more likely to be the case than otherwise. However, this does not

²⁶ *Submission*, Law Institute of Victoria, Administrative Law Section, Vol. 12, p. 2858

²⁷ *Evidence*, Tasmanian Regional Office HREOC, p. 355.

²⁸ *Evidence*, Tasmanian Regional Office HREOC, p. 355. See also below, Paragraph 5.172.

²³ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1819.

²⁴ See below. Paragraphs 5.30-5.35 and 5.173-5.174.

²⁵ New South Wales *Anti Discrimination Act 1977*, Section 20B.

mean that the respondent is disadvantaged by this process, or that he or she does not also receive some advantage from the absence of a number of legal processes.

Type of Evidence

5.26 Anti-discrimination legislation may not encourage a formal legalistic process but it does allow it. In order to balance this to a degree, provision is made for a different quality of evidence to be given, reflecting the fact that many complainants may have limited access to legal assistance.

5.27 Another contributing factor to the more relaxed rules is that the nature of evidence in discrimination cases is often nebulous. Much may depend on perception, rather than action; it may be difficult for a person to express his or her rejection of statements or actions; and, most importantly, much discriminatory action can be either 'indirect' or, where direct, may be carried out without any witnesses. Corroboration of evidence is therefore unlikely.

5.28 This point was referred to by some witnesses to the Committee's inquiry, although sometimes indirectly. As noted above, there was substantial objection to vilification provisions for a number of reasons,²⁹ including the fact that there may be a limited relationship between the respondent and the outcome of his or her act. In such instances, the evidence relating to 'intent' might be perceived as tenuous.³⁰

5.29 Others stated that they were concerned the quality of evidence might deteriorate with the development of sexuality and gender discrimination legislation:³¹

'...the whole treatment of the HREOC in this bill is clearly, to my mind, preferential. They can write their own rules of evidence. They consider evidence that is not considered in a court of law.'³²

Systemic discrimination

5.30 Most anti-discrimination legislation contains provisions which address issues of systemic discrimination as well as individual discrimination. Systemic discrimination can often only be addressed by the Commonwealth and state discrimination administration bodies identifying institutionalised discrimination and developing strategies to overcome this.

5.31 Systemic discrimination, by its nature, is often hard to identify as discrimination, as opposed to being seen as normal or standard actions and beliefs:

²⁹ See above Paragraph 5.2 and Chapter 2.

³⁰ See below, Paragraph 5.48.

³¹ *Evidence*, Association of Catholic Parents, p. 740.

³² *Evidence*, Dr Reece, p. 771.
See also below, Paragraph 5.172.

'The commission has also recognised that it is not just individual acts of discrimination that the legislation would be intending to deal with ... but that there appears to be some systemic discrimination in the systems and services operating within the community that fail to adequately affect the status of homosexuals and lesbians.'³³

5.32 One witness drew attention to this fact when referring to the issue of exemptions in legislation, especially exemptions granted to religious organisations. Making a distinction between religious belief and the practices of religious bodies, the witness stated that institutional discrimination was often perpetuated by granting unnecessary exemptions to various organisations.³⁴ A similar point was made by another witness:

'...I think what we need to bear in mind is that discrimination is not something which just occurs in terms of one individual acting against another individual. Discrimination is systemic. In other words, there are certain groups within society that, within the structures and institutions of society, are regularly given a lesser status. In my opinion, discrimination law should not only attempt to redress the acts of individuals against other individuals, but also attempt to address these issues of systemic discrimination.'³⁵

5.33 Other witnesses believed that this type of systemic discrimination needed to be addressed. One of the ways in which this could be done, they believed, was to make a clear distinction between an organisation and any other service it might provide. One example, was that one could allow discrimination in respect of clergy in churches, but not in respect of other employees, such as teachers or other staff in religious schools.³⁶

5.34 Some witnesses identified the exclusion of people from ordinary life as a clear expression of systemic discrimination:

'As long as lesbians and gay men are denied participation in all aspects of public life, real systemic equality - an agenda which all governments must support - will never be achieved ... Without a voice, lesbians and gays do not cease to exist - if you like, they have the option of remaining invisible. It is the invisibility which is, perhaps, the worst kind of discrimination thrust on gay men and lesbians in our society ... To the extent that lesbians and gay men are rendered invisible ... a system of gender inequality, of sex discrimination as we know, it will remain intact.'³⁷

³³ *Evidence*, Equal Opportunity Commission Victoria, p. 223.

³⁴ *Evidence*, Equal Opportunity Commission Western Australia, p. 539.

³⁵ *Evidence*, Mr W. Morgan, p. 281.

³⁶ In respect of other staff, see discussion in *Evidence*, pp. 453-454.

³⁷ *Evidence*, Mr C Kendall, p. 607.

5.35 The same witness also stated that systemic equality had to apply to every sphere. In this context, evidence was given that much anti-discrimination legislation applied primarily to public acts, but systemic discrimination was not restricted to such actions:

'Hatred has to start somewhere. The KKK in the United States spreads its message by beginning with community hall meetings which it labels private. These private meetings are as harmful as anything which is distributed publicly. I think we have to get over the idea that harms do not exist in the private sphere or that there is some kind of sacred space in the private sphere.³⁸

Roles and responsibilities of the parties- the complainant and the respondent

5.36 In much anti-discrimination legislation, the traditional respondent has had limited direct responsibilities. He or she must be aware of their rights and responsibilities in respect of the provisions of the legislation in areas of employment accommodation and so forth. He or she must assess and evaluate the need for taking various actions in order to conform with requirements, and must establish the reasonableness of various actions such as making provision for access to premises or employment, as for people with disabilities; or providing facilities for people of one gender when most employees are of another gender. Apart from such actions, the role of the respondent is usually seen as reactive.

5.37 In respect of the ILO Convention 111, the balance of power was very much towards the 'respondent' because of the limited power of HREOC:

'In many cases, it is not all that easy to get the cooperation of respondents, in particular, who are involved in complaints. In many cases, in my experience, potential complainants have decided that it is not worth their while to pursue a complaint of discrimination because even if it was found in their favour, the outcome is dependent on the cooperation of the respondent, and this may not be forthcoming.³⁹

5.38 The individual complainant⁴⁰ in complaints-based legislation must establish a number of factors. These include:

- establishing that an event or action or series of these has occurred;
- establishing that these actions were discriminatory within the meaning of the legislation;⁴¹ and

³⁸ Evidence, Mr C Kendall, p. 608.

³⁹ Evidence, Tasmanian Regional Office HREOC, p. 347.

⁴⁰ See *Submission* from HIV/AIDS Legal Centre Inc, Vol. 10, p.2197. This refers to research that considers HIV discrimination is especially complex and not well served by current legislative processes that emphasise individual rather than systemic discrimination.

⁴¹ The process is outlined in *Evidence*, Tasmanian Regional Office HREOC, pp. 350-351.

- in some areas of legislation, demonstrating that the actions were not reasonable in the circumstances.⁴²

5.39 The issue of vicarious liability has had very little consideration in Commonwealth anti-discrimination legislation, certainly when compared with State anti-discrimination legislation.⁴³ Thus, most Commonwealth cases are about individuals within organisations rather than the organisation and its practices. This effectively allows an organisation to continue operating in a discriminatory fashion:

'This is neither cost effective nor effective in addressing the systemic nature of the discrimination. It furthers the Respondent's position, in that the Respondent is more likely to be in a financial position to settle the few complaints that may be lodged and continue with what may be a cost saving discriminatory practice.⁴⁴

5.40 This responsibility for providing evidence of a complaint has been seen to contribute to the stress placed on complainants who also experience 'burn out' arising from the extensive administrative and related processes linked to pursuit of an issue through various channels:⁴⁵

'The legislation must provide for a simple and inexpensive dispute resolution process which includes compelling people to attend conciliation where appropriate, allows for education to be imposed as part of the resolution and empowers HREOC to enforce an agreed resolution.

Generally we are supportive of the process proposed in the Bill but it is vitally important that HREOC be provided with adequate funding so that we do not have the same situation which has occurred with similar legislation where substantial backlogs have meant people waiting for years for a complaint to be dealt with.⁴⁶

5.41 Some witnesses to the Committee also raised the issue of whether in fact homosexual people (and, to a lesser extent, bisexual and transgendered persons) could in fact be considered in the role of complainant. This approach was based on the belief that complainants were to be seen as powerless but homosexuals did not fall in that category:

'There is a myth that is being allowed to continue about the homosexual community. The myth is that it is a weak or misrepresented or misunderstood, or poorly represented, part of the society or part of the community. We believe that the

⁴² Anti-discrimination legislation allows some forms of 'acceptable' discrimination such as the provision of special services for disadvantaged groups, see above, Chapter 4, Paragraphs 4.218-4.231.

⁴³ See *Evidence*, Tasmanian Regional Office HREOC, p. 350.

⁴⁴ See *Submission*, Inner City Legal Centre, Vol. 4, p. 763.

⁴⁵ *Submission*, Inner City Legal Centre, Vol. 4, p. 762. See also *Evidence*, Queensland Association for Gay and Lesbian Rights, p. 731.

⁴⁶ *Submission*, Gay and Lesbian Rights Lobby, Vol. 5, p.1028.

homosexual community has a very powerful lobby voice, that it is very well represented and is a very articulate and, dare I say it, well financed group.⁴⁷

5.42 A logical outcome of this belief is that it would be a mistake to provide special services for such a group because they could not demonstrate clearly that they were disadvantaged. Hence the argument that the proposed legislation would not establish rights for the needy but would provide privileges for a small but powerful group.⁴⁸

5.43 Witnesses therefore believed that the role of the respondent had been ignored, and that in fact there was considerable responsibility placed on respondents or potential respondents. There was some discussion of possible frivolous and vexatious use of the system by complainants⁴⁹ which could lead to considerable expense being incurred by respondents.⁵⁰

5.44 Much of the dissatisfaction with existing and proposed anti-discrimination law, however, appears to be concerned with provisions which seek to impose some controls on individual 'liberties'. Many witnesses suggested that existing vilification provisions in other legislation had demonstrated the burden of evidence now unfairly placed on respondents (as well as a belief that this aspect of the relevant legislation interfered with free speech - 'Anybody who opposes the normalisation of homosexuality will be in fact attacked under the vilification law'):⁵¹

'All that must be established beyond the public act of threatening is the likelihood that hatred would be incited. This overlooks the chance that the incitement of hatred may be an indirect and completely unintended effect of the act and merely the product of a totally unreasonable response on that part of the audience.'⁵²

5.45 Some of the resistance to aspects of the proposed legislation was based on a misunderstanding of requirements, such as that regarding leasing of accommodation within a private household. The objections, however, do demonstrate a concern that the freedom of

⁴⁷ Evidence, Assemblies of God Queensland Conference, pp. 778-779.

⁴⁸ See Chapter 2, Paragraphs 2.89-2.91 for the discussion on special rights as opposed to ordinary rights. 'Until sodomy was decriminalised and the Mardi Gras was televised ... the case for a disadvantaged minority may have been sustainable. What we are questioning is whether homosexuals still remain a disadvantaged minority, and we say that today a reassessment is in order...for a disadvantaged minority you need a class which demonstrated political powerlessness. We do not see that in the homosexual community. In fact we find that their influence in the community is staggering...we think that the gay rights laws meet none of the traditional criteria for human rights protection.' Evidence, Australian Family Association, p. 579.

⁴⁹ Evidence, South Australian Equal Opportunity Commission, pp 457-458.

⁵⁰ Evidence, South Australian Equal Opportunity Commission, p. 458.
See also Evidence, Association of Catholic Parents, p. 748.

⁵¹ Evidence, Focus on the Family, p. 250.

⁵² Evidence, Association of Catholic Parents, p. 738.

the individual would be reduced,⁵³ and the capacity to control one's life would be more limited:

'...you do not have to impose in the homes of private people. What is going to happen if these homosexual transgender people are given a private room in a home. Are they then allowed to bring in their - what will I say - class members into that home to their bedrooms and behave as they wish as a matter of rights?'⁵⁴

5.46 Exemptions, however, are generally available in respect of certain types of employment and accommodation.⁵⁵ In the draft legislation, the same range of exemptions and responsibilities is imposed on respondents as is to be found in other anti-discrimination legislation. The only additional area of responsibility for respondents is to defend a charge of vilification, but this does not necessarily require actions more onerous than those required to mount a defence against other charges. For the complainant, vilification is not necessarily any less difficult to prove than any of the other grounds.

5.47 Some witnesses, indeed, believed that the number and coverage of exemptions in anti-discrimination legislation benefited respondents and the existing social structure. Thus, although anti-discrimination legislation existed, its effect could easily be limited by permitting exemptions; by allowing exemptions for groups (as in the case of community services provided by religious organisations);⁵⁶ or by increasing the burden on the individual complainant to meet various criteria in order to demonstrate that discrimination might have occurred (as in the case of the Queensland vilification legislation, which has a double requirement):⁵⁷

'...exemptions need to be very carefully considered ... If [they] are too broad, and if they are not very carefully worded, then the redress functions for vilification are notional only.'⁵⁸

5.48 Witnesses also suggested that many of the complaints about the responsibilities imposed by legislation were misguided, and that supposed burdens for respondents were actually limited. In the case of vilification legislation, for example, it was not uncommon for people to suggest scenarios which appeared to be complex and as imposing burdens on ordinary people that would be difficult to meet, as respondents. A more objective consideration of such scenarios, it was argued, suggested that most eventualities were unlikely to occur:

'In the sorts of examples of vilification that groups bring to us, it is generally quite easy to see the line between a free expression of

⁵³ Evidence, Focus on the Family, p. 250: 'vilification legislation is mind control'.

⁵⁴ Evidence, Association of Catholic Parents, p. 746.

⁵⁵ See Chapter 4, Paragraphs 4.110-4.120, 4.194-4.197, 4.202.

⁵⁶ See Chapter 2, Paragraphs 2.22-2.24; Chapter 4, Paragraphs 4.183-4.193 and Recommendation 8.

⁵⁷ Evidence, Queensland Anti Discrimination Commission, p.688, 694.

⁵⁸ Evidence, Queensland Anti Discrimination Commission, pp. 683-684.

one's own views and the right to hold one's views as opposed to vilifying and being hostile towards other groups because of their right to have their own views. It is when you see those daily examples that it becomes quite clear that those lines can be drawn.⁵⁹

Individualisation of Complaints

5.49 The complaints based approach has also been seen as a process which tends to fragment issues and limit the systematic analysis of systemic discrimination - 'the individualised approach permits attention to be effectively deflected away from the institutional oppression'.⁶⁰

'The ICLC conducts considerable discrimination legislation in both the state and federal systems. It is our experience that individual complaints based anti-discrimination laws, both state(NSW) and federal, often fails to adequately address systemic discrimination. Representative actions are often beset with procedural problems which hinder the capacity of such actions to do so and again force the onus of the system on aggrieved individuals. It is important, in developing any new federal legislation which will increase the net of anti discrimination coverage, to examine the problems with the system as it now exists.'⁶¹

5.50 A fairly broadly based anti-discrimination legislation may also stack the dice against complainants by widening the field of coverage. As noted above, many witnesses argued that it would be a mistake to extend the definition of 'sexuality' to include heterosexuality,⁶² and this argument appeared to be based on fairly pragmatic grounds: that the inclusion did not reflect reality or the experience of people who had been discriminated against for a long time. However, some witnesses also went on to suggest that the development of special measures or positive discrimination, as a means of compensating for an all-encompassing definition of sexuality, was time consuming and therefore could be detrimental to potential complainants:

'...the principle of essential equality' cited by Senator Spindler ... is thus misplaced in covering heterosexual people ... neutrally phrased legislation may be used as a toll to increase discrimination ... Special measures exemptions are a cumbersome and unnecessary method of dealing with this issue ... the burden of

⁵⁹ *Evidence*, Queensland Anti Discrimination Commission, pp. 688-689.

⁶⁰ Thornton, *The Liberal Promise*, p. 38.

⁶¹ *Submission*, Inner City Legal Centre, Vol 4, p. 757.
See also *Submission*, Gay and Lesbian Rights Lobby, Vol 5, pp. 1019, 1023, 1028.

⁶² A view probably supported by the evidence of the Queensland Anti Discrimination Commission that the phrase 'lawful sexual activity' in the Queensland legislation was being used to obtain benefits not available through workplace policy - see *Evidence*, p. 682.

defending hostile uses of the legislation, and of seeking exemptions, will fall upon lesbians or gays.⁶³

5.51 Reference was made on several occasions to the time and resources utilised in defending 'frivolous' cases, and it was believed that people would attempt to waste existing resources by complaining they could not get access to certain venues or services even if such access was not really required.⁶⁴

5.52 In these instances, the emphasis was more on the lack of good faith by complainants who were thought of as being more members of a 'respondent' class, the instance most commonly referred to being that of the Proudfoot case. Some groups clearly separated this frivolous and timewasting action from complaints by those who were being discriminated against by institutionalised behaviours or socially sanctioned violence by individuals.

*Direct and Indirect Discrimination -Comparability and Proportionality*⁶⁵

5.53 Anti-discrimination legislation presupposes a norm against which all members of society compare themselves or are compared. This occurs in those sections of legislation which require that the aggrieved person establish that they are treated 'less favourably' than others, or that, in indirect discrimination, they must comply with a requirement which is more easily met by others not distinguished by the same characteristics as themselves.

5.54 The comparability principle is generally used in anti-discrimination legislation in two ways. In direct discrimination clauses it provides a contrast between two similar circumstances, demonstrating that in a situation the only distinguishing factor between two parties may be their race or their sexual orientation, not their skills or their experience.

5.55 In sexuality discrimination comparison is generally used in direct discrimination clauses where the legislation seeks to establish that discrimination can occur if the aggrieved person believes he or she has been treated less favourably than a person from another group. One of the problems with comparisons is that they may not be carefully phrased. If so, this can allow comparison with a group which may have some characteristics (real or perceived)

⁶³ See *Submission*, Ms J Millbank, Vol. 1, p. 122;
Submission, Gay and Lesbian Rights Lobby, Vol. 5, p. 1030.
See a fuller discussion of this issue below at Paragraphs 5.114-5.123. See also Paragraph 5.64.

⁶⁴ See, for example, *Evidence* pp. 143-144, Ms J Millbank.

⁶⁵ Generally, the test for direct discrimination is whether a person is treated less favourably on the grounds of their sexuality or gender status as compared with a person of a different sexuality or gender status. This test for direct discrimination is sometimes referred to as the "similarly situated" test; the test for indirect discrimination is that a complainant must show that a substantially higher proportion of people of the sexuality or gender status of the complainant cannot comply with a certain requirement or condition that is imposed, as compared with people of a different sexuality or gender status; and that the requirement is unreasonable. This test for indirect discrimination is sometimes referred to as the "proportionality test".

in common with the aggrieved person.⁶⁶ In such cases, the aggrieved person may not be deemed to have been discriminated against.⁶⁷

5.56 In indirect discrimination, comparability or proportionality can help demonstrate that some qualities or skills may not be as characteristic of or as common to one group as they are for another; and that either such qualities are not essential in a situation or it is not reasonable to expect that all people have them to the same degree.

5.57 An example of this would be a requirement to have a certain level of education as a prerequisite for employment when a substantial proportion of a community had not had access to that level of education and it was not reasonable to expect that level of education for that position.

5.58 In indirect discrimination, the comparability approach can reinforce a stereotype of what is normal in society. Women must compare themselves with men, homosexuals with heterosexuals. This can perpetuate a norm which, in fact, the legislation itself is trying to change - in short, the ends of the legislation may indirectly be affected by the processes utilised in the legislation:

'... all of the statutes use this reasonably pure test, which we call the 'but for' test. The idea is that, when you test for discrimination, you look at the actual or hypothetical treatment of a person who shares all of the characteristics of the complainant other than the ground upon which the complaint has been lodged. For example, a homosexual person, in order to demonstrate discrimination on the ground of homosexuality, would have to be able to point to an actual or hypothetical situation in which a person who was the same in all respects but heterosexual was treated more favourably.⁶⁸

5.59 Insofar as the process of comparability results in people being defined by certain characteristics or imputed characteristics, it has been argued that this approach tends to emphasise the specific characteristic of the individual aggrieved (whether this is sex, sexuality, disability, race, age or other factors) and does not consider them as a whole person.⁶⁹ This is true to a degree, but is perhaps an inevitable component of such legislation;

⁶⁶ See A. Chapman, 'Sexuality and Workplace Oppression', *Melbourne University Law Review* 20 (1995) pp. 321-322 - the relevant case is where a person was seen as not being discriminated against because of HIV status in that he received the same treatment as other high risk groups, e.g. people who were haemophilic. In such instances, certain measures may be justified abstractly, much as a person with a highly contagious disease might be excluded from some areas because of the disease not the action which might have caused him to have the disease. The person could not claim that they were discriminated against without reason or that they were treated less favourably than other persons in a similar situation.

⁶⁷ Legislation may also unintentionally exclude some groups from coverage. The Anti-Discrimination Board of New South Wales, for example, was critical of the proposed Commonwealth legislation (subclause 6(3)) because it did not cover situations where a transgender person was not treated as the sex with which they identified, and other submissions also made this point.

⁶⁸ *Evidence*, South Australian Equal Opportunity Commission, p. 449.

⁶⁹ See, for example, Chapter 4, Paragraphs 4.99-4.101.

such an approach can only be overcome by general rights legislation or constitutional change which acknowledged that certain rights existed for all. The onus would then be on the perpetrator to demonstrate reasons why such benefits could not be extended.⁷⁰

5.60 One witness was opposed to the definition of 'discrimination' in the *Sexuality Discrimination Bill 1995* which requires that less favourable treatment be demonstrated by comparing two groups. He suggested that the example of the ACT legislation be followed instead. In the ACT *Anti Discrimination Act*, he believed:

'...the requirement for unlawful discrimination is that a person is treated unfavourably because of their sexuality (or whatever ground) without the requirement of a comparison being made to the way other people are treated. The latter approach is in my view preferable as it accords with real equity rather than with a merely formal equality.'⁷¹

5.61 The comparability approach may also require the disadvantaged group to demonstrate in reality some quality, characteristic skill or ability that other persons or groups do not have to demonstrate. In the draft sexuality and gender legislation, the current version of the indirect discrimination clause (Clause 6(2)) does not require the proportionality test, since it only refers to an unreasonable requirement with which a 'substantial proportion' of people of other than heterosexual status cannot comply. It does not require that the ability of the non-heterosexual community to comply should be compared with that of the heterosexual community:⁷²

'[the clause] means that any practice or policy that cannot be met by a substantial proportion of gay men and lesbians constitutes unlawful discrimination, whether or not it can be complied with by any heterosexual people. This move away from the proportionality test represents a significant shift in the concept of indirect discrimination.'⁷³

5.62 This witness did not appear to fully support this move, stating that it would be preferable to replace the proposed Clause 6(2) with provisions equivalent to those in the amended Commonwealth *Sex Discrimination Act 1984* which reflected a more sophisticated concept of indirect discrimination.⁷⁴

⁷⁰ However, this need not be a problem if the legislation is perceived as an interim step. Given the educative functions within most anti-discrimination tribunals or commissions it could be argued that legislation is a means of changing attitudes over time, as well as providing some relief in a shorter time period.

⁷¹ *Submission*, Associate Professor Tahmindjis, Vol. 4, p. 3.

⁷² There is currently no indirect discrimination provision in respect of transgender people: see below, Paragraphs 5.67-5.68.

⁷³ *Submission*, Ms A Chapman, Vol. 4, p. 682. Ms Chapman suggested that the draft legislation be changed to resemble the indirect discrimination provisions of the amended *Sex Discrimination Act* - *Submission*, Vol. 4, p. 683.

⁷⁴ See *Submission*, Ms A. Chapman, Vol. 4, p. 683. *Submission*, Ms Rosemary Hunter, Vol. 6, p. 1266.

5.63 The Anti-Discrimination Board of New South Wales, however, specifically objected to the non-comparability approach on the grounds that an absence of comparison effectively made the provision very difficult to operate.⁷⁵

'The test in Clause 6 does not contain an element that [a] requirement or condition disadvantage a particular group, or that a higher proportion of persons who are not members of that group could comply with the requirement or condition. In effect this means that a person could complain they have been discriminated against indirectly, even if a substantial proportion of *all* people could not comply with the requirement or condition. The current wording of the section removes the element that the particular group of people be *discriminated against* by the requirement or condition. The fact that the requirement or condition must not be "reasonable in all the circumstances" does not assist, because of the fact that "reasonableness" has not been defined to include considerations of whether the particular group has been discriminated against.⁷⁶

5.64 The Committee has noted these concerns and has suggested changes to the current Clause 6(2). The changes will require a complainant to demonstrate that the action is clearly disadvantageous to any individual or group, rather than the action being assumed to be disadvantageous because it is discriminatory. The intention of this is to avoid frivolous and vexatious complaints, not to require a greater proof in respect of valid complaints

Recommendation 2

That indirect discrimination on the grounds of sexuality be demonstrated to cause a disadvantage to the complainant

Replace Clause 6(2)(b) with the following:

Clause 6(2)(b) 'that, on the balance of probabilities, is considered to cause disadvantage to the aggrieved person or group.'

5.65 The difficulty of some proportionality tests was also noted by the New South Wales Anti-Discrimination Board, with respect to transgender discrimination. The Board suggested that some transgender persons might be able to comply in such tests while others might not. In short, there was little value in considering all transgender persons as one group, and, indeed, to do so could reflect a discriminatory approach. It would be preferable to

⁷⁵ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p.1812.

⁷⁶ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, pp 1827-1828 (emphasis in original).

Also there was no requirement that the person making a complaint be unable to comply with a requirement. Although this was seen as positive, in that it enabled people to lodge a complaint regardless of the effect it had on them (*Submission*, Anti Discrimination Board of New South Wales, Vol .8, p.1828) the Board recommended that the list of remedies for those able to comply should be noted.

acknowledge that male to female and female to male transgender people differed from each other and possibly from some, though not necessarily all, other groups in society. The Board noted that the most effective way of doing this would be to impose a test which examines if there was any *disadvantage* to a complainant group:

'...there may be particular problems in attempting to apply a 'higher proportion' test ... in the area of *transgender discrimination*. This arises from the fact that while male to female transgender persons may be unable to comply with a requirement or condition, female to male transgender persons may be able to comply (and vice versa) ... An example of an alternative test is that found in the Sex Discrimination Act 1984, which looks at whether the requirement, condition or practice has a *disadvantageous* effect on persons in the complainant group.⁷⁷

5.66 The Anti Discrimination Board of New South Wales also proposed that there be two different tests of direct discrimination in respect of transgender persons, a suggestion intended to overcome the possibility of a person not being treated as if they were a member of the sex with which they identified - regardless of re-assignment surgery.⁷⁸

5.67 As noted, the current form of the Commonwealth sexuality legislation does not include a reference to indirect discrimination in respect of transgender persons. Those who referred to this gap in legislation suggested that a clause should be added, for the sake of uniformity and broad coverage:

'While the practical applications of indirect discrimination on the ground of transgender identity may be limited, this does not justify omitting such a provision from the Bill. The fact that situations may arise means that it is imperative that such discrimination be made unlawful, as it is with all other grounds of discrimination at a Commonwealth level.⁷⁹

5.68 The Committee has considered these issues and believes that a clause on indirect discrimination in respect of transgendered persons should be added to the Bill. Noting the comments above in respect of the difficulty of applying the 'higher proportion' test in respect of transgendered persons, and the importance of not suggesting that transgendered persons are a similar group regardless of gender, the Committee recommends changes which refer to demonstrable disadvantage and acknowledge the different groups of transgendered persons.⁸⁰

⁷⁷ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1828. See also *Submission*, Ms Rosemary Hunter, Vol. 6, pp. 1266-1267.

⁷⁸ See below, Paragraphs 5.76-5.95.

⁷⁹ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1827.

⁸⁰ In the new clause 6(4)(b) (Recommendation 3), the reference to a complainant group being restricted to transgendered persons of one gender is a means of distinguishing between male to female and female to male transgender persons and not considering all transgender persons to be the same.

Recommendation 3

That a Clause be added to the *Sexuality Discrimination Bill 1995* to cover indirect discrimination in respect of transgender people.

Replace 6(4) (which becomes 6(5)) with the following:

Clause 6(4)(a) 'A person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of transgender identity or status if the discriminator requires the aggrieved person to comply with a requirement or condition that, on the balance of probabilities, is considered to have a disadvantageous effect on the complainant group;
(b) for the purposes of this Clause, a 'complainant group' is restricted to transgendered persons of one gender, regardless of re-assignment procedures.'

Reasonableness/Reasonable in the Circumstances

5.69 A key factor in discrimination is the issue of whether any requirements or discriminatory actions are 'reasonable'. This test can occur in a number of arenas, usually in the context of direct or indirect discrimination, but also in the area of providing benefits for a specific group. It is possible for the word reasonable to exclude or include certain actions, with the main proviso being that actions are reasonable 'in the circumstances'.

5.70 Neither the word 'reasonable' nor the phrase 'in the circumstances' is defined in legislation, given that assessment must be made on an individual basis. However, the Equal Opportunity Commission of Victoria stated that the reasonableness tests in the Victorian legislation were important in reassuring people that exemptions from provisions were not so broad as to be without value:

'...in looking at some of the wording in those exceptions, there are some objective tests ... which we have said would be very difficult to establish to our satisfaction that the exception applies ... I think people have found some comfort at least in the fact that the precise wording of the exceptions does enable some reasonableness tests and some objective[s] tests before anyone could attempt to rely on them.'⁸¹

5.71 In its comments on the draft Commonwealth sexuality and gender legislation, the NSW Anti Discrimination Board stated that it would be useful to specify those factors that were deemed relevant in determining whether an action was 'reasonable':

'...in the Board's experience there has been much confusion on the part of respondents in relation to the term "reasonable in the circumstances". In order to attempt to reduce the level of uncertainty created by the use of such terms, the Board recommends that the Bill outline factors which can be taken into

⁸¹ Evidence, Equal Opportunity Commission Victoria, p. 231.

account in determining whether a requirement or condition is "reasonable in the circumstances"⁸².

5.72 One of the difficulties with standards of reasonableness is that it is open to a tribunal to determine such standards, which may differ from those of the complainant.⁸³

5.73 The Committee considers that a 'reasonableness test' clause should be added to Clause 6(2) if the changes recommended above at Paragraph 5.68 and the following Recommendation are not accepted. The example to be followed is the reasonableness Section in the *Sex Discrimination Act 1984* (Section 7B).

Special Needs Groups

5.74 Even within specific anti-discrimination legislation, some categories of people may require special attention in order to ensure that they are afforded the same types of protection as others. Without this, there may be situations which create a more disadvantaged set of complainants.

5.75 This point was made by one witness who noted that the basis of the legislation - other anti-discrimination legislation, especially the Commonwealth *Sex Discrimination Act 1984* - was sound, but should not be slavishly followed:

'...there is a need to consider more carefully the extent to which discrimination based on sexuality and transgender identity presents the same kinds of issues as sex discrimination, and, conversely, the extent to which the two forms of discrimination are sufficiently different to require different provisions.'⁸⁴

Establishing Transgender Status as a ground of discrimination

5.76 One of the problems for people of transgender status is that the actual lack of recognition of transgender people can exclude them from the protection of existing laws, such as sex discrimination legislation, without necessarily giving any protection under other laws. Although there is no reason why a transgender person cannot be protected through 'but for' or 'comparability' clauses, these need to be carefully worded in order to compare appropriate groups. As was noted above, some ambiguity exists in current legislation which may exclude a person from coverage, or which may make comparison virtually impossible.⁸⁵

⁸² Submission, Anti Discrimination Board of New South Wales, Vol. 8, p. 1828. The Board also suggested that the Bill possibly use the provisions of the *Sex Discrimination Act 1984* to cover indirect transgender discrimination (which had been omitted from the draft sexuality legislation).

⁸³ Thornton, *The Liberal Promise*, pp. 190-191. See also below, Paragraphs 5.107-5.108.

⁸⁴ Submission, Ms Rosemary Hunter, Vol. 6, pp. 1265-1266.

⁸⁵ See Chapter 4, Paragraphs 4.99-4.100.

5.77 Those who appear to be most vulnerable would be people who sought to live as members of one sex but were not so defined by any official body. At present, this means that these people have not undertaken re-assignment surgery and are not planning to do so, insofar as there is some recognition of post-operative transgendered persons. Strictly speaking, however, there is no specific legal obligation to treat a transgender person as a member of the sex with which they identify.⁸⁶

5.78 The South Australian Equal Opportunity Commission advised that the Commonwealth legislation should assist in clarifying the situation, insofar as this was possible, because without a clear guidance in the legislation a large number of people could well be excluded from coverage:

'Without such legislative guidance, gender identity must be defined in terms of the common law, that is, in terms of whether the person is pre- or post-operative or whether or not they have a sex re-assignment certificate. This will limit the broad definition of transgender which considers the individual's psychological and social/cultural identity and not just their chromosomal configuration or gonadal or genital features.'⁸⁷

5.79 In order to overcome these problems, the Anti-Discrimination Board of New South Wales suggested that there be two tests of direct discrimination in respect of all transgender persons. The first would be the usual type of test, that a transgender person was treated less favourably than a person who was not transgender:

'The second test should make it unlawful to fail to treat a transgender person as a member of the sex with which he or she identifies.'⁸⁸

5.80 This recommendation has been accepted by the Committee through the changes made to Clause 6, acknowledging that discrimination occurs when a person's preferred and identified gender is not accepted.

5.81 The office of the South Australian Equal Opportunity Commissioner noted some of the problems that can occur when legislation is not thorough (although some of the problems referred to have been overcome by the South Australian *Sexual Reassignment Act 1988* which allowed at least post-operative persons the right to be known in that State, as persons of their reassigned gender):

'In South Australia we have encountered numerous difficulties where, particularly transsexuals, not homosexuals, but people who have opted to take on characteristics of the other sex, and, for example, have undergone sexual reassignment procedures, have encountered discrimination but it has been almost impossible to

⁸⁶ Submission, Anti Discrimination Board of New South Wales, Vol. 8, p. 1816.

⁸⁷ Submission, South Australian Equal Opportunity Commission, Vol. 2, p. 253.

⁸⁸ Submission, Anti Discrimination Board of New South Wales, Vol. 8, p.1825-1826.

identify their transgender status as the legal cause of their discrimination because the legal cause has been their actual legal gender.'⁸⁹

5.82 The major reason for this problem is that sex discrimination legislation was not devised to deal with change of gender issues, but only with the discrimination issues of people who had always identified as members of their birth gender. Thus most sex discrimination legislation presupposes that a complainant will be arguing that they have been discriminated against because they *are* a member of a specific gender or that they are a member of a specific gender *and* have been disadvantaged relative to the treatment available to another gender.

5.83 The difficulty that transgender people experience in this instance is that they are rarely considered to be a person of their preferred gender. Hence, it is only if legislation exists at State or Commonwealth level which considers that all transgendered persons are members of the sex with which they identify that a complaint of direct discrimination could be made.

5.84 Without this protection, claims of direct discrimination fail - if the person is making a complaint that, for example, they have been discriminated against because they are female. If the law does not perceive them as female, they cannot progress with such a complaint:

'A male undergoes sexual reassignment and becomes... a female and is in employment and wants to use female toilets. The transgender person in that case could not possibly satisfy the test of discrimination elaborated in clause 6 of this bill or, indeed, in any other instrument in force in Australia.'⁹⁰

5.85 With respect to indirect discrimination, which generally requires comparison with another group - such as men - a male to female transgendered person may find that she is still considered as having certain male characteristics, and therefore has not been discriminated against.

5.86 In order to allow the usual provisions of anti-discrimination law to operate, therefore, special attention may need to be given to the issues relating to transgender people. As noted⁹¹ a major issue is the extent to which people are 'transgender' or are rather seen as a member of the sex with which they identify:

⁸⁹ Evidence, South Australian Equal Opportunity Commission, p. 449. Again, a problem of this nature could also occur if other legislation existed which was not overridden - See Evidence, pp. 449-450.

⁹⁰ Evidence, South Australian Equal Opportunity Commission, p. 449. The Commission went on to note that unless the proposed Commonwealth legislation specifically overrode the provisions of State laws, certain actions would still be illegal within states, Evidence, p. 450. See also Evidence, Equal Opportunity Commission Victoria, p. 230.

⁹¹ See Chapter 4, Paragraphs 4.95-4.102.

'Many of us see no virtue in continuing to be classified as transgender, or in having a transgender identity, we have a gender identity consistent with our reassigned status.'⁹²

5.87 However, according to the South Australian Equal Opportunity Commission, certainty with respect to a definition of transgender and especially with respect to a definite status for all transgender persons, would not be easy to achieve. The reason for this was that the current definition of transgender in the *Sexuality Discrimination Bill 1995* was broad and all-encompassing.⁹³

5.88 Nonetheless, this problem may not be as serious as is thought. Although there appeared to be considerable concern that people would move in and out of a gender identity on a regular basis,⁹⁴ this in fact appears to be a very rare occurrence. It should be possible to identify as transgender those people who wish to remain 'transgender', those who may return to their original gender, and those who physiologically become their preferred gender:

'...to respect our reassignment, transgender identity must not be defined in a manner that makes it logically impossible for someone to consider that identity to be transitional for them. By requesting a definition that can cease to apply after reassignment there is no implication ... that reassigned persons are "better" than those who do not seek reassignment, it merely recognises that gender identity is a continuum and for some people an ambiguous gender reflects their true state whereas for others it does not.'⁹⁵

5.89 This issue has been dealt with through changing the definition of transgender person (see Chapter 1, Recommendation 5) and having a specific definition for a transsexual person (Chapter 1, Recommendation 6) while still including transsexual people within transgender.

5.90 Those who wish to move on from being a transgender person to being known as a member of another sex, should be protected by the status of transgender and having this transgender status accepted regardless of re-assignment surgery. Sex discrimination legislation, however, does not accommodate this at present.

5.91 The issue of people who move between genders, and hence may be transgendered persons, and male or female over a period of time, is slightly more difficult to accommodate but not impossible.⁹⁶ The main difficulty that is likely to occur is with use of sex discrimination legislation when a person may be identifying as different genders over a

period of time; logically, however, such problems would be more effectively addressed by a comprehensive sexuality and gender legislation, than through sex discrimination legislation.⁹⁷

5.92 The intention of the legislation with respect to other groups may need to be clarified. As noted above, there was some concern expressed by the Commonwealth Attorney General's department with respect to the more difficult issue of those who were occasionally or temporarily 'transgender'.⁹⁸ However, it may be necessary for legislation to make a distinction between transgender people and those such as transvestites and drag queens.

5.93 The current form of the legislation seeks to provide protection to transgender people by providing a comprehensive definition which includes a statement that a 'transgender' includes a person of one sex who 'assumes any of the characteristics of the other sex, whether by medical intervention ... or otherwise.'⁹⁹ Neither transvestites nor drag queens actually live or 'seek to live' as a member of the other sex;¹⁰⁰ nor do they identify as a member of the other sex. They do not define themselves as transsexual. Thus, the only area in which they would be covered by the legislation is as a person 'who assumes any of the characteristics of the other sex'.

5.94 This issue was discussed by the Human Rights and Equal Opportunity Commissioner, who noted that it was possible that those who held a temporary status would in fact be better protected by sexuality provisions:

'Where I would have thought that transvestism may have come in, but does not [in the Commonwealth legislation], is that my understanding is that transvestism is a form of sexuality. So, if the definition said sexuality includes those things, I think it would certainly be arguable that transvestism is covered. But it says 'sexuality means' so that is restricted to heterosexuality, homosexuality and bisexuality.'¹⁰¹

5.95 In Chapter 1 it has been recommended that 'transgender person' is redefined to include only those persons who live and identify full time (or as much as possible) as a person of a particular gender, regardless of re-assignment surgery.¹⁰² Current recommendations therefore do not provide specific protection to transvestites or any other person who does not live full-time, or as much as possible, as a person of the opposite gender, and whose sexuality is not included in the current definition of sexuality. Persons in this group may need to utilise other legislation such as that prohibiting assault.

⁹⁷ See, for example, Paragraphs 5.96-5.102.

⁹⁸ See Chapter 3, Paragraph 3.71.

⁹⁹ *Sexuality Discrimination Bill 1995*, Clause 5, 'transgender'.

¹⁰⁰ *Evidence*, HREOC, p. 136.

¹⁰¹ *Evidence*, HREOC, pp. 136-137.

¹⁰² *Submission*, Mr J. Mountbatten, Vol. 10, p. 2233.

See also Mountbatten, 'Priscilla's Revenge: or the Strange Case of Transsexual Law Reform in Victoria,' *Melbourne University Law Review*, 20 (1996), pp. 871-895.

⁹² *Submission*, Gender Council of Australia (WA) Inc, Vol. 6, p.1275.

⁹³ *Submission*, South Australian Equal Opportunity Commission, Vol. 2, pp. 1252-1253.

⁹⁴ See Chapter 2.

⁹⁵ *Submission*, Gender Council of Australia (W.A.) Inc, Vol. 6, p. 1275.

⁹⁶ The main problems appear to occur with having multiple identities, possibly for criminal purposes, and moving into areas which are ordinarily segregated by gender, such as sport - see Chapter 4, Paragraphs 4.132-4.137 on sport, Chapter 6 Paragraphs 6.81, 6.85-6.93 on identity issues.

Same Sex couples and Sex Discrimination Legislation

5.96 It was suggested during the Committee's hearings that some protection may be available to same sex couples through sex discrimination legislation. Such provisions, if they apply, would be primarily in the area of marital status and gender (sex).¹⁰³ However, given the major concerns of some same sex couples (income issues, superannuation, leave and other benefits), use of sex discrimination legislation to deal with disadvantageous treatment is a second-best option. It is also one fraught with problems similar to those experienced by transgender people.

5.97 The marital status of same-sex couples, for example, is not an issue that could easily be brought under sex discrimination legislation, even though such legislation is concerned to limit discrimination on the basis of marital status. Where marital status relates to couples, it requires parties to have a status recognised as marital, and this in turn currently depends on partners being of a different sex to each other.¹⁰⁴ Where marital status relates to a single person, the gender of the party is irrelevant (unless, for example, there is some assumption being made about likelihood of marriage and children as affecting employment): 'Visiting your bank manager for home loans [is] particularly difficult for lesbians as most lending institutions are concerned about the prospect of marriage and children.'¹⁰⁵

5.98 Where an assumption is being made about employment availability and so forth in respect of single people who are nonetheless in a partnership, sex discrimination legislation can offer little special assistance - the issues are ones which have to be addressed on a sexuality-free basis. Refusal to provide a service *may* have a 'sex' basis rather than a sexuality basis - for example, police may consider all domestic violence where a woman is the victim to be not as much of a crime as other forms of violence. In such a case, a lesbian woman may be treated the same as a heterosexual woman, and both may have been discriminated against initially on the basis of their gender. However, sex discrimination legislation may not be the most appropriate source of assistance for either.¹⁰⁶

5.99 Assumptions may also be made about people on the basis of gender, which would theoretically come under sex-discrimination legislation. However, it is difficult to see that sex-discrimination legislation offers any real recourse for same-sex couples. 'Most discrimination against same-sex couples ... occurs at the state level in areas such as adoption, child custody, property division, wills and intestacy, access to one's partner in hospital, et cetera.'¹⁰⁷

5.100 Male same sex couples are likely to have even less opportunity to benefit, given that sex-discrimination legislation was primarily intended to address individual and systemic discrimination against women, both as women *per se* and as single or married women.

¹⁰³ Evidence, Equal Opportunity Commission Victoria, p. 225.

¹⁰⁴ See Chapter 4, Paragraphs 4.63-4.65.

¹⁰⁵ Submission, Ms Thompson and Ms Connor, Vol. 5, p. 930.

¹⁰⁶ See also Evidence, Mr Christopher Kendall, p. 613.

¹⁰⁷ Evidence, Ms K. Walker, p. 277.

5.101 These complexities indicate that specific legislation is often required to address specific situations. This factor was recognised by many witnesses who indicated that legislation did have to be carefully drafted since in many cases it did not always meet its objective:

'Persons of the same sex who in all other respects have relationships which are equivalent to heterosexual de facto relationships are treated differently. In the Federal sphere this occurs most obviously in the areas of taxation, superannuation, immigration and health care.

There is some uncertainty as to whether such discrimination is caught by a law making it unlawful to discriminate on the grounds of homosexuality ... The overarching legislation needs to make it clear that such discrimination is covered.'¹⁰⁸

5.102 If marital status is recognised through Clause 107 of the *Sexuality Discrimination Bill 1995*, the *Sex Discrimination Act 1984* could apply to same sex couples.

Exemptions and Exceptions

5.103 As was discussed in Chapter 4, anti-discrimination legislation offers a range of exemptions and exceptions. There are two major types of exemptions - those which permit a number of groups to be excluded from provisions on grounds such as religious belief; and those which allow for affirmative action or positive discrimination to assist in overcoming past disadvantage.

5.104 Many gay, lesbian, bisexual and transgender groups acknowledged the claim that some organisations had on exemptions, but they were also careful to make distinctions between these claims. There was some acceptance, for example, that religions had a right to exclude some people from their ministry on various grounds, including homosexuality; there was often less acceptance that such an exclusion could be legitimately applied to all areas of a religion's operation:

'In terms of the structures of religious institutions, obviously there are issues in terms of the state, and the laws trying to enforce certain things in that regard. So in terms of religious belief, religious doctrine and the internal structure of religious organisations, in terms of clergy, et cetera, we quite accept that.

We would have great concern is exemptions were to be looked on in a broader area, particularly I think with changes with unemployment, the gender of unemployed people on case management ... We have great concerns about whether those church organisations would be subject to anti-discrimination

¹⁰⁸ Submission, Gay and Lesbian Rights Lobby, Vol. 5, p. 1022.

provisions in terms of dealing with unemployed gay, lesbian, bisexual and transgender people.¹⁰⁹

5.105 The issue of exemptions for community services run by religious organisations has been dealt with through making Clause 28 subject to Clause 23 which has also been amended.¹¹⁰

Exclusion from Provisions

5.106 A major problem with exclusions and exemptions which shelter organisations from compliance is that they give a mixed message to the community. On the one hand the legislation appeared to be suggesting that discrimination was forbidden; on the other, it suggested that those purportedly protected had some qualities from which society needed to be protected:

'We are not happy with the concept of exemption, because it does seem to indicate that society does not fully accept that discrimination is not acceptable across the board.'¹¹¹

5.107 Another issue related to exclusion was raised by the Victorian Council for Civil Liberties which believed that grounds which allowed for a subjective assessment could actually encourage discrimination. This comment was made in the context of discussion on vilification provisions:

'We have serious concerns with the attempt in this legislation to define matters which were essentially subjective and impressionistic in nature. The criteria for safe harbour provisions such as those enumerated in the bill like reasonably in good faith, academic, artistic or religious instruction and/or scientific or research purposes would require a judge to give content to all or many of these expressions. It is our view that the uncertainty inherent in that exercise is inimical to the law. The provision is so widely cast that it would simply encourage the expression of hatred on sexuality or transgender identity. It is, in our view, a positive inducement to homophobes ... to dress up their views as pseudo science to being them within the safe harbour provisions.'¹¹²

5.108 As was noted above, subjective decisions may also make it difficult for a respondent or potential respondent to determine if he or she is acting in a fashion likely to constitute vilification or an inducement for others to vilify.¹¹³

5.109 A similar problem has also been identified with the processes of legislation, which 'may further discourage potential complainants from lodging a complaint.'¹¹⁴ Legislation which had a number of exemptions could be seen as making a statement about its commitment to limiting discrimination, especially if the information required to fight exemptions or to demonstrate that they were not 'reasonable' was difficult to collect:

'...the other effect of those exemptions, though, is to actually probably discourage people from lodging complaints, which then in effect would mean that the legislation is not actually an effective mechanism of redress. There does seem to be some evidence of that.'¹¹⁵

Affirmative Action/Positive Discrimination

5.110 Many witnesses to the Committee suggested that affirmative action or positive discrimination programs were an important part of anti-discrimination legislation. Some suggested that they were the determining factor in whether legislation offered equality of outcomes or only a more limited equality of opportunity:

'A major concern is the extent to which the special measures clause in the Bill will also allow discrimination by heterosexuals against those groups sought to be protected by the Bill. Only paragraph a) refers to equality of opportunity, which *could* (but need not necessarily) be interpreted as recognition that non-heterosexuals are disadvantaged and oppressed and is a term less preferred to equality of outcome or substantive equality.'¹¹⁶

5.111 A further point in the argument for developing affirmative action programs, or at least not presupposing that equality exists when legislation starts, is that what is deemed to be normal in society may not be standard for all members of society. A standard may reflect generations of advantage or privilege which cannot be compensated for in the short term:

'...it is our view that equality before the law, or equality in any sense, is not always achieved by "equal treatment". Equal treatment of people in a society where the standard is heterosexuality and deviance from the standard has traditionally

¹⁰⁹ *Evidence*, Queensland Association for Gay and Lesbian Rights, p. 735. See also *Submission* Ms Thompson and Ms Connor, Vol. 5, p.933.

¹¹⁰ See Chapter 4, Recommendation 8 (following Paragraph 4.191).

¹¹¹ *Evidence*, Queensland Association for Gay and Lesbian Rights, p. 735.

¹¹² *Evidence*, Victorian Council of Civil Liberties, pp. 801-802.

¹¹³ See above Paragraph 5.72.

¹¹⁴ *Submission*, Ms A. Chapman, Vol. 4, p. 678.

¹¹⁵ *Evidence*, Ms A. Chapman, p. 281.

¹¹⁶ *Submission*, Gay and Lesbian Rights Lobby, Vol. 5, p. 1031. The reference is to Clause 27 of the *Sexuality Discrimination Bill 1995*.

resulted in discrimination and prejudice, will not always produce equality of outcome ...¹¹⁷

5.112 This has been clearly stated in a number of overseas arenas which refer to anti-discrimination legislation of this nature perpetuating people in their inequality by assuming that at a particular point in time all people are equal:

'The bottom line in relation to the need for this sort of legislation, and the proactive parts of this legislation that we would advocate, is well encapsulated in a comment of Martin Luther King who said that if you start treating people equally who have previously been treated unequally, you capture them forever in their inequality.'¹¹⁸

5.113 This does support the argument that discrimination legislation also needs to be reinforced by positive discrimination or affirmative action legislation which seeks in a fashion to compensate for past exclusions.

5.114 Some witnesses sought to introduce a form of positive discrimination or equalisation in the legislation, either through excluding heterosexuals and heterosexuality generally - that heterosexuality not be included in the term 'sexuality' - or through excluding them from the provisions of any special measures.¹¹⁹ There were two main reasons listed for such exclusion: that discrimination was experienced by non-heterosexuals rather than heterosexual persons,¹²⁰ and that the legislation should seek to establish or create some equality rather than continue the existing imbalance:

'...if people were to actually look at who is suffering inequality, it is actually lesbians and gay men, not heterosexual people ... I think the idea of anti-discrimination is to redress a wrong ... it is not always appropriate to treat everybody the same, which is essentially what anti-discrimination is about, but the concept of direct discrimination is that everybody is treated the same. If there is inequality sometimes treating people the same just exaggerates it and makes it worse...'¹²¹

5.115 The Anti Discrimination Board of New South Wales was opposed to including in the Commonwealth legislation any measure which would enable special measures to be developed for heterosexuals. In particular the Board believed it was a mistake not to require

¹¹⁷ *Submission*, Gay and Lesbian Rights Lobby, Vol. 5, p. 1030.

¹¹⁸ *Evidence*, Anti Discrimination Board of New South Wales, p. 107.

¹¹⁹ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1812.

¹²⁰ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1821: 'Homosexuality was originally made a ground of discrimination under the ADA [*Anti Discrimination Act*] because of the overwhelming weight of evidence that homosexual people are subjected to significant and exceptional levels of discrimination. There was little or no evidence of people being discriminated against on the basis of their heterosexuality.'

¹²¹ *Submission*, Ms A. Chapman, Vol. 4, p. 674
Evidence, pp. 279-280.

some evidence of 'special need' or of measures being required to 'improve' service access.¹²² This approach is also seen in the Board's consideration of the need to demonstrate disadvantage.¹²³

5.116 Other witnesses supported this approach:

'...neutrality in the protected ground tells a lie. It tells a lie about who is discriminated against and by whom, who is at risk and who is doing the harm. It is potentially dangerous in that I think it could provide yet another weapon in the arsenal of homophobic people to harass and generally make life difficult for lesbians and gay men.'¹²⁴

5.117 Affirmative action or special measures policies were also seen as a means of maintaining a cultural safe haven and provision of appropriate services. This type of general provision does exist in much State legislation, with minority or cultural groups being able to maintain their own services while still gaining access to more general services.¹²⁵ Witnesses stated that the Commonwealth legislation should offer the same options:

'...the state provides many services for heterosexuals, most of which exclude homosexuals. We have, over a period of time, developed our own services. We contribute our own money. Often we receive no government funding; some times we receive some limited government funding. But on the whole, we provide our own services for our own community. We are concerned that ... we will be forced to extend the very limited services available to a wider range of people or suffer the repercussions of complaints.'¹²⁶

5.118 One witness advised that some aspects of affirmative action or positive discrimination could be addressed in the proposed legislation by adding the words 'to meet their special needs' to Clause 27(b) of the draft legislation,¹²⁷ an approach similar to that proposed by the Anti Discrimination Board of New South Wales.

5.119 The outcome of this would be to make it clear that heterosexual persons do not have unmet needs within a particular context. This would provide them with protection against

¹²² *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1830.
Evidence, p. 111.

¹²³ See above, Paragraphs 5.53-5.68, especially Paragraph 5.64.

¹²⁴ *Evidence*, Ms J Millbank, p.138, and see also p. 143.
A similar point was made by the Gay and Lesbian Rights Lobby, *Evidence*, p. 183. and COAL, *Submission*, Vol 3, pp. 616-617.

¹²⁵ See Chapter 4, Paragraphs 4.218-4.222.

¹²⁶ *Evidence*, Gay and Lesbian Rights Lobby, p. 183.

¹²⁷ *Submission*, Ms A. Chapman, Vol. 4, pp. 683-684:
'the appropriate wording of special measures provisions has been the subject of considerable investigation and consultation.'

discrimination in key areas but limit their access to special services,¹²⁸ and ensure such access was available only to nominated groups:

'It cannot be said that including heterosexuality would meet any unmet need, because there is no need for that protection. I think, more importantly, it would derogate from the protection offered to lesbians and gay men. I say that because there are a number of gay and lesbian specific groups that would then be open to heterosexual people under such a ground.

I do not think temporary exemptions and special measures are sufficient because they are ambiguous and they have been used in ways that would perhaps not bring about real equality in terms of outcome.¹²⁹

5.120 This witness re-iterated this point in committee hearings, saying that exceptions and exemptions were 'an inadequate framework in which to address these sorts of issues.'¹³⁰ The main reason for this was that the granting of special exemptions in order to have an affirmative action program would disadvantage those who might need assistance in advancing their needs: '...obviously, people need to have sufficient information, understanding and perhaps financial resources to seek and obtain a temporary exemption.'¹³¹

5.121 Those witnesses who were opposed to temporary exemptions to advance specific projects were more likely to be in favour of special measures which contributed to an equality of outcome:¹³²

'If that sort of systemic discrimination is to be allowed to continue by granting exemptions to these bodies, which still hold a great deal of power in our society to define what is right and what is wrong, then that is only going to impact more in furthering the inequality of gay men and lesbians.

...this is not a question about religious belief ... It is only a question of the practices [religions] engage in and the way they make people suffer because of those practices. Religious belief can be what it likes, but when it comes to a question of how religious institutions and bodies are to treat individuals, there is no reason religion should not be subject to the laws of the land in the same way that everybody else is.'¹³³

¹²⁸ Evidence, Ms A. Chapman, p. 273.

¹²⁹ Evidence, Ms A. Chapman, p. 273.

¹³⁰ Evidence, Ms A. Chapman, p. 280.

¹³¹ Evidence, Ms A. Chapman, p. 281.

¹³² Submission, Gay and Lesbian Rights Lobby, Vol. 5, p. 1031.

¹³³ Evidence, Mr W. Morgan, p. 281.

See also Evidence, Anti Discrimination Board of New South Wales, p. 111.

5.122 The Committee has considered these issues in detail. At Chapter 1 it has recommended that bisexual and transgender people have access to services. At Chapter 4, it has further stated the view that publicly funded services are not to exclude people on the basis of sexuality or gender status.¹³⁴

5.123 It has been stated that heterosexual services have excluded homosexuals and others, and this may well be the basis for sexuality-specific services (as well as the belief that heterosexual services do not meet special needs). However, as no general service will be allowed to exclude on the basis of sexuality or gender, a demand for sexuality and gender specific services may be expected to decrease. The Committee considers it is preferable, especially in areas where resources are scarce, that services and programs are developed for the whole community and seek to meet the needs of all members of the community. This belief is reinforced by the statement in Chapter 4 about the need for careful assessment of special needs programs, and the recommendation that affirmative action programs and services, if approved, be reviewed and reported on regularly.¹³⁵

The Role and Function of State and Commonwealth Anti-Discrimination Boards and Tribunals

5.124 The Human Rights and Equal Opportunity Commission had limited involvement in the issue of sexuality related rights and discrimination. The HREOC Regulations of 1989 included sexual preference as a proscribed ground of discrimination in respect of employment, responding to ILO 111.¹³⁶ This meant that discrimination in employment, and occupation including in termination of employment, was prohibited on the grounds of 'sexual preference'. However, HREOC only had conciliation powers in respect of the regulations and could not progress with an issue if conciliation did not work:

'...where conciliation is unsuccessful or is deemed inappropriate ... the Commission may report on the matter to the Federal Attorney General ... This is effectively the only power which the Commission can exercise if a complaint proves to be non-conciliable.'¹³⁷

5.125 In theory, HREOC also had a watching brief in respect of domestic legislation to notify when it was in breach of Australia's international obligations. This has led to separate reports being written on sexuality issues, including transgender status (*Transgender and Discrimination: Options for Legislative Protection*, 1996).¹³⁸

5.126 In 1992, the *Disability Discrimination Act*, effective from 1993, explicitly recognised that people could be discriminated against on the basis of real or perceived health problems.

¹³⁴ Chapter 4, Paragraph 4.131, and see also Paragraph 4.230.

¹³⁵ Chapter 4, Paragraph 4.230 and Recommendation 10.

¹³⁶ Submission, HREOC, Vol. 5, p. 1566-1567.

¹³⁷ Submission, HREOC, Vol. 5, p. 1572.

See also Submission, Queensland Anti Discrimination Commission, Vol. 2, pp. 235-236.

¹³⁸ Submission, HREOC, Vol. 5, p. 1559.

These included HIV/AIDS, considered especially prevalent in the homosexual and bisexual community. The *Disability Discrimination Act* prohibits such discrimination.¹³⁹

5.127 In 1994, with the passing of the *Human Rights (Sexual Conduct) Act* the Commission assumed additional responsibilities in respect of discrimination on the grounds of invasion of privacy.¹⁴⁰

5.128 There is currently little provision in Commonwealth law regarding transgender people. HREOC noted that the *Sex Discrimination Act 1984* provided very limited, if any, protection to people of transgender status. While there might be some provision in respect of post operative persons, the wording of the legislation was primarily concerned with 'sex' as opposed to any 'status' of an individual.¹⁴¹

5.129 Anti-discrimination legislation has a role for the administrative body to take a more active part in limiting discrimination by seeking to identify individual issues or the extent of systemic discrimination. All relevant bodies have a direct educative role in the community. They also have a more indirect educative role, and a direct operational role, through analysis and assessment of information.

5.130 Some of the problems identified with the operation of Commonwealth and state anti-discrimination legislation were more directly problems with the structure and processes of HREOC and with the various state-based bodies.¹⁴²

5.131 Most state bodies and HREOC have the power to undertake investigations, either on their own initiative in response to observed problems, or at the request of the relevant Minister; they can identify potential problems and conflict with existing legislation, review overlapping provisions, or determine gaps in legislation.¹⁴³ HREOC was seen as rarely initiating investigations in the absence of complaints,¹⁴⁴ and it was recommended by one witness that the bill ensure that the Commission undertake such investigations.

Review of legislation

5.132 A major role of both Commonwealth and state boards and commissions is to review legislation, especially to identify gaps and overlaps, and also to assess the degree of inconsistency in state or Commonwealth laws.¹⁴⁵ Even where this role is not necessarily

¹³⁹ See Chapter 4, Paragraph 4.38.

¹⁴⁰ See Chapter 4, Paragraph 4.2. Although the Tasmanian government repealed the relevant section of the *Criminal Code Act 1924* in 1997 it has not developed its anti-discrimination legislation to provide protection on the grounds of sexuality.

¹⁴¹ *Submission*, HREOC, Vol. 5, p. 1591.

¹⁴² See above, Paragraphs 5.6, 5.8-5.11.
See also *Evidence*, Victorian Equal Opportunity Commission, p. 221.

¹⁴³ *Evidence*, Western Australian Equal Opportunity Commission, pp. 534, 538.
Evidence, Equal Opportunity Commission Victoria, pp. 224-225.

¹⁴⁴ *Submission*, Inner City Legal Centre, Vol. 4, p. 762.

¹⁴⁵ *Evidence*, HREOC, p. 128.

allocated to a board or commission, the involvement of the relevant body may be sought. Thus, the Equal Opportunity Commission Victoria expected to be involved in the review of State legislation in order to identify discriminatory provisions. It had a more clearly defined role in another area:

'The commission ... as part of its duties has a responsibility to advise the minister if, in the course of our duties, we become aware of discriminatory provisions in legislation. So there is also a notification procedure ...'¹⁴⁶

5.133 The review of anti-discrimination legislation, however, is a somewhat different matter, given that those most involved in the administration and application of such legislation should not necessarily be involved in its review. Of the existing Commonwealth anti-discrimination legislation, review has occurred primarily through two processes: the amendments to legislation (particularly of the *Sex Discrimination Act 1984*) and the review of the operation of the Human Rights and Equal Opportunity Commission itself.

5.134 Witnesses who discussed the issues did believe there was a role for the Human Rights and Equal Opportunity Commission (especially one with more power) and believed the legislation should be a part of the Commonwealth anti-discrimination legislation package.¹⁴⁷

5.135 However, there was some considerable support for a general Commonwealth anti-discrimination act, similar to those which operated in the States, in preference to a series of anti-discrimination acts dealing with specific issues. The benefits of all-encompassing legislation were discussed by several organisations, and concerned primarily greater efficiency and standardisation.¹⁴⁸

5.136 Harmonisation of State/Territory and Commonwealth anti-discrimination legislation was also mentioned by several witnesses.¹⁴⁹ This process would require standardisation between Commonwealth acts as well as between Commonwealth and other legislation; and would identify any inconsistencies that contribute to the ineffective operation of anti-discrimination legislation.

Review of Exemptions

5.137 Given the support for, and opposition to, the range of exemptions listed in the bill, any review of the legislation would need to consider retaining or repealing various of the exemptions. As was noted by witnesses, some exemptions had been provided almost automatically in anti-discrimination legislation, and the value of them had not always been assessed:

¹⁴⁶ *Evidence*, Equal Opportunity Commission Victoria, p. 225.

¹⁴⁷ *Evidence*, pp. 733-734.

¹⁴⁸ See Chapter 6, Paragraphs 6.12, 6.15 and 6.17.

¹⁴⁹ See Chapter 6, Paragraphs 6.13-6.14.

'My own personal view ... is that the exemption for religious institutions has never been tested ... I think there are some occasions upon which ... the religious sensibilities of particular organisations should be taken into account. But there are others when I think it probably is unreasonable and it probably is too broad.'¹⁵⁰

5.138 The Victorian Civil Liberties Council was also somewhat sceptical of the need for a number of exemptions, although recognising the political value of these. It perceived there to be a need for review of exemptions and a follow through of the information obtained from a such a study:

'It is our view, with respect to the exemptions contained in the legislation, that these should be reviewed as a matter of course to ascertain that they do not unduly trespass on the right to protection of the individuals ... whom the legislation is designed to protect. We believe that a statutory requirement to review exemptions on a regular basis would strengthen this proposal and the principle...

The commission, for instance, would monitor those complaints which it did not have the jurisdiction over and it would decide, on the basis of the merits of those matters, whether or not people were falling through the safety net provided by the legislation. It is our belief that the parliament could legislate for a statutory provision to review these legislative exemptions in order to give that review greater force and to necessitate its happening.'¹⁵¹

5.139 Given the concerns expressed about exemptions, it may be also useful to link a review process to time limits for all exemptions/exemptions. This could require all those seeking exemptions - whether for affirmative action purposes or otherwise - to provide information on the effectiveness of exemptions and the continued need for them. Although such a process is often seen as a means of doing away with exemptions,¹⁵² anti-discrimination legislation will need to demonstrate that it can be effective and cost-effective in its operation.

5.140 The Committee has made recommendations which affect the extent of exemptions and exceptions. However, it also considers there is room for a further review of exemptions and exceptions in other areas - such as exemptions in respect of small business and partnerships.

Recommendation 4

That all exemptions and exceptions provisions not otherwise subject to review be assessed and reported on within three years after the commencement of the Act with a view to determining if such provisions are necessary and effective.

Add to Clause 31

31(4) The President of the Commission will ensure that an organisation with appropriate legal qualifications and experience in the field of human rights legislation will review and report on all exemptions and exceptions, other than those subject to specific review, within three years from the commencement of the Act. The President will advise the Minister of the conclusions of this report.

Complaints and Conciliation

5.141 The complaints and conciliation process forms a major part of the work of most agencies, often overtaking educative functions. It covers all processes from helping people to define a problem and determining if discrimination might have occurred, to providing general advice on the legislation:¹⁵³

'...the number of cases simply do not reflect the extent to which people are able to settle matters between themselves simply by saying to the potentially offending party, 'Unless we get this sorted out, it's going to be a matter of complaint to the Anti-Discrimination Board.' In fact, we deal with numerous cases where people say, 'I don't want to lodge a complaint yet. Can you advise me about what I can do?' We talk to them. We talk to respondents. We get matters sorted out between complainants and respondents in a way which, as a result, never turns up in the statistics.'¹⁵⁴

5.142 Once a complaint is made formally, in writing, a number of activities occur. Discussions may be held which determine that there is no real case to answer; or a complaint may be handled by another more appropriate area. If this does not occur, conciliation between the parties is sought:

'If it appears appropriate, we would attempt to move towards some sort of meeting between the parties if we think the matter can be resolved in that way. In some instance, it is probably not helpful to get the parties directly together, such as in a harassment matter.

¹⁵³ See *Evidence*, Tasmanian Regional Office HREOC, pp. 350-351.

¹⁵⁴ *Evidence*, Anti Discrimination Board of New South Wales p. 115, and see also *Submission*, Vol 8, p. 1819. *Evidence*, HREOC, p. 130.

'One of the reasons why in our general schema of anti-discrimination laws in this country we place such strong emphasis on conciliation is that the vast majority of these sorts of questions can be sorted out by getting people together and talking through what the issues are.'

See also above, Paragraphs 5.8-5.11.

¹⁵⁰ *Evidence*, Equal Opportunity Commission Western Australia, p. 539.

¹⁵¹ *Evidence*, Victorian Council for Civil Liberties, p. 805.

¹⁵² *Evidence*, Baptist Churches of Tasmania, p. 420.

...We would either have a meeting or some form of conciliation type of arrangement whereby we attempt to resolve the matter by negotiation or conversation ... if the conciliation breaks down, the commissioner then decides whether the matter should go forward to a public hearing or not.¹⁵⁵

5.143 One witness noted that one of the benefits of the conciliation process was that it could help reduce systemic discrimination:

'One of the things that can come out, and consistently does come out, of conciliation agreements ... is an opportunity for complainants to help drive respondents to the point where they will change the recruitment practices and the grievance resolution practices within their organisation, and they will change their policies and procedures in ways that should and do serve to minimise the incidence of these sorts of things in the future.'¹⁵⁶

5.144 It is only when conciliation is unsuccessful, and the complainant wishes to continue, that the second, a more formal process of gathering information and having the case heard proceeds, and this may not occur until some considerable time after the original complaint was made.¹⁵⁷ This process is handled by parties different to those who have handled the preliminary matter.

5.145 There was considerable scepticism expressed about the capacity of some of the bodies to actually enforce any decision, although this limitation applied primarily to Commonwealth rather than to State or Territory legislation. The New South Wales *Anti Discrimination Act 1977* was seen as effective, in part because of the power it gave the Anti Discrimination Tribunal to award substantial damages.

5.146 The scepticism about HREOC may have been caused by various factors including the limited function of HREOC in respect of sexuality-based discrimination in employment;¹⁵⁸ the known delays in having a case dealt with; and the substantial information and process burden imposed on complainants.¹⁵⁹ However, the major factor was no doubt the legal impediment to having a decision enforced, an issue brought to a head with the so-called Brandy case.

'...at the end of the day the availability, not so much of penalties - that is not quite the right word - but orders, for example, that

compensation be made, is one of the bottom line community education tools that you have.'¹⁶⁰

5.147 There was also limited remedy available when an organisational failure to comply occurred, leading to the suggestion that there should be a mechanism in place allowing 'non compliance to be reported and acted on' without further complaints having to be made.¹⁶¹ Without such a process, institutional or systemic discrimination could continue unabated, requiring each individual complainant within the offending organisation to start again.

5.148 To overcome these problems it was suggested that Commissioners take more proactive steps to initiate complaints (using existing powers) and develop an effective means of dealing with systemic discrimination, possibly through following models which allowed for a prosecution role.¹⁶² To a degree, this suggestion has been overtaken by events, with proposals being made for all hearings to be held in the Federal Court rather than the Commission. HREOC will no longer have a prosecution role, and this will place more emphasis on its other conciliation, education and individual investigation functions.

5.149 The Gay and Lesbian Rights Lobby noted that it was important to ensure that education about access to law and education about the effect of law should not only be provided to those making complaints but also to those making decisions. Although not explicitly stated, this argument suggests that although a complaints based system may appear to disadvantage people because of the responsibility it places on them, there is a role for this disadvantage to be limited by appropriate action:

'It is necessary that those who make decisions or take actions which are covered by the Act should be informed of the effect of the legislation. A system which only relies on the complaints to relay such information will be costly and ineffective.'¹⁶³

5.150 A number of factors, including reduced funding, have limited this role and are likely to reduce it even further. As a result, most issues are raised individually, although there is provision for class action in the draft legislation.

Class and Representative Actions

5.151 Class actions bring together a large number of complainants, as distinct from organisational representatives making a complaint on behalf of complainants. The *Sexuality Discrimination Bill 1995* makes provision for both class and representative actions.¹⁶⁴ At Clause 38, a list of individuals or groups who may make a complaint includes:

¹⁶⁰ *Evidence*, Queensland Anti-Discrimination Commission, p. 689, and also p. 691.

¹⁶¹ *Submission*, Inner City Legal Centre, Vol. 4, p. 763.

¹⁶² *Submission*, Inner City Legal Centre, Vol 4, pp. 763-764.

¹⁶³ *Submission*, Gay and Lesbian Rights Lobby, Vol. 5, p. 1024.

¹⁶⁴ *Sexuality Discrimination Bill 1995*, Clause 64.

¹⁵⁵ *Evidence*, HREOC Tasmanian Regional office, p. 351.

However, as noted, ILO Convention cases cannot progress any further if conciliation does not work. See above, Paragraph 5.37 and *Evidence*, HREOC Tasmanian Regional Office, p. 351.

¹⁵⁶ *Evidence*, Queensland Anti Discrimination Commission, p. 690.

¹⁵⁷ See above, Paragraphs 5.6, 5.8, 5.38-5.40.

See also *Evidence*, Equal Opportunity Commission Western Australia, p. 540.

¹⁵⁸ See, for example, *Evidence*, Queensland Anti Discrimination Commission, p. 691.

¹⁵⁹ See above, Paragraphs 5.6, 5.12, 5.36, 5.38-5.40.

' (1)

(c) a person or people included in a class of people aggrieved by the act, on behalf of the people included in that class of people; or

(d) a trade union of which a person or people, or people included in a class of people, aggrieved by the act is a member or are members, on behalf of that person, those people or people included in that class of people.

(2) In the case of a representative complaint, this section has effect subject to section 64.¹⁶⁵

5.152 The New South Wales *Anti Discrimination Act 1977* permits organisations to make representative complaints, which differ from class actions:

'Under the representative body provisions, a body may lodge a complaint if the interests or the welfare of its members or the people it represents may be affected by the alleged contravention of the Act. In the Board's experience, these provisions are often used in relation to alleged acts of unlawful vilification.'¹⁶⁶

5.153 Although the Anti Discrimination Board of New South Wales believed there was no provision in the Commonwealth *Sexuality Discrimination Bill 1995* for representative, as opposed to class action, complaints,¹⁶⁷ Clause 64(3) of the Commonwealth bill does allow for action to be taken by an organisation ('a representative complaint may be lodged without the consent of class members'), so long as the other provisions of the section are met. However, this would need to be read in conjunction both with Clause 38 of the *Sexuality Discrimination Bill 1995* and especially with any changes made through the *Human Rights Legislation Amendment Bill 1996* which are more restrictive.¹⁶⁸

5.154 During the inquiry on sexuality discrimination witnesses made some objection to the operation of class actions, especially the provision that one class member could be replaced by another 'if it appears to the Commission that the complainant is not able adequately to represent the interests of the class members.'¹⁶⁹ The objection appeared to be on the basis of potential damages,¹⁷⁰ although damages payments through Commonwealth legislation are generally less than those made under State legislation.

¹⁶⁵ *Sexuality Discrimination Bill 1995*, Clause 38.

¹⁶⁶ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1832.

¹⁶⁷ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1833.

¹⁶⁸ See Senate Legal and Constitutional Affairs Legislation Committee, *Report on Human Rights Legislation Amendment Bill 1996* (June 1997), pp. 64-69.

¹⁶⁹ *Sexuality Discrimination Bill 1995*, Clause 66(1).

¹⁷⁰ *Evidence*, Association of Catholic Parents, p. 748, and see also pp. 749-750.

Future Role of the Human Rights and Equal Opportunity Commission

5.155 Although there was some concern with the operation of HREOC, witnesses supporting the legislation appeared in favour of HREOC taking an additional role of sexuality/transgender discrimination on board (although obviously this role would be limited by subsequent developments). Witnesses believed that there was a need for a separate commissioner,¹⁷¹ and for legislation which specifically addressed sexuality and gender issues:

'...at the same time, gay, lesbian, bisexual and transgender people experience other forms of discrimination as well as discrimination on the grounds of their sexuality [but] it is unlikely the Commonwealth would want to deal with, for instance, age discrimination yet because of the international situation. So I guess that in terms of the constitutional reality, the political reality, we would probably prefer this specific bill to deal with one issue at a time.'¹⁷²

5.156 This did not mean that potential complainants wished HREOC to deal with all issues relating to sexuality and transgender discrimination. A reason stated for this was both time delays but, more importantly, the fact that HREOC was seen as having limited effect on groups such as employers.¹⁷³

'The differences between the Industrial Relations Commission and going to a human rights commission are that, first of all, you have got a time period, and the time period to go to an Industrial Relations Commission ... can be within two weeks...

To go to a human rights commission, you could be put on the waiting list for two years...

Another issue is that I believe the Industrial Relations Commission carried a hell of a lot more weight, because employers and unions who go through that process, employers are less likely to ignore the Industrial Relations Commission than they are a human rights commission, because they know they have to go back to the commission again and if they do not do the right thing they could fare badly on another case...'¹⁷⁴

5.157 HREOC itself, however, although not claiming to take on board all responsibility for employment issues, suggested that it would have been appropriate for the bill to refer to ILO 111 as a basis for certain of its powers.¹⁷⁵ This was in the context of attempting to identify

¹⁷¹ *Submission*, Ms Rosemary Hunter, Vol. 6, pp. 1267-1268 and below Paragraphs 5.161-5.164.

¹⁷² *Evidence*, p. 366 Tasmanian Gay and Lesbian Rights Group.

¹⁷³ See above Paragraphs 5.6, 5.37, 5.40.

¹⁷⁴ *Evidence*, Queensland Association for Gay and Lesbian Rights, p. 731.

¹⁷⁵ *Evidence*, HREOC, p. 127.

the strong claims which the bill had through international agreements, but the point was similar: that power was necessary for legislation to be effective.

5.158 Another witness, however, suggested that some of the provisions of the legislation should be removed from HREOC's scope as being inappropriate:

'While there are many historical reasons why awards have distinguished between male and female workers and why women have experienced unequal pay, the same is not true of sexuality- or transgender-based distinctions. There seems to be no good reason at all to have a referral and review process for sexuality or transgender discrimination in awards or Remuneration Tribunal decisions. Such discrimination should simply be unlawful.'¹⁷⁶

5.159 The Victorian Council for Civil Liberties believed that some responsibilities in the bill were already met by other parties, or would not be met most effectively by the Commonwealth legislation. State legislation already existed in respect of incitement to violence.¹⁷⁷ The vilification (and incitement) provisions of the legislation might be unnecessarily heavy-handed in that their objective could be met in other ways without running the risk of apparent limitation of free speech:

'...we could apply the principles that exist in the common law, in the form of the duty of care that exists in a tort relationship and which does not have regard to the quality of the relationship. Those principles say that everyone has a duty of care, a liability, whatever the nature of the relationship ... I am arguing that, with respect to the anti-discrimination legislation, if the consequences of your action are deleterious - if there is damage caused - applying similar principles in those areas could actually have the effect of gaining a resolution to incitement of violence or vilification ... without the disadvantageous and deleterious effects on freedom of expression.'¹⁷⁸

5.160 The Committee has considered this matter and has previously recommended that the anti-vilification provisions in the legislation be reviewed in order to ensure they are necessary and effective.¹⁷⁹

The role of the commissioner

5.161 The sexuality discrimination legislation proposes that a separate position of sexuality discrimination commissioner be established to operate in the same way as the other

¹⁷⁶ *Submission*, Ms Rosemary Hunter, Vol. 6, p. 1266.
See also Chapter 6.

¹⁷⁷ *Evidence*, Victorian Council for Civil Liberties, p. 803 and see above, Paragraph 5.8 [?]

¹⁷⁸ *Evidence*, Victorian Council for Civil Liberties, p. 813.

¹⁷⁹ See Chapter 2, Recommendation 2.

commissioners of HREOC do - that is, to undertake investigations into matters that cannot be conciliated.¹⁸⁰ According to HREOC the bill could have defined the commissioner's powers more broadly (although all commissioners' powers are now subject to change):

'...the bill perhaps does not rely sufficiently on international human rights instruments and the external affairs power in setting out the jurisdiction or the conferral of power on the sexuality discrimination commissioner. I think that it could go further in that direction. I am quite confident that particularly the International Covenant on Civil and Political Rights would support wide-ranging legislation to protect rights, including legislation to protect against vilification.'¹⁸¹

5.162 Nonetheless, the idea of a separate commissioner did gain support, including from those people who would have preferred to have a general anti-discrimination act, rather than a series of separate acts. The reason for the support of a commissioner for sexuality was to give these issues appropriate prominence:

'The Commissioners created by the Sex Discrimination Act, Racial Discrimination Act and Disability Discrimination Act have played an important role in research and policy development in their respective portfolio areas, and have provided a profile and a central locus of activity around the Acts for which they have been responsible. A Sexuality Discrimination Commissioner would be able to perform the same function in relation to sexuality and transgender discrimination.'¹⁸²

5.163 Noting that the proposed changes to HREOC included possible limitations on the appointment of additional commissioners, the Victorian Council for Civil Liberties suggested that the need for a commissioner in this context could be met by providing commissioners in areas which needed support and reducing them in those areas where legislation had been in existence for some time:

'It certainly is the case at a state level that human rights commissioners or tribunal members ... have a generic responsibility for the legislation administered by those states. But in areas where we are newly enacting provisions such as sexuality ... I think it would be very important to provide resources and a focus for community attention around the new provisions, around community education and around developing the special skills and experience in conciliating these new complaints...'¹⁸³

¹⁸⁰ *Evidence*, HREOC, p. 124.

¹⁸¹ *Evidence*, HREOC, p. 125.

¹⁸² *Submission*, Ms Rosemary Hunter, Vol. 6, p. 1268.

¹⁸³ *Evidence*, Victorian Council for Civil Liberties, p. 808.

5.164 Recognising resource constraints and the importance of commissioners dealing with a wide range of discrimination issues, the Committee believes that Sexuality and Gender discrimination issues would most appropriately be dealt with by the Sex Discrimination Commissioner for at least the first two years of operation of the Act.

Recommendation 5

That sexuality and gender discrimination issues be dealt with by the Sex Discrimination Commissioner.

Remove Clauses 99-106, and replace as follows:

Clause 99 (1) The Sex Discrimination Commissioner is to assume responsibility for issues of sexuality and gender discrimination.

(2) Within two years of the commencement of the Act, the President of the Commission is to report on the management of sexuality and gender complaints, including the appropriateness of the Sex Discrimination Commissioner continuing to have responsibility for sexuality and gender discrimination issues, and if there is a demonstrated need for additional resources.

Human Rights Legislation Amendment Bill 1996 - Proposed Changes to HREOC

5.165 The *Human Rights Legislation Amendment Bill 1996* proposed a number of changes to HREOC. The changes were developed as part of the response to the so-called Brandy case which deals with the arrangement to enforce HREOC determinations through registration of them with the Federal Court. The High Court decision on the Brandy case was that the arrangement for registering HREOC decisions in the Federal court and seeking their enforcement through the Court was invalid since the process did not respect the division of executive and judicial power.

5.166 The *Human Rights Legislation Amendment Bill 1995* repealed the registration and enforcement provisions. The *Human Rights Legislation Amendment Bill 1996* proposes that complaints which cannot be conciliated should be heard by judges, assisted by judicial registrars, in the Federal court. This avoids the duplication of hearings likely to result from the refusal of a respondent to accept a HREOC determination which upheld a complaint.¹⁸⁴ In addition, other changes were proposed in the legislation to establish a clear separation between the complaints making, inquiry and conciliation functions, which would come under the President of the Commission; and the education and *amicus curiae* functions of the various commissioners.

¹⁸⁴ Determinations made against Commonwealth agencies generally had to be complied with. See Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Human Rights Legislation Amendment Bill 1996* (June 1997), pp. 1-10. However, appeals against some decisions have been lodged, see *Hansard*, 28 August 1997, p. 6005; 30 October 1997, p. 8242.

5.167 It is proposed that the conciliation of other issues under the *Human Rights and Equal Opportunity Commission Act*, including complaints made about employment issues under ILO 111 are to be carried out by the President of HREOC, and then reported on to the relevant Minister.¹⁸⁵

5.168 There was no discussion in evidence to the sexuality discrimination inquiry of any streamlining and harmonisation that may be required if sexuality discrimination legislation is passed. Although the ILO Convention remains important, especially in that it is the basis of certain rights in the *Workplace Relations Act 1996* and other legislation, the development of discrimination legislation specifically addressing employment, training and promotion issues and providing a conciliation and determination process would make most employment inquiries under the HREOC Act redundant.

5.169 The role of the Sex and other discrimination commissioners would be somewhat different to the role discussed by witnesses to the committee. The most obvious change is the fact that commissioners would no longer be involved in the inquiry work, which would either be undertaken by the President's office or would be undertaken by the parties involved, possibly with some assistance from the judicial registrars in the Federal Court.

5.170 The *amicus curiae* role, whereby commissioners provide information on their areas of expertise will allow for the maintenance of certain skills by commissioners. However experience in conducting inquiries and making determinations will no longer be available.

Complainants

5.171 The changes proposed through the *Human Rights Legislation Amendment Bill 1996* may have an equal effect on both complainant and respondent, certainly where both are individuals. The costs of taking an unconciliated matter to the Federal Court are likely to be substantially greater, given that costs could previously be reduced to the minimum in HREOC cases if neither party had legal representation.¹⁸⁶

Formality

5.172 Although the *Human Rights Legislation Amendment Bill 1996* proposes that more informal processes be available in the Federal Court for discrimination matters, there is no guarantee that these will be continued. This will also have an effect on the rules of evidence and various application processes.¹⁸⁷

¹⁸⁵ Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Human Rights Legislation Amendment Bill 1996*, (June 1997), pp. 12-13.

¹⁸⁶ Senate Legal and Constitutional Legislation Committee, *Report on the Human Rights Legislation Amendment Bill 1996*, (June 1997), pp. 56-64.

¹⁸⁷ Senate Legal and Constitutional Legislation Committee, *Report on the Human Rights Legislation Amendment Bill 1996* (June 1997), pp. 54-56.

Systemic discrimination

5.173 The possibility of making substantial change to systemic discrimination may be limited by the changes proposed by the *Human Rights Legislation Amendment Bill 1996*. While witnesses to the Committee's inquiry into sexuality and transgender discrimination did not believe that systemic discrimination was dealt with satisfactorily, it is unlikely that the role and function of commissioners in the future will enable them to make substantial inroads on systemic discrimination in specific areas such as race, gender, sexuality or disability. This does not result from their lack of inquiry function, since the outcome of inquiries would be available to them; but could arise from the lack of a specific power or recommendation to undertake and report on such discrimination on a regular basis.¹⁸⁸

5.174 Insofar as Commonwealth agencies may be involved in systemic as opposed to individual discrimination, the cessation of previous limitations on agencies is detrimental to complainants. Previously, complaints against agencies were dealt with by HREOC and agencies were obliged to accept the determinations of HREOC.¹⁸⁹ The *Human Rights Legislation Amendment Bill 1996* requires all processes relating to Commonwealth agencies to be the same as those for other parties.¹⁹⁰

The Educative Role Of HREOC and State Tribunals

5.175 'We have to set guidelines for people to deal with differences, and I would say that one way in which we need to set those guidelines is through governments, via legislation and, obviously, through education and other ways of dealing with differences, as well.'¹⁹¹

5.176 All Commonwealth anti-discrimination legislation provides HREOC with an educative role, and many witnesses supported this role. State legislation also enables public education services to be provided. Some witnesses saw the legislation as a form of education in itself:

'This act performs a number of roles. It is preventive because it says to people that this is not okay. It is educative because it sets boundaries for people and says 'This is acceptable and this is what the government considers to be not acceptable.'¹⁹²

5.177 Some were careful, however, to make a distinction between the legislation as a means of enforcing rights and as a means of changing behaviour:

¹⁸⁸ Senate Legal and Constitutional Legislation Committee, *Report on the Human Rights Legislation Amendment Bill 1996* (June, 1997), p. 71.

¹⁸⁹ See above, Paragraph 5.166 and Footnote 184.

¹⁹⁰ See Senate Legal and Constitutional Legislation Committee, *Report on the Human Rights Legislation Amendment Bill 1996* (June, 1997), pp. 22-23.

¹⁹¹ *Evidence*, Dr Vivienne Cass, p. 522.

¹⁹² *Evidence*, Queensland Association for Gay and Lesbian Rights, pp. 733-734. A similar point was made also by the Queensland Anti Discrimination Commission which believed that the capacity to make enforceable orders was important, *Evidence*, p. 689.

'We reject the notion of legislation as an educative instrument. It is our view that legislation creates legal rights and obligations and summons the coercive power of the state to enforce them. It is a serious matter to pass a law, particularly one which can have deleterious effects on other rights such as freedom of speech and expression. However, education by proper and considered means is surely the most effective way of combating homophobia and irrational fears of transgender people. The council strongly advocates government initiatives through public and community liaison projects for this purpose.'¹⁹³

5.178 In many instances, people saw the two are mutually dependent - that without legislation, education would have a limited effect and vice versa:

'Public education, without the backing of law, can sometimes be a failure. Law provides leadership. I do not see law as being the solution to all social problems by any stretch of the imagination, but it is certainly a necessary instrument or one part of a framework of defences to social issues when they arise. I think they do need to go hand-in-hand. I would certainly say there is a need for legislation but, without the educational component, the legislation is not worth the paper it is written on.'¹⁹⁴

5.179 A similar view was put forward by the Queensland Anti Discrimination Commission which saw the education and the complaints and redress process as equally important. The Commission believed in pre-empting problems through the education process, and had been targeting employers and service providers. However, it also believed that 'community education programs tend to influence those who are most influenced and most amenable' and that it was important to have other powers available:

'...one of the things that we are noticing is that people being on the wrong end of some very effective complaints is one of the most useful community education tools of all.'¹⁹⁵

5.180 Education could also be provided through the development of legislation which would provoke community response:

¹⁹³ *Evidence*, Victorian Council for Civil Liberties, p. 802.

See also *Evidence*, Anti Discrimination Board of New South Wales, p. 115:

'The usage of the act is also dependent upon the resources which organisations like mine have to get out and provide community education.'

¹⁹⁴ *Evidence*, HREOC, p. 124.

See also 'I do not disagree with the need to press for community education; but I do think the fact that legislation is in place does in some ways provide an earnest of what the government intends, and then community education can build on that legislation', *Evidence*, HREOC Tasmanian Regional Office, p. 355; and *Evidence*, Anti Discrimination Board of New South Wales, p. 115.

¹⁹⁵ *Evidence*, Queensland Anti Discrimination Commission, p. 683.

'...the debate around a specific bill would encourage that kind of community debate - a rational debate about why gay, lesbian, bisexual and transgender people are discriminated against and how that can be remedied. That public debate is a crucial aspect of having this particular bill.'¹⁹⁶

5.181 A similar point was made in respect of some of the decisions of the Anti Discrimination Tribunal of New South Wales, especially those where financial penalties for actions may be substantial.¹⁹⁷

5.182 Education and information services could also take the form of meetings or discussions:

'The commission also has developed a reference group involving representatives of most of the significant gay and lesbian organisations and associations as well as representatives of government departments and other areas ... That is in an endeavour to maintain a two-way dialogue. The commission explains how it proposes to deal with issues. We obtain feedback on what we are intending to do and what we should be doing and what we can do, as well as bring some of the more obvious information and education issues to a broader audience.'¹⁹⁸

5.183 HREOC noted that although its involvement in sexuality issues had been limited because there had been a restricted coverage by the Commonwealth, the provision of submissions to inquiries and separate reports to Parliament were part of a 'public education' role:

'I think we have assisted to have these matters seen as human rights issues in ways that they were not in the past ... there is more that could be done if there was a specific federal provision dealing with these issues...'¹⁹⁹

5.184 Education services were seen as fulfilling different needs for different groups or individuals, including providing information before discrimination occurred, and tailoring educational materials to meet the particular needs of communities.²⁰⁰ However, some evidence suggested that education and information services did not lead to a steady progress:

'...publicity in relation to the results of decisions...means that people can at least read that and say whether it rings a bell for them, whether they have been discriminated against in the past or

need to lift their game in the workplace or whatever. I suppose with some cases there is certainly evidence of backlash.'²⁰¹

Education through more indirect means

5.185 Witnesses suggested clearly that education services did not have to be limited to those run by HREOC or state bodies directly, but could take many forms to meet the range of needs in the community.

'...we have been able to talk about these issues with people from a great variety of belief systems who are entering the training. So we certainly have not been preaching to the converted by any means. It has given us the privileged position of coming up constantly against the attitudes and misinformation that people hold about sexuality and the discriminatory attitudes that get expressed, and we have been able to come up with the best mechanisms for interrupting some of those attitudes.'²⁰²

5.186 Members of gay and lesbian organisations in particular were already involved in education and information services, and suggested that there were other forms of education which could help create a more positive image. One of these methods was through the provision of courses on sexuality,²⁰³ and a second was to allow a range of people with different sexualities to be role models for young people²⁰⁴ and to provide guidance for young homosexuals:

'What you can do is educate young gay men and lesbians about who they are and to bring them to understand that they are not alone, there are support services for them and they have a right to exist free from discrimination.'²⁰⁵

5.187 The role of such education and information services would be to help provide a positive image for all people, especially young people, many of whom had a very negative image of non-heterosexual people:

'...those children grow up and continue on in our society where positive images of lesbians and gay men are very rare and where

²⁰¹ Evidence, Tasmanian Regional Office HREOC, p. 356.

²⁰² Evidence, AIDS Council of South Australia/Adelaide Central Mission, p. 425.

²⁰³ Submission, GALL, Vol. 3, p. 494.

²⁰⁴ Evidence, Ms K. Walker, p. 282: 'the absence of role models is already one significant problem.' See also Submission, Australian Feminist Law Foundation Inc, Vol. 6, p. 1322. 'The exclusion of lesbians and gay men as teachers potentially discriminates against lesbian and gay students, as well as against the individual teachers concerned, who are sent a negative message concerning their sexual preference and deprived of role models and sympathetic counsellors in their schooling.'

²⁰⁵ Evidence, Australian Council for Lesbian and Gay Rights (WA), p. 573.

¹⁹⁶ Evidence, Tasmanian Gay and Lesbian Rights Group, p. 366.

¹⁹⁷ See Submission, Inner City Legal Centre, Vol 12, p. 2741-2742.

¹⁹⁸ Evidence, Equal Opportunity Commission Victoria, p. 224.

¹⁹⁹ Evidence, HREOC, p. 124.

²⁰⁰ Evidence, Equal Opportunity Commission Victoria, p. 224.

the presentment of positive images is met with a great deal of opposition and fear...²⁰⁶

5.188 Other witnesses stated that violence from young people was common, and a form of herd or pack behaviour.²⁰⁷ Such forms of education as would address these problems have also been devised by individuals especially when formal organisations, such as school systems, have not yet developed programs.²⁰⁸

5.189 The Australian Catholic Bishops Conference and others expressed concern that the provision of education and information could lead to the support of homosexual activity as opposed to the discouragement of unjust actions:

'...the functions of the Human Rights and Equal Opportunity Commission include the promotion, by way of public discussion and the provision of information, of human rights. With such a broad charter, one might be legitimately concerned how public discussion and the provision of information would be confined to unjust discrimination and not broadened to the promotion of homosexual relationships.'²⁰⁹

Education services about transgender status

5.190 Similar information was provided by organisation and individuals representing transgender persons. Given the complexity of issues relating to transgender status, it could be argued that there is a greater need for education in the community in order to establish the wide range of issues that need to be addressed and to overcome some of the stereotypes.²¹⁰

Education and Information Services for Bisexuals

5.191 Bisexual organisations also provided information and education services, although more limited resources may have affected the extent to which these services actually reached into the wider community. However, the Australian Bisexual Network did provide information through the Internet and in this way was able to reach a substantial audience.²¹¹

Recommendation 6

5.192 That the Human Rights and Equal Opportunity Commission ensure that funding of information and education services on gender and sexuality discrimination take account of the specific needs of transgender and bisexual persons and allocate resources for appropriate services in respect of these groups.

Gaps in Education Services

5.193 A major problem identified by many organisations was the absence of time or resources²¹² for education services. In most cases, this was caused by the need to deal with other aspects of the organisation's role, such as handling of complaints.²¹³

5.194 The Committee recognises the constraints imposed on organisations by limited resources. It encourages organisations to utilise their resources effectively, developing common information and resource services as much as possible.

Conclusion

5.195 In practical terms, most day to day activities are more influenced by State or local government than by the Commonwealth. For this reason, access to State and Territory legislation may provide a more concrete outcome in cases where the legislation is comprehensive. Given some of the problems which witnesses identified as affecting the efficiency of HREOC, the process of making and carrying through a complaint at State or Territory level may also be more cost effective and be completed in a shorter time period. This factor would also suggest that State and Territory legislation is preferable, if it is comprehensive.

5.196 However, there are substantial variations in the level of protection offered against discrimination, a factor which supports arguments for uniform as well as comprehensive Commonwealth legislation. Evidence suggests that discrimination still exists in areas which are subject to State legislation,²¹⁴ as well as in areas which are either subject to Commonwealth legislation²¹⁵ or where existing Commonwealth legislation may be used to override a more favourable State interpretation, as in insurance or superannuation. As was noted by many witnesses, the *Sexuality Discrimination Bill 1995* does not deal with a number of issues under the control of the States and Territories, such as inheritance laws, and thus will not cover all issues which witnesses were concerned with. However, it does provide

²¹² Evidence, Tasmanian Regional Office HREOC pp. 356-357.
Evidence, Queensland Anti Discrimination Commission, pp. 692-693.

²¹³ Evidence, Tasmanian Regional Office HREOC, p. 355:
'Unfortunately, in recent years in Tasmania, our complaint load has been increasing quite significantly, and we have had to concentrate rather heavily on complaint handling. In years gone by, I tried to give a lot of emphasis to community education ...'

²¹⁴ See Chapters 2 and 4.

²¹⁵ See, for example, Chapter 4, Paragraph 4.151.

²⁰⁶ Evidence, GLAD, p. 334.

²⁰⁷ Evidence, Metropolitan Community Church, pp. 180-181;
Evidence, Lesbian and Gay Anti Violence Project, pp. 188-189.

²⁰⁸ Evidence, p. 441: 'what is appropriate and safe to challenge and what is currently not appropriate and not safe to challenge.'
See also *Submission* from Streetwise Comics (Vol. 6, pp. 1169-1174) outlining some strategies by which information can be provided to younger people.

²⁰⁹ *Submission*, Australian Catholic Bishops Conference, Vol. 4, p. 720.

²¹⁰ See Chapter 2, Paragraphs 2.90-2.109.

²¹¹ Evidence, Australian Bisexual Network, p. 679.

some coverage for people affected by sexuality and gender discrimination in areas such as income support, superannuation, employment and status and thus has the potential to overcome some major problems for those most affected.

CHAPTER SIX

CHANGES TO COMMONWEALTH LEGISLATION

Introduction

6.1 Although a number of organisations advised the Committee that there were some useful terms and forms of protection in State and Territory anti-discrimination legislation, there was general support for the Commonwealth implementing a specific sexuality and transgender discrimination bill and taking action to amend other legislation.

6.2 There were several reasons for this support, including the belief that Commonwealth legislation would:

- be a means of formally meeting Australia's international 'obligations' and achieving international standing;
- provide a standard for Australia that would overcome less progressive legislation; and
- minimise confusion and expense by providing a comprehensive law.

Australia's International Standing

6.3 Many witnesses discussed in some detail the issue of Australia's international obligations, the need to enforce these, the extent of the external affairs power and the meaning of various international covenants.¹

6.4 Those who believed the external affairs power gave the Commonwealth the means of enacting legislation which was comprehensive, also believed that all legislation - State or Commonwealth - should similarly reflect the breadth and depth of the international standards:

"To the extent that the international community has been able to find a common ground on human rights issues and has addressed basic questions of civil and political rights which are now accepted worldwide, the Victorian legislation and any federal legislation should similarly reflect those international obligations."²

6.5 The idea that one could meet an international obligation by having a range of legislation with different rights was seen as illogical and also as discriminatory to some of the citizens of Australia:

¹ See Chapter 3.

² *Evidence*, Equal Opportunity Commission Victoria, p. 227. *Submission*, Ms Rosemary Hunter, noted that national sexuality legislation would complement the provisions in the *Disability Discrimination Act 1992* which were of special assistance to those believed likely to have HIV/AIDS, Vol. 6, p. 1265.

'It is inconsistent with Australia's international human rights obligations that gay, lesbian, bisexual and transgender people should be subject to such a patchwork of partial protection. Article 2 of the International Covenant on Civil and Political Rights states that the rights recognised in the Covenant should be available to all individuals equally, not depending on the status of the individual.'³

6.6 In this context, the issue of 'status' was not so much sexual orientation or gender status, but one's geographical location. The same point was also made in respect of the legal status of transgender people (although raising complex issues relating to availability of documentation):⁴ 'it is only just that an Australian citizen's state or country of origin should not in itself [affect] their treatment under Commonwealth law.'⁵

Provide a standard for Australia

6.7 Some witnesses indicated that one of the reasons for Commonwealth legislation was that it would assist those states which had little or no anti-discrimination legislation, and would thereby indicate that Australia was at least meeting minimal obligations at an international level and to its own citizens.

6.8 For Tasmania and Western Australia, federal legislation would grant access to a Commonwealth body and provide improvements to employment, service provision and other areas which were under Commonwealth control. 'It seems to me ... that human rights override states' rights, and I believe that certain inalienable rights should not be subject to state boundaries.'⁶ It would also require state public sector employment to operate according to the provisions of the legislation in these two states, as in all others.⁷

6.9 As was pointed out by witnesses, the Australian Constitution does not allow for different treatment on the basis of either status or residence; thus, it was argued, legislation which permitted this would be unconstitutional, as well as being in contravention of the provisions of the ICCPR:⁸

'Although all States and Territories now have anti-discrimination legislation, the coverage with respect to sexuality is uneven. Australia is thus potentially in breach of its international legal

³ *Submission*, Ms Rosemary Hunter, Vol. 6, p. 1265.

Submission, Gender Council of Australia (W.A) Inc, Vol. 6, p. 1273.

⁴ See below, Paragraphs 6.145-6.151.

⁵ *Submission No.*, Gender Council of Australia (W.A.) Inc, Vol. 6, p. 1276.

⁶ *Evidence*, ALSO Foundation, p. 325.

Submission, Australian Feminist Law Foundation Inc, Vol. 6, p. 1321.

⁷ See below, Paragraph 6.25. Where State public sector provisions are more extensive, these would apply.

⁸ *Submission*, Gay and Lesbian Rights Lobby, 'Whilst discrimination and violence against lesbians and gay men continues at its current unacceptably high level, with often no form of legal redress, Australia is not fulfilling either its international obligations or its obligations to its own citizens. Every Australian should enjoy the same rights to fair and equitable treatment irrespective of their sexuality and it is the responsibility of the Federal Government to ensure that this occurs.', Vol. 5, p. 1017.
Submission, Ms A Chapman, Vol. 4, pp. 678-679.

obligations under the International Covenant on Civil and Political Rights which requires equal non-discriminatory treatment for all persons within its territory. Better treatment in some States and worse in others does not satisfy this requirement.⁹

6.10 The same witness also advised that Australia could be in breach of its obligations under the ICESCR through failing to provide equal treatment to people in respect of taxation, superannuation and pensions.¹⁰

6.11 Commonwealth legislation was also seen to be beneficial in that it made a statement at the national level about people who were, or felt, marginalised:

'Anti-discrimination legislation ... is largely not used, in the sense that very few people make complaints, but it is used in the sense that it signals a profound symbolic shift in the way people in society think of rights: the fact that a government, in this case a federal government, thinks that lesbians and gays are worthy of protection. I think that symbolic shift is enormously important.'¹¹

Provision of a comprehensive law

6.12 Quite apart from the issue of inequity demonstrated by varying access to anti-discrimination legislation,¹² witnesses believed that the multiplicity of laws was confusing and expensive. The Queensland Anti Discrimination Commission, for example, believed that the inconsistencies between State and Federal legislation caused problems both for administrators¹³ and those more directly involved in a complaint.¹⁴ Another witness believed multiple laws were unnecessary:

'It makes little sense for each state and territory jurisdiction to develop different and diverging legislative models for dealing with sexuality discrimination. A comprehensive national law should

⁹ *Submission*, Associate Professor Tahmindjis, Vol. 4, p. 687.
See also below, Paragraph 6.18.

¹⁰ *Submission*, Associate Professor Tahmindjis, Vol. 4, p. 688.
See Chapter 3, Paragraphs 3.3-3.5. One of the most controversial areas that would have to be addressed under equality provisions is that of age of consent - see, for instance, *Submission*, Ms Frances Sutherland, Vol. 4, p. 711.

¹¹ *Evidence*, Ms Millbank, p. 140.
See also *Submission*, Kingsford Legal Centre, Vol. 5, pp. 924-925.

¹² *Submission*, Ms A. Thompson and Ms S. Connor, 'Current antidiscrimination legislation is obfuscated by varying quality and application...Discriminatory provisions are still contained in some Commonwealth Acts.' Vol. 5, p. 929.

¹³ *Evidence*, Dr Finlay, which notes the problems arising from transgender changes of status, p. 391.

¹⁴ *Evidence*, Queensland Anti Discrimination Board, p. 682.

provide a model for states and territories in developing their own laws.¹⁵

6.13 Evidence was provided to the Committee that harmonisation of Commonwealth and state legislation was planned, but that this had not progressed far. The harmonisation process was stated to have two components - seeking by various means to overcome some of the inconsistencies in the existing legislation, and possibly integrating all Commonwealth anti-discrimination legislation to form a comprehensive act as existed in states and territories.¹⁶

6.14 The process by which harmonisation of legislation would overcome some of the problems inherent in inconsistent provisions, or duplication of various provisions, included the development of consistent law, and the use of templates so that:

'...at least on the areas where states and the Commonwealth can agree that these issues ought to be covered under anti-discrimination legislation, at least around technical definitions and so on, there is consistency on the areas of agreement.'¹⁷

6.15 The development of an omnibus Commonwealth anti-discrimination law was generally considered favourably by witnesses.¹⁸ It was seen as being both administratively more effective and as offering the opportunity to provide consistency and a wider range of rights.¹⁹ Currently, each of the anti-discrimination acts had to be amended separately in order to accommodate technical and content changes. More importantly, some witnesses pointed out, it was possible to have different provisions in anti-discrimination legislation - such as that relating to indirect discrimination for example - which were unnecessary.²⁰

'There are extremely compelling arguments for an omnibus piece of legislation. What happens otherwise is that in different legislation you get minor but inconvenient differences arising, depending on particularly historically when the bills were written. So you might have in a sex discrimination bill exemptions or provisions or requirements which do not apply to a disability discrimination bill, and usually what happens is that the latest bill tends to be the most comprehensive and extends its provisions to areas which have come up as problems in the previous bills but are not then readdressed by going back and amending those problems in the previous bills.

So, for the consistency of administration, the consistency of interpretation, the uniformity of benefit, the uniformity of

¹⁵ *Submission*, Kingsford Legal Centre, Vol. 5, p. 924.

¹⁶ *Evidence*, Queensland Anti Discrimination Commission, p. 684.

¹⁷ *Evidence*, Queensland Anti Discrimination Commission, p. 687.

¹⁸ *Evidence*, Queensland Anti Discrimination Commission, p. 685.

¹⁹ *Evidence*, Tasmanian Gay and Lesbian Rights Group, which noted that general anti-discrimination legislation could also address issues such as age discrimination, p. 388.

²⁰ See Chapter 5, Paragraphs 5.62 - 5.63.

exemptions and exceptions and areas of coverage, I think there is quite a compelling argument for omnibus legislation ... so that you get a uniformity and you get an historical keeping together of the rights of various groups, I think a single piece of legislation is the correct way to go.²¹

6.16 On those occasions when a standard format was undesirable, variations appropriate to the nature and objectives of each act would be allowed.²²

6.17 Witnesses pointed out that the problems identified with omnibus legislation related more to the exemptions in legislation than to the size of the legislation.

Legislation as a Commitment by the Commonwealth

6.18 There was a widespread belief amongst those who supported Commonwealth legislation that it must provide real coverage of issues and it must be properly implemented. What was understood by this varied somewhat, but many witnesses were concerned that there would be a piecemeal²³ or lacklustre approach by which Commonwealth legislation might provide some basic coverage, but fall far below the level offered by some of the States such as New South Wales. Many witnesses considered that the legislation offered an opportunity for a major statement on human rights and should take advantage of provisions already used elsewhere (in national legislation and international covenants) to not only create some uniformity but to maintain the principle of essential equality before the law:

'Section 10 of the Racial Discrimination Act provides a positive right to equality before the law on the grounds of race, colour, or national or ethnic origin. Equality before the law should also be guaranteed on the grounds of sexuality or transgender identity.'²⁴

6.19 As a part of this broad approach, it was believed that the Commonwealth legislation must be all embracing, without being too specific:

'Overarching legislation should not unduly limit itself to particular categories of activities or circumstance. Whilst a general philosophy might prevail that individuals should be free to order their own affairs as they see fit, the prohibition on discriminatory behaviour should, as far as possible, be extended to all aspects of public life. This should include small businesses, private schools, unincorporated associations, and all providers of goods and services.'²⁵

²¹ *Evidence*, Anti Discrimination Board of New South Wales, p. 114.

²² See Chapter 5, Paragraphs 5.13 - 5.14.

²³ *Submission*, Ms J. Millbank, Vol. 1, p. 125.

Submission, Women's International League for Peace and Freedom, Australian Section, Vol. 8, p. 1778.

²⁴ *Submission*, Ms Rosemary Hunter, Vol. 6, p. 1266.

²⁵ *Submission*, Gay and Lesbian Rights Lobby, Vol. 5, p. 1022.

6.20 A concern of some witnesses was that while State laws were discriminatory in a range of areas, Commonwealth anti-discrimination law could exacerbate some problems. If a new law did not take a holistic approach it could leave some people worse off financially and in other ways through affecting rates of payment under Commonwealth Social Security and other legislation:

'If there were a change in federal law, it would remove a significant portion of welfare benefits by presuming economic dependency between same sex couples. We do not even know whether that presumption is correct or not because so little is known about same sex couples ... You have to show that there is going to be an equal or greater provision of rights and benefits through the bill to balance out that loss.'²⁶

6.21 The 'lack of will' that concerned witnesses was perceived in one areas in particular - the uncertainty about the extent to which the legislation would override State and Territory laws that were antithetical.²⁷

Override Discriminatory Provisions in other legislation

6.22 A major reason why a number of people supported the idea of Commonwealth legislation was that they believed that the Commonwealth should specifically seek to override the discriminatory provisions in other legislation, both Commonwealth and State/Territory. In this fashion, it was believed, provisions which offered less than the Commonwealth legislation would be redundant. At the same time witnesses also stated that if the Commonwealth legislation was not broad, then the benefits of existing state legislation should not be lost:

'We have put the view that any Commonwealth legislation should not operate on the basis of the lowest common denominator. It should not seek to remove any benefits that already exist in state legislation ... so that the highest level of protection is maintained.'²⁸

²⁶ Evidence, Ms J Millbank, p. 139. Witnesses also stated that some people were currently discriminated against in access to Austudy, in that having to leave home because of sexuality or transgender issues was not readily accepted as a ground for gaining this benefit: see *Submission*, Queer Sexuality Collective, University of Queensland, Vol. 11, pp. 2481-2482. The issue was also discussed in debate on the *Student and Youth Assistance (Sex Discrimination Amendment) Bill 1997*, Hansard 30 October 1997, pp. 8179, 8184 and 8186.

Evidence, Queensland Association of Gay and Lesbian Rights, p. 734.

²⁷ State laws in particular were seen as discriminatory not only because of limitations within anti-discrimination laws, or lack of anti-discrimination legislation, but also because of the provisions of other legislation. In particular, witnesses raised a number of issues which affected them in their daily life, such as next of kin arrangements; intestacy arrangements; lack of access to certain courts; superannuation and related problems; limited if any access to favourable insurance and other arrangements. See Chapters 2 and 4.

Submission, Gay and Lesbian Rights Lobby, Vol. 5, pp. 1019-1020.

²⁸ Evidence, Equal Opportunity Commission Victoria, p. 225.
Evidence, Queensland AIDS Council, p. 711.

6.23 Many witnesses expressed a belief that there would be limited value in Commonwealth legislation which did not cover discriminatory state legislation. By this they meant not only fairly narrow anti-discrimination legislation which had too many exemptions, or which contained offensive terms,²⁹ but also other State, Territory and Commonwealth legislation that limited the effective operation of anti-discrimination provisions:³⁰

'Our concern with the bill, as it is worded, is that it is the one section of the act which is restricted to only Commonwealth legislation. Most of the pieces of legislation which exclude our relationships and which indeed impact on our daily lives is state legislation. We would like to see that ... amended ... so that we can then fight with better resources for the changes that we most need within state jurisdiction.'³¹

6.24 The *Sexuality Discrimination Bill 1995* 'is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act' (Section 7(2)).³² In this context, the 'law' of a State or Territory is specifically defined as anti-discrimination legislation (Clause 7(1)). In practice, this means that compatible anti-discrimination legislation continues to operate, although people may not make claims under both.

6.25 The Bill clearly states that employment³³ in a State's public sector and agencies is covered, that is, that the provisions will apply to State employment (Clause 5, 'employment') insofar as other provisions in State anti-discrimination laws are not compatible with the Commonwealth legislation, the Commonwealth legislation will apply. However, insofar as the Commonwealth legislation does not deal with certain issues in its anti-discrimination law then State anti-discrimination law will operate. Where a State does not deal with an issue - such as the rights of transgender people - then it is assumed the Commonwealth legislation will operate to make up the deficit.³⁴ However, this would need to be tested.³⁵

²⁹ Such offensive terms, for some people, included 'lawful sexual activity' - See Chapter 1, Paragraphs 1.30-1.35.

³⁰ *Submission*, Australian Council of Trade Unions, Queensland Branch, Vol. 11, p. 2451.
Submission, Illawarra Legal Centre Inc., where reference is made to the need to change local government laws; however, this has been achieved to some degree in some State legislation where discrimination is prohibited with respect to *membership* of local government; it is not clear if local government services are provided in a discriminatory fashion, Vol. 5, p. 916.

³¹ Evidence, Gay and Lesbian Rights Lobby, p. 185 - this is in reference to Clause 107 of the bill dealing with same sex couples.

³² The reference to State or Territory laws is only to laws dealing with 'discrimination on the ground of sexuality or transgender identity' (Clause 7(1)).

³³ *Submission*, Law Institute of Victoria, Administrative Law Section, which recommends that casual work be specifically listed, Vol. 11, p. 2858. The definition of 'employment' includes part-time and temporary employment, but does not specifically mention casual employment.

³⁴ Issues of 'inconsistency' between State and Commonwealth anti-discrimination legislation are considered in G. McCarty, 'Landmines Among the Landmarks: Constitutional Aspects of Anti-Discrimination Laws', *Australian Law Journal*, 63: (1989) pp. 327-342.

³⁵ Any inconsistency between Commonwealth and State/Territory law which would arise from the Commonwealth intending to cover the field may have been avoided by the express statement in the *Sexuality Discrimination Bill 1995* that the Act is not intended to 'exclude or limit the operation of a law

6.26 An issue which concerned many witnesses was the capacity of the Commonwealth legislation to override other State legislation which was not anti-discrimination legislation. There is no specific provision in the legislation to do so, and the author of the bill has stated that the bill is limited to Commonwealth legislation. It does not deal with State issues such as access to IVF services.³⁶ Thus, other State legislation, including legislation such as Criminal Codes which may contain discriminatory provisions, will not be overridden. It may be argued that this means the Commonwealth has failed to conform to the provisions of the ICCPR through not providing uniform legislation available to all members of the society.³⁷

6.27 One of the concerns which witnesses expressed in this regard was that the *Sexuality Discrimination Bill 1995* also provided that nothing within it would prevent a person 'from taking action to stop another person from engaging in unlawful behaviour' (Clause 8). At the time of public hearings of the Committee's inquiry, the Tasmanian Criminal Code's restrictions on homosexual and some forms of heterosexual sexual activity were still in force; it was believed these would not have been affected by the implementation of Commonwealth legislation.³⁸ Although the Tasmanian law has now changed, it may remain possible for State legislation to prohibit an action which the Commonwealth legislation would otherwise allow.

6.28 An example of this would be the Western Australian legislation - the *Law Reform (Decriminalisation of Sodomy) Act 1989* - which prohibits the provision of information on homosexual matters to people who are or think they may be, homosexual, and who are under the age of 21.³⁹ The provisions in the *Sexuality Discrimination Bill 1995* allow and encourage the provision of education services. Quite apart from the issue of distinguishing between provision of information and encouragement of homosexuality,⁴⁰ this State law is not part of anti-discrimination law; and any State which wishes to limit education and information services could include a similar provision.

of a State or Territory that is capable of operating concurrently with this Act.' (Clause 7). See *Viskauskas v Niland* (1983) 153 CLR 280.

³⁶ Evidence, Mr Sid Spindler, p. 242.

Exclusion from various services such as IVF may be challenged through other anti-discrimination provisions of legislation, such as 'marital status' - see:

Evidence, Equal Opportunity Commission Victoria, p. 230.

³⁷ See, G. McCarry, on consideration of the need for equal operation throughout the States of any legislation which purports to implement the provisions of an international covenant, *op. cit.*, p. 332.

³⁸ Although Tasmanian law has now changed, similar situations may be avoided either by having a transition phase or by stating that while laws similar to those of the Commonwealth can operate concurrently, any contradictory or less beneficial provisions are overridden. There is also a need to ensure that subsequent discriminatory State anti-discrimination legislation can be covered. For the basis of the current approach in the legislation, see information provided by: Evidence, Mr Sid Spindler, which notes the political reasons for the relevant section of the bill, p. 187; *Submission No. 46*, Queensland Anti Discrimination Commission, which noted that the Queensland legislation exempted from coverage any action done in order to comply with another act. This prevented any action being taken in respect of the discriminatory provisions of legislation, a situation unlikely to be overcome in that there was not a sunset clause in operation; such provisions are not unusual, Vol. 2, p. 238.

Evidence, Gay Men and Lesbians Against Discrimination, p. 339.

³⁹ *Submission*, Gay and Lesbian Counselling Service of WA Inc, Vol. 1, pp. 147-148.

⁴⁰ Example, *Submission*, Australian Catholic Bishops' Conference, Vol. 4, p. 720. See Chapter 5, Paragraph 5.189.

6.29 Other evidence given to the Committee expressed some concern that State anti-discrimination legislation could be subject to change in crucial areas such as the definition of 'lawful sexual activity', and that it would therefore be possible for the benefits of Commonwealth legislation to be undermined:

'...if provisions under "lawful sexual activity" become inconsistent with the definition of "sexuality" is it specifically clear that the Commonwealth legislation will prevail, given that the State legislation still makes some provision in this area?'⁴¹

6.30 With respect to existing Commonwealth legislation, the *Sexuality Discrimination Bill 1995* does not directly address a number of complex issues arising from discriminatory provisions in legislation or regulations. However, all Commonwealth legislation is affected by the bill. Only the available exemptions as listed in the legislation, and the possibility of seeking an exemption from the provisions of Clause 107, relating to same sex couples, will restrict the application of the law's provisions to other Commonwealth legislation.

Compliance With A Law of the Commonwealth

6.31 In its current form, the *Sexuality Discrimination Bill 1995* provides a brief exemption in respect of discriminatory actions done in direct compliance with legislation. There may be circumstances where any disadvantage arising from this can be overcome by arguing that the action was not 'in direct compliance' or not 'in compliance'⁴² However, this would require considerable input by the complainant and may not result in systemic change.

6.32 Unless a specific act was given exemption from the provisions of the legislation, there would be little value in complainants seeking to challenge existing legislation, and it would be preferable to wait for the expiration of the six month period of grace.

Sunset Clauses

6.33 The use of a sunset clause regarding the time-limited operation of other discriminatory legislation was recommended by witnesses, including the Anti Discrimination Board of New South Wales and the Kingsford Legal Centre, both of which referred to the provisions of the *Commonwealth Disability Discrimination Act 1992*.⁴³ A recommendation was also made that the *Sexuality Discrimination Bill 1995* allow for a committee to 'review state, territory and federal laws and administrative practices and to report to the Human Rights Commissioner on the need for legal and administrative reforms.'⁴⁴ Any such committee was expected to operate on an ongoing basis.

6.34 At Clause 2 of the *Sexuality Discrimination Bill 1995*, provision is made for Clause 107 to come into operation six months after the commencement of the Act. At Subclause

⁴¹ *Submission*, Australian Council of Trade Unions, Queensland Branch, Vol. 11, p. 2441.

⁴² See below, Paragraph 6.44.

⁴³ Evidence, Anti Discrimination Board of New South Wales, p. 107. *Submission*, Kingsford Legal Centre, Vol. 5, p. 925.

⁴⁴ *Submission*, Kingsford Legal Centre, Vol. 5, p. 925.

29(3) similar provision is made in respect of Commonwealth legislation affected by Divisions 1 and 2 of the *Sexuality Discrimination Bill 1995* - such legislation must conform with the provisions of the Bill six months after commencement. Determinations or decisions of the Human Rights and Equal Opportunity Commission, and orders of 'a court', are exempt from the provisions of Subclause 29(3).⁴⁵ There is no provision for ongoing review of legislation, nor any specific reference to the purpose of the six-months' delay in commencement of Clause 107 or as provided for in Subclause 29(3).

6.35 The Committee believes that any ongoing review of legislation, after the initial assessment of Commonwealth legislation, should be undertaken as a part of the ordinary duties of the Human Rights and Equal Opportunity Commission. However, the Committee considers it necessary to recommend specifically that, as the purpose of the six-months' time period after commencement has been stated as allowing time for examination of existing legislation,⁴⁶ appropriate planning for such a review should be made. The Committee is also of the view that Clause 107 currently stands in isolation from the remainder of the Bill and should be made new Clause 17.

Recommendation 1

That a working group be established no later than the date of commencement of the Act in order to review all Commonwealth legislation, with priority being given to legislation affecting social security and related payments (including Veterans Affairs); taxation; superannuation legislation; health and family programs and services legislation, and family law matters.

Recommendation 2

That current Clause 107 become new Clause 17.

Areas of Change

6.36 Although many witnesses had no specific recommendations on the process by which the bill should be changed, they addressed in some detail the philosophy behind suggested changes. As outlined in Chapter 2, gay, lesbian, bisexual and transgender people share a concern about discrimination and violence. Different groups acknowledged the concerns of others even if they did not share them, and many groups were willing to acknowledge that some people valued rights they did not, and *vice versa*. However, they do not necessarily agree between or among themselves as to the ways in which to limit such discrimination, although the majority of witnesses supporting the rights of non-heterosexuals and transgender people wished rather to change the content of some social institutions than the whole social framework.

6.37 The areas which caused most concern were three interrelated issues:

- the recognition of relationships, including rights accorded next of kin and a form of marriage;

⁴⁵ This exemption was noted by the Anti Discrimination Board of New South Wales which believed it was too broad - see Chapter 4, Paragraphs 4.178-4.180.

⁴⁶ Evidence, Mr Sid Spindler, p. 241.

- taxation arrangements, especially in respect of superannuation;
- other benefits, including work related benefits.

6.38 The emphasis on these issues may reflect the relative strength of some groups, and does indicate a concern to obtain the benefits that are generally available to other couples. However, there was also an awareness of the needs of others such as transgender persons and those not in relationships.

Recognition of relationships

6.39 The *Sexuality Discrimination Bill 1995* does provide for some form of relationship recognition through Clause 107 which grants to same sex couples the same rights as are available to de facto heterosexual couples. Exemptions from the provisions of Clause 107 are available through the use of regulations which may state that certain acts are not affected (Subclause 107(3)). The New South Wales Council for Civil Liberties believed that leaving such exemptions to regulation was not a sound process, since this clause of the bill was of considerable significance:

'We simply say that the matter is important enough to deal with in a manner other than by regulation and to come back before the parliament by way of amendment, whether by way of incorporating a schedule into the bill or otherwise.'⁴⁷

6.40 Acknowledgment of relationships - or not - was a major concern, partly because the refusal of society to do so in a number of ways was seen as a summation of social attitude to non-heterosexual people. It was also a problem for transgender people, since government refusal to accept a change of gender could have a direct impact on a person's identity and sense of self.

6.41 For some, 'marriage' in the sense of a formal state-endorsed relationship was irrelevant.⁴⁸

'...that has never been something that my organisation has argued for. We accept both the religious connection to a thing like marriage and the emotional reaction it provokes from people in the general community. In terms of legislation and rights and responsibilities, it is perhaps more symbolic than something that directly gives you rights and responsibilities such as access to someone in hospital and intestacy and so on.'⁴⁹

⁴⁷ Evidence, New South Wales Council for Civil Liberties, p. 156.

⁴⁸ Evidence, Ms K. Walker, pp. 276-277.

⁴⁹ Evidence, Gay and Lesbian Rights Lobby, p. 185.

6.42 For others, a formal recognition appeared to be a major concern, regardless of any benefits that might follow. This concern was met in part by the various informal and quasi-religious ceremonies that people were able to arrange.⁵⁰

6.43 As was noted by the Commonwealth Attorney General's department, the interpretation of the Commonwealth *Marriage Act 1961* limits the marriage contract to be between a man and a woman, thus limiting same sex marriage and also placing some limits on marriage between a transgender person and another person⁵¹ - although the *Marriage Act* itself does not refer to the gender of the parties to a marriage. Thus the Commonwealth, even through use of the external affairs power, could not permit same-sex marriage.

6.44 There was some disagreement with this view on two grounds, the first of which was that marriage might be interpreted more flexibly in the future.⁵² The second was that refusal to allow same sex marriage might be an act that was not in direct compliance with the legislation:

'In my view the refusal of permission to marry or to recognise as valid a marriage made otherwise [than] under the terms of the Marriage Act 1961 would not be "in direct compliance" of that law. Similarly, decisions on eligibility and payability pursuant to the Social Security Act 1991 would not be in "direct compliance" of that Act if they denied access to payments to a pre-operative transgender on the ground that she or he was a transgender and hence not a "married person". These would both be policy decisions based on parameters or factors other than those set out in the legislation.⁵³

6.45 This assessment refers in particular to the provision in the *Sexuality Discrimination Bill 1995* (Subclause 29(2)) that 'Divisions 1 and 2 do not affect anything done by a person in direct compliance with a law of the Commonwealth.'⁵⁴ The Department of Social Security, however, stated that the *Social Security Act 1991* did specify that people had to be 'legally married' or in a marriage-like relationship to a person of the opposite sex to be considered as a 'couple'.⁵⁵ With respect to transgender people (assuming a male/female rather than a same sex relationship) a post operative person living with a person of the opposite gender would currently be considered a couple, but a pre-operative person would not. An amendment to the *Social Security Act* would be required, including the latter to be seen as part of a 'couple'.⁵⁶

6.46 Although there are some grounds for considering that the treatment of same sex couples under the Social Security Act depends more on administrative arrangements than on the legislation itself, the *Social Security Act* would have to be amended to change the

⁵⁰ *Evidence*, Metropolitan Community Church, p. 185.
Submission, The Religious Society of Friends (Quakers) in Australia Inc, Vol. 11, p. 2511.

⁵¹ See Chapter 3, Paragraphs 3.81-3.83.

⁵² See Chapter 3, Paragraph 3.83.

⁵³ *Submission*, Ms Chris Ronalds, Vol. 2, p. 302.

⁵⁴ As noted in Paragraph 6.34, this subclause is affected by subclause 29 (3).

⁵⁵ *Submission*, Department of Social Security, Vol. 1, p. 63.

⁵⁶ *Submission*, Department of Social Security, Vol. 1, p. 64.

definition of 'couple'. Since such a change would not confer any rights on same sex couples, other than those available to other couples,⁵⁷ and would not provide a recognition of 'marriage', it could be undertaken without an amendment to the *Marriage Act*. Administrative arrangements in respect of payments would not necessarily be more onerous than for other couples.⁵⁸ There is no clear reason why transgender partners could not also be defined as a couple, or why the word 'partner' could not be included in a definition regarding eligibility for certain payments, services or benefits if there is objection to some people being included in the word 'spouse'. This matter is considered further below.⁵⁹

6.47 Other objections to the refusal to allow marriage to transgender persons were based on arguments addressing the reason for marriage and demonstrating certain logical inconsistencies in current attitudes:

'Since sterile females may marry and a person physically reassigned to female can perform the same sexual and behavioural acts as any other sterile female there is no rational basis for the refusal to allow them to marry.'⁶⁰

6.48 At present, other forms of relationship may be entered into without restriction apart from those relating to age of consent. The Commonwealth already recognises several of these - de facto heterosexual couples, and certain same sex relationships - for various purposes.⁶¹ States and Territories have the power to recognise different relationships for a range of purposes, although currently only the Australian Capital Territory has specific legislation pertaining to a range of 'domestic' relationships.⁶²

Effect of the Legislation on Existing Acts

6.49 Any changes to actual payments by Commonwealth agencies such as the Department of Social Security⁶³ and bodies such as superannuation trustees⁶⁴ would only result from Clause 107 coming into effect and acknowledging various forms of partnership: couple payments only arise from there being a couple or part of a couple making a claim. In theory, Clause 107 *could* also cover other relationships where both parties are of the same sex even though one is transgender, but is not post-operative (assuming there are no additional changes in the *Sexuality Discrimination Bill 1995* to the legal status of pre-operative transgendered persons). The extent to which this type of relationship would be recognised would depend on

⁵⁷ Most benefits granted under Social Security legislation would provide a lower payment to a couple than to two singles, the only exception being in respect of Rent Assistance - see, Chapter 2, Paragraph 2.60 and footnote 125.

⁵⁸ *Evidence*, Department of Social Security, p.36.

⁵⁹ See below, Paragraphs 6.68-6.69.

⁶⁰ *Submission*, Gender Council of Australia (W.A.) Inc, Vol. 6, p. 1274.

⁶¹ See below, Paragraphs 6.58, 6.62.

⁶² See Chapter 4, Paragraphs 4.10, 4.48, 4.59.

⁶³ Payments for a range of government departments are now made through an agency known as Centre Link.

⁶⁴ See below, Paragraphs 6.110, 6.123.

accepting the fact that the 'same-sex' couple was living 'on a genuine domestic basis'⁶⁵ (even though the couple would define themselves as being of different sexes, and as being a man and a woman living in a de facto relationship).

6.50 The Department of Social Security did not perceive that it would automatically be entitled to an exemption (under S 107(3) or on any other basis) and stated that the *Social Security Act 1991* would have to be amended in order for the department to comply:

'Amendments would be needed to the rates payable under the Act and to the entitlements of couples under the Act. This may have considerable cost implications for the Commonwealth or, alternatively, remove existing social security entitlements, depending on how the Act is amended.'⁶⁶

6.51 The extent of support for changes in the Social Security area is hard to measure. Although some witnesses referred to the balance between gains and losses, others noted that one group might experience gains and another group altogether might experience the losses - thus there would be no balancing out between the same people.⁶⁷ This reflected the fact that gay, lesbian, bisexual and transgender people varied in their economic well-being, and that the most disadvantaged were those most likely to be affected by changes to social security payments and least likely to have access to superannuation.

6.52 The major objections to Clause 107 were that it appears to provide no element of choice, and that it would suggest that people who are considered to have a long history of unequal status were now equal.⁶⁸ Insofar as Clause 107 does not permit people living in a relationship on a 'genuine domestic basis' to be other than a couple, it does not provide a choice. It would allow same-sex couples to be perceived as a couple either after a two year relationship or after the different periods of time specified in respect of opposite sex de facto couples in legislation (Subclause 107(2))⁶⁹.

6.53 As noted above, there was a belief that there needed to be a time period during which some form of catch-up could occur for people who had previously been discriminated against.⁷⁰ In most instances, this belief was expressed in terms of special measures which would enable the retention of sexuality-specific organisations and services; and the exclusion of heterosexuals and others from these; and other provisions which could assist the development of sexuality specific groups. However there was also very strong support for the idea that a form of special measure would also be to quarantine people from disadvantages such as receiving reduced benefits through being a member of a couple.

⁶⁵ *Sexuality Discrimination Bill 1995*, Subclause 107(1)

⁶⁶ *Submission*, Department of Social Security, Vol. 12, p. 2681. Amendments would be required if the regulations made under the Act did not protect this or other legislation - See *Sexuality Discrimination Bill 1995*, Clause 107.

⁶⁷ See Chapter 5, Paragraph 5.114.
See also *Submission*, Feminist Lawyers, Vol. 8, p. 1643.

⁶⁸ See above, especially Chapter 2, Paragraphs 2.70-2.72.

⁶⁹ The 'qualification period' for achieving de facto status varies.

⁷⁰ See Chapter 4, Paragraph 4.218. See also Chapter 2, Paragraphs 2.7, 2.10, 2.64, 2.67.

6.54 In part this resulted from the belief that those most affected by reduced benefits would be those most likely to be dependent on them.⁷¹ From evidence provided, this would include transgender people unable to remain in their previous employment⁷² and/or unable to develop a career,⁷³ women rather than men; and women with children rather than those without.⁷⁴

'My question with any piece of legislation such as this is: does it improve the quality of life for the group that is targeted ... Does it make life easier? Does it reduce impoverishment? Does it reduce discrimination? If formal equality does not bring about substantive equality, then it is not a useful exercise and may even be a negative exercise because there is the comeback of, 'Well you have equality now; what are you still complaining about?''⁷⁵

6.55 The approach taken by the *Sexuality Discrimination Bill 1995* was seen as sound in theory but limited in application, being an example of a piecemeal approach. 'My problem with this bill is that it attempts to deal with this issue without looking at the whole patchwork of laws that concern couples and families, and it specifically does not cover the field.'⁷⁶

6.56 Other objections to the automatic formalisation of relationships provided through Clause 107 concerned the assumptions both that homosexuals and transgendered persons were financially dependent or interdependent⁷⁷ and that non-heterosexual people wished to replicate the institutions of heterosexual society, including through relationships of interdependency. It was also suggested by another witness that the form of relationships which existed between heterosexual persons did not necessarily exist between non-heterosexuals:

'De facto relationship recognition was introduced in relation to heterosexual couples primarily for gender-based reasons - to protect women from exploitation by men who refused to marry them and thus could avoid property division and other

⁷¹ *Submission*, Feminist Lawyers, Vol. 8, p. 1643.

⁷² See Chapter 2, Paragraphs 2.11, 2.52.

⁷³ See Chapter 2, Paragraph 2.11.
Submission, Ms J Aspen, Vol. 1, pp. 45-46.

⁷⁴ See Chapters 2 and 4 and also
Submission, Feminist Lawyers, 'More specifically, the de facto regime contained in the Bill discriminates against lesbians...Like most women, most lesbians are poorer than most men (including gay men). Lesbians are much more likely to have children than [are] gay men and hence to be receiving benefits such as the single parent's pension which would be affected by the de facto regime.' Vol. 8, p. 1643.

⁷⁵ *Evidence*, Ms J Millbank, p. 138.

⁷⁶ *Evidence*, Ms J Millbank, p. 139.
Submission, Gay and Lesbian Rights Lobby, other objections to automatic acknowledgment or registration of relationships included the fact that some people have 'significant others', but are not in a relationship; thus, Section 107 would not help them to make any provision for a significant other, Vol. 5 p. 1037; and the fact that some people were not restricted to one major relationship, and S 107 did not accommodate this. In its current form S 107 only applies to the recognition of relationships for limited purposes. More detailed legislation would be required to provide *guaranteed* access for a nominated person or persons to an estate including superannuation.

⁷⁷ *Evidence*, Ms J Millbank, p. 141.

responsibilities upon the break down of the relationship. This state of affairs reflected particular power differences between men and women, manifested in an economic way. These gendered power differences are not present in lesbian or gay relationships (although that is not to say that there are not differences in economic power between gay men and between lesbians).⁷⁸

6.57 Regardless of the validity of the above statement,⁷⁹ both any inequity between members of couples, and financial disadvantage arising from life experiences is not restricted to gay, lesbian, bisexual and transgender people. Although a number of people recommended that there be detailed evaluation of the likely effects of Clause 107 on non-heterosexual and transgender people,⁸⁰ the Committee believes that such an evaluation should be done after the Clause has been in operation for two years. This would enable any disadvantage to be identified from experience.

Recommendation 3

That the impact of the operation of new Clause 17 [formerly 107] be assessed by a qualified body two years after the commencement of the clause.

New Subclause 17(5)

(a) The impact of this section is to be assessed two years after its commencement, and a report provided to the President of the Human Rights and Equal Opportunity Commission.

(b) To assist in evaluating impact, relevant Commonwealth agencies and departments should collect appropriate data and provide this in a de-identified form to appropriate agencies.

Meaning of 'genuine domestic basis' of a relationship⁸¹

6.58 Heterosexual couples are generally perceived to form a couple when they live in the same accommodation as husband and wife. The relationship is assumed to be broader than a sexual relationship and can include sharing of responsibilities and financial dependency or interdependency. De facto couples are perceived as couples after different time periods, from a few months to two years, while married couples exist from the date of marriage.

6.59 In attempting to determine if same sex relationships are similar to heterosexual ones, emphasis has been placed on both the extent of financial interdependency and of the exclusion of others. This emphasis may reflect some beliefs that same sex couples are different from heterosexual couples and are both financially independent of each other and do not

⁷⁸ *Submission*, Australian Feminist Law Foundation Inc, Vol. 6, pp. 1322-1323. See also *Submission*, Gay and Lesbian Rights Lobby, Vol. 5, p. 1037 and *Submission*, Ms A Chapman, Vol. 4, p. 684.

⁷⁹ See also *Submission*, Women's International League for Peace and Freedom, Australian Section, Vol. 8, pp. 1778-1779.

⁸⁰ *Evidence*, Ms K Walker, pp. 283-285.

⁸¹ *Evidence*, HREOC, p. 123.

maintain stable monogamous relationships - in short, that they do not reflect a stereotype of heterosexual couples.

6.60 Some of the evidence to the Committee suggested that some same sex couples were financially independent of each other.⁸² However, this does not mean that all such couples are independent, nor that the retention of separate financial arrangements means each has a substantial income. Other evidence did indicate that long term relationships were common⁸³ although some evidence did suggest more than one partner, or more than one relationship at a time.⁸⁴

6.61 The Human Rights and Equal Opportunity Commission was not especially concerned with the precise meaning of the word 'genuine', although accepting through its use that not all relationships were 'genuine' or *bona fide*.⁸⁵ Although these words appear to, and can, have a moral connotation, they also reflect the effort made by government to identify areas of dependency or interdependency, particularly when a claim is made for welfare support.⁸⁶ Current dependency-based rules preclude payment of various benefits to a dependent person who is to be maintained by a partner.⁸⁷ On the same grounds, two 'single' unemployed persons living in a long term *bona fide* relationship not recognised by government may be eligible for a greater rate of benefits than if their relationship was recognised; or one of the two would be eligible for benefits whereas, as a partner, he or she might not.

6.62 Dependency is also a crucial concept in superannuation and insurance payments and in the payment of other benefits, although it is assumed with respect to heterosexual persons regardless of their actual financial arrangements.⁸⁸ Same sex couples are obliged to demonstrate financial dependence or interdependence in respect of superannuation, whereas other couples do not; and may be unable to claim a pension even if they have access to lump sum payments. Heterosexual partners or a surviving partner may experience no such difficulty in obtaining both a pension and a lump sum payment.⁸⁹ Thus, while dependency

⁸² See above, Paragraph 6.56.

⁸³ See, for example, *Evidence*, Gay and Lesbian Rights Lobby, pp. 184-185.

⁸⁴ See, for example, *Submission*, Mr A. Bell, Vol. 15, p. 3555.

⁸⁵ *Evidence*, HREOC - the Commission referred also to 'bona fide domestic relationships', p. 123. *Evidence*, North Melbourne Legal Service/Federation of Community Legal Centres, p. 332.

⁸⁶ See above, Paragraphs 6.45-6.46, 6.49-6.51. See also *Submission*, Vol. 12, p. 2681. Information provided by the Department of Social Security on the basis for differential rates in pensions relative to marital status. There is no acknowledgment of multiple partners either insofar as this suggests short-term relationships or several simultaneous relationships. Although some evidence supported the belief that some homosexual and bisexual people had several partners, as well as, or to the exclusion of, a more stable relationship, there is no necessary gap in legislative provisions in respect of these people - if there is any financial dependence, this would be resolved at the personal level (as it would be for heterosexual people) or through some formal provision in case of death. If provision, including through a will was challenged, the short length of a relationship might exclude the person from provision, much as would be the case in respect of a heterosexual de facto relationship of a similar length.

⁸⁷ *Submission*, Women's International League for Peace and Freedom, Australian Section, Vol. 8, pp. 1778-1779.

⁸⁸ See below, Paragraphs 6.124-6.128 and *Evidence*, Australian Council of Trade Unions, pp. 311-312.

⁸⁹ *Evidence*, Australian Council of Trade Unions, pp. 312-313.

for same sex couples is not currently recognised by Social Security legislation, it is essential for superannuation purposes. This issue is considered further at Paragraphs 6.124-6.125.

6.63 It could also be argued that the *bona fide* nature of relationships is eroded not by the choice of the partners but by their exclusion by law from various activities that are freely available to other couples or partners, such as major life decisions relating to medical treatment.⁹⁰

6.64 Given that the major purpose of assessing whether a relationship is *bona fide* is to include or exclude, and to allocate responsibility and obligations, clear and consistent definitions should be established.⁹¹

Recommendation 4

That a consistent and gender neutral definition of living in a 'genuine domestic partnership', or in a 'bona fide domestic partnership or relationship' be established and be used by all Commonwealth agencies and departments.

Legal status

6.65 Witnesses expressed some uncertainty about the status of the protection afforded to various groups under Clause 107. In particular, they were uncertain if there was a need to provide additional protection to same sex couples other than that available through Clause 107; and uncertain of the nature of any benefit provided by this clause to transgender persons and the best means by which to overcome any lack of cover.⁹²

6.66 With respect to the extent of protection afforded by Clause 107, HREOC pointed out that the *Sexuality Discrimination Bill 1995* does not provide a 'legal' status either for 'same sex and transgender relationships [or] for those who change their gender.'⁹³ Clause 107 does not acknowledge the specific problems of transgender status or the status of couples one of whom at least is of transgender status. However, insofar as Clause 107 does provide to de facto same sex couples the same status in respect of Commonwealth legislation as it does to de facto heterosexual couples, it does provide a form of legal status at a Commonwealth level:

'...the limited nature of the Commonwealth's power to legislate on discrimination means that this acknowledgment of non-heterosexual couples will form only part of a much larger picture in which such relationships are not recognised at State law, for example. The piecemeal nature of this approach to the recognition of non-heterosexual relationships may result in such relationships

being subject to less favourable treatment than a heterosexual couple could expect both at Commonwealth and at State law.'⁹⁴

6.67 The New South Wales Council for Civil Liberties also indicated some uncertainty about the effectiveness of the clause because of its limited application:

'...it only applies to laws of the Commonwealth. There is nothing specific in there about a law of the state or the effect that this clause would have on laws of the state. I am not sure of the reason for that ... One assumes that that is because there may be some sort of assumption that the Commonwealth legislation simply overrides state legislation which is inconsistent, but I am not quite sure that it operates in that way.'⁹⁵

6.68 From the statement provided by HREOC and others there appears to be no reason why the Commonwealth could not establish a 'legal recognition' process of partnerships both for same sex couples⁹⁶ and transgender couples, and for the recognition of the status of transgender people as men or women and as transgender. This would assist not only in recognising gender status *per se*, but in acknowledging the importance of gender status in respect of partnerships. It would avoid the problem experienced by those who may currently be classified as single people because their gender status is not acknowledged.

6.69 The Committee has considered the particular problems experienced by transgender people and believes there is no reason why people who choose to be part of a couple or a partnership should be deprived of recognition as a couple or partnership because one or both is a transgender person. The Committee recognises that an exemption to an amended Clause 107 (New clause 17) may be sought in respect of the *Marriage Act 1961*.

Recommendation 5

That all couples or personal partnerships achieve legal recognition at Commonwealth level

Clause 17[107] (3) After the commencement of this Act, the law: confers the same right or entitlement, or imposes the same obligation, on a person who lives with another person, either or both being a transgender person, because of the couple living together on a genuine domestic basis'

Clause 17 [107] (4) the regulations may provide that this section does not apply to a specified law of the Commonwealth.'

⁹⁰ See Chapters 2 and 4.

⁹¹ Evidence, Commonwealth Attorney General's Department, p. 15.

⁹² Evidence, HREOC, p. 123.

⁹³ Evidence, HREOC; that is, transgender people need protection for their partnerships as well as for their status as individuals, p.123.

⁹⁴ Submission, Women's International League for Peace and Freedom, Australian Section, Vol. 8, p. 1778. Evidence, Ms K. Walker '[people] thought that they were getting full de facto recognition from this clause and they are not.' p.283.

⁹⁵ Evidence, New South Wales Council for Civil Liberties, p. 156.

⁹⁶ Submission, Ms A. Chapman, 'Such legal recognition could take many forms and combinations of federal and/or state legislative packages.' Vol. 4, p. 684.

Difficulties arising from recognition of same sex couples, transgendered persons and transgender couples.

Same Sex couples

6.70 Recognition of same sex couples was seen as bringing both benefits and disadvantages. Costs were seen as a major factor in some cases, through the provision of various partner or family benefits.⁹⁷ If the legal recognition did not extend to state matters, and the Commonwealth legislation did not override state provisions, then access to many other services would not be available.⁹⁸

6.71 Although the *Migration Regulations* 1992 did recognise same sex partners of Australian citizens in respect of applications for interdependency visas,⁹⁹ the Department of Immigration and Multicultural Affairs was unable to recognise any such relationships for same sex couples applying for other visas, including overseas same sex marriages.¹⁰⁰

6.72 The basis of this situation appears to be that a quasi-marital (dependency) status is granted where one of the parties is an Australian citizen (interdependency visas are available to others than partners) whereas all applications which do not involve a relationship with an Australian citizen do not extend these provisions. It should also be noted that, while the spouse of an Australian citizen may be granted citizenship without having to go through the usual processes, de facto heterosexual and same sex partners of Australian citizens do not have access to this benefit.¹⁰¹

6.73 It was also stated on several occasions that some issues were too detailed and complex to be included in legislation without further consideration. The issue of recognition of relationships and the impact of resulting changes was one such matter:

'The issue of same sex relationships and the type of legal regulation they should be subject to is a complex one which has not been properly investigated. It is inappropriate for the Commonwealth to seek to regulate such relationships before such an investigation ... is conducted. Thus, Part 6 of the Bill should be deleted.'¹⁰²

6.74 However the Committee, although recognising the complexity of this issue, especially with transgender couples, believes that assessment of the effects would be best carried out through assessing the changes that occur and any exemptions that are sought. It has

⁹⁷ Evidence, Australian Defence Force and Department of Defence, pp. 18-19.

⁹⁸ See below, Paragraphs 6.99-6.103.

⁹⁹ Evidence, Department of Immigration and Multicultural Affairs, p. 17.

Submission, Department of Immigration and Multicultural Affairs, 'the interdependency visa makes no mention of a sexual relationship and a broader group of applicants, not only same-sex couples, may also be eligible.' Vol. 8, p. 1702.

Submission No. 86, COAL, Vol. 3, pp. 615-615.

¹⁰⁰ Evidence, Department of Social Security, pp. 33, 35.

¹⁰¹ Submission, Department of Immigration and Multicultural Affairs, Vol. 8, pp. 1703-1704.

¹⁰² Submission, Mr W Morgan, Vol. 7, p. 1380.

recommended that this clause be maintained and amended (see Recommendation 3 of this Chapter).

Transgender Status

6.75 Administrative or legal protection for transgender persons at all stages of transgender life needs to be clearly established in order to avoid the complexities and uncertain status that affects transgenders:

'...the current ... Commonwealth legal position that **reassigned** persons are sometimes of their sex (for purposes of Social Security) and sometimes not (for purposes of marriage) and sometimes in a legal limbo (for purposes of passports we are administratively but not legally of our reassigned sex), subjects such people to discrimination of the worst kind.'¹⁰³

6.76 Of those persons who discussed the status of transgender people, there was limited objection to some form of recognised or legal status for people who had undergone re-assignment surgery. This was on the grounds that such people had taken specific action to become a specific gender and this fact provided a form of certainty for others. However, those who had not undertaken such surgery were often seen as not being genuine in their commitment.¹⁰⁴

6.77 Other evidence suggested that the multiple stages involved in changing gender status required a range of 'appropriate' responses from society, including education, tolerance, legislative protection and legal status. The more permanent the change, it appeared, the greater the need for legal protection¹⁰⁵ or recognition,¹⁰⁶ but some of this emphasis was made by those who had been re-assigned and was not always shared by those who were unlikely to undergo any surgical procedure.

6.78 Certainty or consistency appeared to be the major factor influencing the opinion of government agencies and others.¹⁰⁷ Concerns expressed about granting legal status to other transgender people referred to the possibility of fraud¹⁰⁸ and continual changing from one gender to the other.¹⁰⁹ Although little evidence was offered as to the latter issue, and some

¹⁰³ Submission, Gender Council of Australia (W.A.) Inc. (emphasis added), Vol. 6, p. 1272.

¹⁰⁴ There are different opinions within the transgender community on this issue. Some believe that only those who have surgery are genuine; some accept all stages of status: Submission, Gender Council of Australia (W.A.) Inc., 'Each phase deserves appropriate recognition in a caring society', Vol. 6, p. 1271. For those not themselves transgender, but wanting some form of 'certainty', there was considerable emphasis on the transient nature of other transgenders - a view not shared by some transgender witnesses.

¹⁰⁵ Submission, Gender Council of Australia (W.A.) Inc, Vol. 6, pp. 1271-1272.

¹⁰⁶ Submission, Ms Abbie Hughes, Vol. 6, p. 1286.

¹⁰⁷ Submission, Dr Finlay, Vol. 8, p. 1785.

¹⁰⁸ Submission, Dr Finlay, Vol. 8, p. 1783.

¹⁰⁹ Submission, Dr Finlay, Vol. 8, p. 1785.

evidence given that this was not likely (and not on a continual basis),¹¹⁰ as well as to the fact that such change as did occur was rarely fraud-linked, there was limited support for legal recognition of pre-operative or non-operative persons:

'...the bill's definition of the term 'transgender' allows self-assessment of gender in the absence of independent, objective and verifiable evidence which support's the individual's self assessment ... the Australian Defence Force would be opposed to recognising a change in gender unless and until reassignment surgery had been successfully completed and a person is physically of the opposite sex.'¹¹¹

6.79 In response to the proposed legislation, the ADF stated that it would seek an exemption in respect of all transgender members of forces who had not had surgery. The argument in this case was less a matter of entitlement to benefits and more a matter of status in relation to duties, and the importance of team cohesion.¹¹² The ADF appeared to have been strongly influenced in its decision by the belief that people would identify as a member of the opposite sex on an opt in/opt out basis and was especially concerned that a loose definition of transgender would enable people to avoid combat and also disrupt the operations of a team.¹¹³

6.80 With respect to overseas postings of ADF personnel (as distinct from APS staff) some restrictions were in place which were a response to the standards of the countries to which people were posted:

'The majority of countries approached stated unequivocally that the posting on loan, exchange or secondment of ADF members with same sex partners or falling within the transgender categories would be unacceptable, and should Australia post such members. Australia could be asked to replace them.'¹¹⁴

6.81 The Department of Foreign Affairs and Trade also expressed some reservations about the definition of transgender in the proposed legislation, believing that it could offer opportunities to obtain passports as transgendered persons 'to maliciously or criminally obtain

¹¹⁰ Evidence, Anti Discrimination Board of New South Wales, p. 108.

Evidence, Civil Liberties Council of New South Wales: 'I think it is really important to recognise that most people who are going through this process are not doing it for economic gain or for some kind of notoriety. They find themselves in a circumstance and a predicament that most of us just cannot even begin to imagine. I think the legislation must try to keep a level head about this. I do not think you need worry about situations where people are changing their gender on Tuesday and then again on Thursday. I think it is much more serious than that.' p. 160.

¹¹¹ Evidence, Australian Defence Force, p. 19.

¹¹² Evidence, Australian Defence Force, pp. 18-19.
Submission, Department of Defence, Vol. 8, pp. 1794-1795.

¹¹³ Evidence, Australian Defence Force, pp 18-19.

¹¹⁴ Submission, Australian Defence Force; for example, as at August 1996, the United Kingdom did not permit homosexuals to serve in the defence forces; and in Germany, defence force staff identified as homosexual have limited career opportunities. Whatever the arrangements with respect to Australian ADF members in Australia, it appears that some categories of people would be unable to take advantage of career opportunities because of the requirements of other countries, Vol. 9 pp. 2172, 2173.

a new identity.'¹¹⁵ The Department's objections were similar in some ways to those of the Attorney General's department.¹¹⁶ Nonetheless, the department did provide appropriate passports for postoperative transgender people, and documentation for pre-operative persons¹¹⁷ that is, those who were in the process of undertaking surgery,¹¹⁸ again on the basis of 'certainty' as to identity being established through an irreversible process.

6.82 Recommendations as to acceptable legal changes concerned the establishment of a national register similar to that established under South Australian legislation, the *Sexual Reassignment Act 1988*.¹¹⁹ However, this particular register only provides protection to persons who have undergone re-assignment surgery, as opposed to including all persons who consider they are in the process of, or have undergone, some form of gender change. Evidence received from other states also indicated that documentation was only provided to people who had undergone re-assignment surgery.¹²⁰

6.83 There appears to be no reason why any national documentation process should not be able to accommodate a change of gender status, whether this is by re-assignment surgery or any other means. To offer this option would overcome some of the current objections to the legislation. This is not to say that there will be no objection to any proposal to establish a register since some witnesses believed that some transgendered persons could change gender on a regular basis.¹²¹

6.84 The Committee believes that any registration of change of gender should be a matter to be discussed with States and Territories, as part of the process of establishing national standards regarding acceptance of gender change and provision of documentation for all transgendered. While acknowledging the concerns expressed about individuals obtaining another identity fraudulently, the Committee believes that such concerns can be reduced through effective administration - for example, the Office of the Northern Territory Registrar General advised that there was limited access to the original birth certificates of those persons who had received a new certificate after reassignment surgery, and penalties for intended fraudulent use of the original birth certificate.¹²² The issue of developing national documentation is considered further below.¹²³

¹¹⁵ Submission, Department of Foreign Affairs and Trade, Vol. 13, p. 2999.

¹¹⁶ See Chapter 3, Paragraphs 3.24-3.25, 3.71.

¹¹⁷ Submission, HREOC, Vol. 5, p. 150.

¹¹⁸ See especially Submission, Department of Foreign Affairs and Trade, Vol. 13, p. 2992.
Submission, Department of Foreign Affairs and Trade, pp. Vol. 13, 2998-2999.

¹¹⁹ Submission, Gender Council of Australia (W.A.) Inc, Vol. 6, p. 1276.

¹²⁰ Submission, Office of the Registrar General of the Northern Territory, Vol. 15, p. 3592.

¹²¹ Submission, Dr Finlay, 'over a period of time, the same individual may assume, chameleon-like, sometimes a male, sometimes a female identity', Vol. 8, p. 1785.

¹²² Submission, Office of the Registrar General of the Northern Territory, Vol. 15, p. 3592.

¹²³ See Paragraphs 6.88 - 6.98 and Recommendation 6 of this Chapter.

Legal recognition that a person is now a man or woman (rather than a transgendered person or former gender)

6.85 The *Sexuality Discrimination Bill 1995* provides limited protection in respect of people being treated as a member of the sex with which they identify. At present, the bill requires that people be recognised as the sex stated on a certificate issued by a state; that people not be discriminated against because they are transgendered persons; or because they are of a specified sexuality (see Clauses 23-25 especially). It may be that such protection is not available until people are able to clearly identify their preferred status (including change to another sex, rather than transgender status). As it is, these sections in the legislation permit states which do not accept transgender status to refuse to re-issue a birth or other certificate, even though the person may have been through re-assignment.¹²⁴

6.86 As noted in Chapter 4, the bill did not provide specific protection for people who are discriminated against on the basis of not having their gender change acknowledged, that is, if they are not treated as either a man or a woman. Proposed amendments to Clause 6 of the bill have now provided further protection to transgender people.

6.87 There is no barrier to the Commonwealth providing protection to transgendered persons, although the external affairs power to do so is slightly more tenuous insofar as existing covenants are concerned - that is, there is no specific reference to transgender people in the two main covenants and less 'international concern' about transgender people than about homosexual people.¹²⁵ Nonetheless, it could be argued that there is sufficient flexibility within an understanding of the ICCPR to provide for transgender issues under 'other status' or 'sex'; and to consider that the problems experienced by transgender people are an invasion or breach of privacy which is also prohibited under the ICCPR.¹²⁶ Current levels of international concern and interest, while not as obvious as they are for homosexuals, are reasonably high in respect of transgender issues.¹²⁷

6.88 The legislation as currently drafted does oblige Commonwealth programs and services to be provided in a non-discriminatory fashion; does not permit information to be sought if it is not sought from other parties who are not transgendered persons or not of a specific sexuality; and obliges acceptance of documents at face value (such documents being State-issued documents providing information about a person's sex). However, this is very much limited to documentation provided by the States, and the use of this and other information by some agencies. The extent of this power, seemingly broad, is not specified.¹²⁸

¹²⁴ *Submission*, Ms Abbie Hughes, Vol. 6, pp. 1288-1289.

¹²⁵ See Chapter 3, Paragraphs 3.68-3.71, 3.81.

¹²⁶ *Submission*, Ms Abbie Hughes, Vol. 6, pp. 1290-1291. Privacy issues, in the context of the United Nations' Human Rights Committee decision regarding privacy and homosexuality, are considered at Chapter 3, Paragraphs 3.60-3.62.

¹²⁷ See for example Robert Wintemute, 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes', *Modern Law Review* 60:3 (May 1997) pp. 339-344.

¹²⁸ *Sexuality Discrimination Bill 1995*, Clauses 23-25. In fact, the directions in these clauses may be difficult to enforce, given that they also refer to documents provided by State and Territory authorities such as driving licences. Subclause 25(2) provides that those responsible for issuing documents such as driving licences must accept the sex of a person as stated in a State-issued certificate.

6.89 The Anti-Discrimination Board of New South Wales believed it was important for the Commonwealth to accept State documents relating to 'recognised' transgender persons.¹²⁹ Other witnesses, however, did identify some of the problems that might occur if there was no systematic process of recognition or no awareness of possible incompatibility of legislation. It is not clear, for example, if Commonwealth acknowledgment or acceptance of State certificates of registration would permit marriages to occur between 'recognised' transgender persons and a person of the opposite sex.¹³⁰ Unless there is an intention to specifically amend the *Marriage Act 1961* to allow such marriages, any nationally accredited documentation may need to limit the extent to which certificates are accepted - that is, that they may be used for passports but not for obtaining a marriage licence (although licences are provided by States and Territories, which also register marriages).¹³¹

6.90 Nationally accredited documentation may be useful for the processing of passport applications - at the moment, it is established practice to provide an appropriate passport or temporary travelling document for people who are postoperative or intend to undertake surgery.¹³² Acceptance of all documents, even those which may be granted to people who have not undergone surgery, would be seen as causing difficulties in the issuing of passports.¹³³

6.91 Without use of the external affairs power, the Commonwealth cannot oblige all States and Territories to issue new birth or other certificates; it cannot force all States and Territories to accept certificates issued by other states. In the *Sexuality Discrimination Bill 1995* it is proposed that all State and Territory certificates referring to a change of sex be accepted, which in effect is an expression of Commonwealth power obliging all States and Territories to accept documents including those issues in other states and territories, for a specific purpose (such as the issuing of a driver's licence in a particular sex or gender). Subclause 25(2) is therefore a use of the external affairs power since the Commonwealth does not ordinarily have the power to impose such a condition.

¹²⁹ *Submission*, Anti Discrimination Board of New South Wales, Vol. 8, p. 1820.

¹³⁰ *Evidence*, South Australian Equal Opportunity Commission, p. 451. *Evidence*, Dr Finlay, pp. 390-391.

¹³¹ *Submission*, Attorney General's Department, Victoria. Victoria does not change details on birth certificates where those details were correct at the time of registration; it will not issue a new birth certificate because of a re-assignment; names may be changed, however, and a new birth certificate can be provided for a person born in Victoria showing a change of name, but not of gender. Vol. 13, pp. 3184-3185.

Submission, Office of the Registrar-General (Northern Territory), Vol. 15, p. 3591. The Northern Territory, through the *Births Deaths and Marriages Registration Amendment Act 1996*, which came into force on 1 June 1997, will change a birth record if a person has had sexual re-assignment surgery. Other potential problems arise in minor areas, such as the age at which one may receive an age pension, but this will become irrelevant in the longer term.

Evidence, Dr Finlay, outlined problems regarding the possible use of sex-change certificates for the purposes of obtaining a marriage licence, pp. 390-391.

¹³² *Evidence*, Department of Foreign Affairs and Trade, p. 820. *Submission*, Department of Foreign Affairs and Trade, Vol. 13, pp. 2992-2993.

¹³³ *Submission*, Department of Foreign Affairs and Trade, Vol. 13, p. 2999. *Evidence*, Department of Foreign Affairs and Trade, pp. 819-820.

6.92 The *Sexuality Discrimination Bill 1995* also requires the Commonwealth to accept State and Territory documents for purposes such as the issuing of passports, with subclause 25(2) making acceptance obligatory rather than a matter of favour.

6.93 Some witnesses sought a more positive commitment from the legislation, such as the development of a national register. This, it was suggested, would provide certificates to re-assigned persons and others, and would impose national recognition of the documents provided:

'In our submission the issuing of official documents...ought not depend on whether a certificate has been issued under a law of a State. What if no such procedure exists, or is repealed by the State? The Bill should be amended to allow the Sexuality Discrimination Commissioner to issue a certificate if satisfied that no reasonable procedure is available in a State. Further, clause 25 should be amended so as to apply to alterations to certificates as well as to their issue.'¹³⁴

Transgender Couples

6.94 Transgender couples are difficult to define. If both parties are re-assigned, or one is re-assigned and one is of his/her birth gender, and they do not form a same-sex couple, they may be considered for various purposes as an ordinary de facto heterosexual couple. Legal recognition of re-assigned people will only ratify this situation, but any change to marriage laws permitting marriage by re-assigned persons could make the couple a married heterosexual couple with all the protections this affords.

6.95 The situation with respect to other transgender persons has been somewhat more tenuous. A form of legal recognition and administrative recognition is possible for all couples. The main barriers have been the objections by various agencies and organisations based on the supposed transitory nature of some identities; the supposed administrative costs involved; the loss to public revenue; the possibility of people establishing fraudulent identities; and the unacceptability of rights for transgendered persons.

6.96 Some of these problems have been overcome by changing Clause 107 (new clause 17) to include transgender couples, at Recommendation 5 above.

6.97 The Committee believes that the administrative and status problems experienced by transgendered persons are extensive, and have been considered in detail in submissions to the Committee.¹³⁵ Many of the problems relating to status and formal identity could be overcome by agreement being reached between the States/Territories and the Commonwealth

¹³⁴ *Submission*, New South Wales Council for Civil Liberties, Vol. 7, p. 1459. *Evidence*, Anti Discrimination Board of New South Wales, which noted that information to be obtained regarding status - whether post-operative or otherwise - was not seen as an insuperable problem: 'In relation to the question of identity, I think it should be in exactly the same way as, say, for the recognition of same sex partnerships in things like the migration. I do not think there is any difficulty, if it is genuinely perceived as an issue, in finding out from external sources whether the person concerned has genuinely sought to identify as, and live as, a member of the other sex', p.113.

¹³⁵ *Submission*, Ms S C Else, Vol. 2, pp. 340-341.

on the most effective way of recognising all transgender people for a range of purposes. This would help establish a standard legal status for transgender people,¹³⁶ regardless of re-assignment. The Committee also believes that nationwide policies should also be able to develop guidelines concerning additional changes to documentation.

6.98 The Committee also acknowledges the problems identified by witnesses concerning the use of documentation to obtain services such as a marriage licence.

Recommendation 6

That a States/Commonwealth working party be established to discuss the most effective way of providing standard identification documents for all transgender persons who require them.

Recognition of relationships for other personal purposes

6.99 Insofar as people seek a recognition of relationships for other purposes, marriage or formal acknowledgment may be irrelevant, as was suggested by the Gay and Lesbian Rights Lobby,¹³⁷ but legal recognition is important. The concerns which a number of people expressed relate primarily to matters which are covered by State laws, such as next of kin status and intestacy.¹³⁸ The laws of next of kin also are important in areas such as transplants, organ and other donations, medical decisions, including to terminate or continue life, and autopsy decisions and funeral arrangements. These issues are controlled by States and Territories, which would need to determine if any Commonwealth system of legal recognition would also be acceptable in respect of the above areas.

6.100 A number of witnesses also expressed some concern about other issues related to partnerships and family life, including parenting, adoption, and access to IVF programs,¹³⁹ all of which are dealt with under State law, and issues such as 'custody', child support, and access to the Family Court, some of which issues can be dealt with through State legislation and some through Commonwealth legislation.¹⁴⁰

6.101 *In de facto heterosexual relationships, child custody and support were previously dealt with by State courts, although States may also have such matters dealt with now by the Commonwealth Family Court. Aspects of Family Court matters can also be dealt with by State magistrates courts. There is no reason why all matters relating to Family Court issues cannot be dealt with by that court, regardless of the sexuality of persons, if the standing of the various parties is established.*¹⁴¹ One witness, noted, for example, that the 'other' parent of a

¹³⁶ See Chapter 5, Paragraphs 5.82-5.83.

¹³⁷ See above, Paragraph 6.41.

¹³⁸ See Chapter 2, Paragraphs 2.66-2.68, See Chapter 4, Paragraphs 4.55-4.62.

¹³⁹ See Chapter 2, Paragraph 2.68. *Submission*, Ms Frances Sutherland, Vol. 8, p. 710.

¹⁴⁰ *Submission*, Ms J Millbank, Vol. 1, pp. 115, 116-118.

¹⁴¹ *Submission*, Gay and Lesbian Welfare Association, Vol. 11, p. 2467.

lesbian couple with a child born within the relationship did not have any standing; this fact reflects the fairly rigid concepts of couples and of parents,¹⁴² which could be softened by appropriate amendments to the *Family Law Act 1975*.

6.102 The potential for Commonwealth legislation to indirectly discriminate against people on grounds of their sexuality status was noted in various submissions. In particular, although various rights to services such as adoption and IVF were regulated by States, the Commonwealth only recognised biological and adoptive parents.¹⁴³ This could create problems in the area of child support and access - even though the wording of a statute is not necessarily discriminatory, its implementation may be.¹⁴⁴

6.103 This suggests that any review process of Commonwealth legislation would need to take such factors into consideration, as a change in terminology could lead to a substantial increase in access to services, requiring an increase in funding.

6.104 The Committee has recommended above (at Recommendation 1 of this Chapter) that a working group be established to review Commonwealth legislation, including legislation relating to the above issues where applicable.

Access to Taxation and Superannuation Benefits

6.105 The major issues with respect to superannuation for non-heterosexual and transgender people are being accepted into superannuation or insurance schemes at rates which are not discriminatory, and being able to gain payments or superannuation benefits for the contributor, or the contributor's partner or another person or persons on the same terms as are available to heterosexual persons.¹⁴⁵

6.106 In its current form, the *Sexuality Discrimination Bill 1995* will not assist people whose insurance or superannuation scheme does not come under Commonwealth control. How broad this coverage is will depend partly on an interpretation of the legislation. It could be argued, for instance, that if employment in a state public sector was subject to the provisions of the legislation, all superannuation schemes operated by State governments for such employees may also be affected. Nonetheless, the provisions of some state and territory superannuation and other schemes may have to be amended to allow trustees to make payments. Similarly, the application of the provisions of the legislation to foreign corporations (Clause 10(a)) and to 'trading and financial corporation[s] formed within the limits of the Commonwealth' (Clause 10(b)) may affect a wide range of operations of such bodies.

6.107 The legislation does facilitate, where required, access to superannuation and insurance, providing that various objective criteria are met, since it prohibits discrimination

¹⁴² *Submission*, Ms J. Millbank, Vol. 1, pp. 117-118, 125-145.

¹⁴³ *Submission*, Department of Immigration and Multicultural Affairs, where it is stated that the 'responsible parent' definition (required in cases of children acquiring Australian citizenship) is based on the *Family Law Act 1975*, Vol. 8, p. 1704.

¹⁴⁴ *Submission*, Ms J. Millbank, Vol. 1, p. 117.

¹⁴⁵ See Chapter 4, Paragraphs 4.149-4.156.
Submission, HREOC, Vol. 5, pp. 1577-1579.

on the grounds of data which are not statistical or objective.¹⁴⁶ However, given that there have previously been complaints about the nature of some data used in assessing eligibility or the terms on which insurance or superannuation is offered, the Committee has made recommendations amending the nature of such data and the provision of such data to an individual affected by a decision.¹⁴⁷

6.108 Insofar as State anti-discrimination legislation may also provide access to such benefits, the Commonwealth legislation may be superfluous, or it may be seen as increasing access to various schemes. As has been noted by many witnesses, care must be taken in considering these criteria to ensure that they are objective and that they are applied appropriately.¹⁴⁸ There is also the possibility of differences of opinion regarding the use of data, and some organisations may seek to limit access to benefits through resisting changes to definitions of 'spouse' or 'partner' or other potential beneficiaries.

6.109 The use of the term 'associate' may be of considerable importance in this as in other contexts. As noted in Chapter 4, ordinary matters of discrimination such as in employment, accommodation and so on may be limited through exemptions granted in respect of 'family' or 'associates'. Similarly, people who are family or associates may also claim to have been discriminated against because of their relationship to a person or because they are dependants (regardless of gender), or a person who is a dependant of a member of the first person's household (Clause 5). In the *Sexuality Discrimination Bill 1995*, the term 'associate' includes friends and a person who has a business relationship to an individual who is a transgendered person or has non-heterosexual status. The definition of de facto spouse is also gender neutral (Clause 5). If all other Commonwealth legislation - unless exempted - must be compatible with the provisions of the *Sexuality Discrimination Bill 1995*, similar broad terms may be used in superannuation legislation - this could also include friends and would reduce many of the problems which exist with respect to 'spouses' and 'dependents'.

6.110 The *Sexuality Discrimination Bill 1995* prohibits discrimination by a person 'exercising a discretion about the payment of a superannuation benefit to or for a member of a superannuation fund' (Clause 10(5)) on the grounds of sexuality or transgender identity. However, the controversial decisions made on these issues have effectively been determined by the wording of relevant legislation which only refers to spouse or dependent child etc., and which excludes same sex partners and others from such definitions. Again, a variation to the relevant legislation would be required in order to ensure that all language is gender neutral; or

¹⁴⁶ See, Chapter 4, Paragraphs 4.152-4.156.

¹⁴⁷ See Chapter 4, Recommendation 7.

¹⁴⁸ See Chapter 4, Paragraph 4.156.
Evidence, Association of Superannuation Funds of Australia, The representative of this body noted that 'The Sex Discrimination Commissioner has stated her opposition to the use of sex based actuarial data because other crucial issues affecting longevity such as race or economic class are not used.' The main problems in relation to sex and transgender occur with *some* defined benefit funds, p. 148.
Evidence, Association of Superannuation Funds of Australia, which charge different rates for men and women based on the fact that women live longer and therefore would have to pay more to get the same benefit over a longer time period. Defined benefit funds include CSS but are being replaced by accumulation funds, p. 150.
Evidence, Association of Superannuation Funds of Australia, access to superannuation and insurance; schemes may also be limited for a number of reasons, including lifestyle, age, and health status. Thus people may need to pay higher rates or have specific provisions imposed - such as limited access to benefits - to overcome these factors, p. 148.

else other amendments may be required, if a decision is made to not exclude some other groups from the benefits of untaxed superannuation:¹⁴⁹

'Section 10(5) provides that a person must not exercise their discretion in a way which discriminates when dealing with a superannuation fund. We are concerned that there may be situations in which there is discrimination in the way a superannuation fund is established. There is no provision declaring this to be unlawful. We believe that discrimination in the way funds are structured, where no exercise of discretion is involved, should be unlawful. We are of the view that the limited exemption in Section 30(1) of the Bill which relates to superannuation provides sufficient balance in respect of discriminatory aspects which are non-discriminatory as well as discretionary.'¹⁵⁰

6.111 However, the legislation does not override State and Territory legislation which may affect distribution of an estate, even though payments to an estate from State schemes would be affected by taxation rulings which are a Commonwealth responsibility and even though some State bodies may be unable to discriminate in respect of payments to an individual or an estate. Those States which may not currently be flexible in their interpretation of superannuation and insurance beneficiaries¹⁵¹ would be unable to appeal to Commonwealth superannuation legislation to override if all Commonwealth legislation is changed.¹⁵²

6.112 However, the status of superannuation and insurance which is managed by a State or a purely state-based organisation is less clear. If superannuation is deemed to be an employment-related benefit, then superannuation schemes linked to State public sector employment should be bound by the provisions of the legislation. However, payments to people may continue to be restricted if the legislation affecting other State restricted superannuation schemes does not allow persons other than heterosexual spouses and dependent children linked to a heterosexual relationship to be acknowledged as beneficiaries.

6.113 Legislation similar to that set up by the ACT relating to probate and family relationships would have to be an integral part of change to allocation of death benefits (including payment of compensation for death or injury).

6.114 The *Sexuality Discrimination Bill 1995* only explicitly extends any superannuation benefit to people who are in relationships similar to those of married and de facto heterosexual couples. In this sense, it seeks to grant similar benefits to people perceived to be in obviously similar circumstances. It does not explicitly extend assistance to transgender couples, although they may be covered by the term 'de facto' spouse which is defined as 'another person who is not married to the person but lives with the person on a *bona fide*

¹⁴⁹ *Submission*, Queensland Aids Council, Vol. 12, pp. 2872-2973.

¹⁵⁰ *Submission*, Law Institute of Victoria, Administrative Law Section, Vol. 12, p. 2859.

¹⁵¹ See Chapter 4, Paragraphs 4.138-4.145.

¹⁵² See Chapter 4, Paragraph 4.151.
Evidence, Anti Discrimination Board of New South Wales, p.118.
Submission, Queensland Aids Council, which refers to NSW Anti Discrimination legislation being overridden by the less favourable provisions of the Commonwealth *Life Insurance Act 1945*, Vol. 12, p. 2874.

domestic basis' (Clause 5). However, any support of increased access by same sex couples should perhaps also be matched by a support of people to equal access regardless of sexuality, gender status or 'marital' status:

'Ascribing spousal status to same sex cohabitantes is not the only, or even the most desirable, cure for this discrimination. There may be no reason, in many areas, why live-in sexual relationships should be privileged by the law above other relationships; any more than heterosexual relationships should be privileged above homosexual ones. The discriminatory provision in commonwealth superannuation legislation, for example, could be cured by permitting a designated person to collect a pension from the fund rather than passing pensions only to spouses.'¹⁵³

6.115 This issue has been addressed in respect of transgender couples by the proposed amendments to Clause 17, previously 107. However, the Committee considers that there should be an examination of the practice of limiting the benefits payable in relation to people of any sexuality and gender status who have made superannuation contributions, but who were not in a relationship at the time of their death. This matter is considered further at Paragraphs 6.131 and 6.132 and Recommendation 8.

Access to schemes

6.116 Evidence suggested people had experienced a range of problems in access to superannuation and insurance, including a lack of certainty with respect to the scientific or objective nature of the data on which decisions were based; and inappropriate or generalised assumptions being made about people on the basis of their sexuality as opposed to their lifestyle.¹⁵⁴

6.117 Some objections to allowing people with unacceptable lifestyles access to benefits were based on two factors - that they had a limited life expectancy, so would not have made a high level of payment; and they may have had multiple partners and no real relationships. Thus payment to a 'dependant' or partner was seen as inappropriate in that such people had no real partners.¹⁵⁵ However, this type of exclusion would not be acceptable unless it was based on objective data which was applied without respect to sexuality or gender.

¹⁵³ *Submission*, Ms J. Millbank, Vol. 1, p. 115.

¹⁵⁴ *Evidence*, Australian Transgender Support Association Inc., p. 790. One transgender person stated that she had lost all her superannuation because she had known she was transgender, but had not stated this. This appeared to be an inappropriate action on the part of the fund, as some recalculation of benefits relative to scientific data on change of gender effects could have been undertaken.

¹⁵⁵ *Evidence*, Dr Reece, p. 772.

Access for Transgender people

6.118 The Association of Superannuation Funds of Australia noted that it should be possible for change of gender status to be accommodated by a fund, in the sense of a fund being able to make appropriate adjustments to rates and benefits once a specific status was advised.¹⁵⁶

'Given the fact that there will be very few such cases, this Association believes that any legislation should allow trustees some discretion to reach a compromise with the member following discussion and counselling.'¹⁵⁷

6.119 Such adjustments would be based on the extent to which a person's gender had been changed by medical processes, a factor which might also affect the risks of various gender-linked disorders or likely incidence of disorders.¹⁵⁸

6.120 Although the Association of Superannuation Funds of Australia expressed some concern about possible discrimination on the basis of a change of gender, it is unlikely that such a complaint would be substantiated. Discrimination, in the sense of charging different rates for coverage relative to gender is already permitted under the *Sex Discrimination Act 1984* as well as under various insurance and superannuation schemes. If action was taken under the *Sex Discrimination Act 1984* that a 'recognised' male to female transgender person was disadvantaged by having to pay higher rates, such a claim might be dismissed because the person was not disadvantaged relative to other women. The major difficulties that would arise would be if a male to female transgender person who had not undertaken any medical or surgical treatment would be asked to pay higher rates in order to provide for an expected longer life. If such an expectation of longevity would not be reasonable, considering that biologically the person was still male, discrimination may occur - but the use of the *Sex Discrimination Act 1984* to resolve this problem may be inappropriate.

6.121 If people do not undertake any medical or surgical process to become transgender, their situation with respect to superannuation status may remain the same as that prior to change of status. The factors that will remain relevant are gender, age, health and lifestyle. However, given that the numbers of such people are relatively very small, funds and contributors may need to come to some agreement which acknowledges the change and the implications of this. In addition, any change to existing superannuation legislation may assist funds in making such agreements. A witness representing the Association of Superannuation Funds of Australia advised the Committee that the *Superannuation Industry (Supervision) Act (SIS)* 'prohibits any reduction in accrued benefits without the member's agreement'.¹⁵⁹ Superannuation funds may seek an exemption from the legislation if the adjustments required cannot be made although the contributor may still benefit.

¹⁵⁶ Submission, Association of Superannuation Funds of Australia, Vol. 8, p. 1856.

¹⁵⁷ Submission, Association of Superannuation Funds of Australia Limited, Vol. 8, p. 1856.

¹⁵⁸ See Chapter 4, Paragraph 4.150.

¹⁵⁹ Submission, Association of Superannuation Funds of Australia, Vol. 8, p. 1856.

Payment of Benefits

6.122 Superannuation is provided in a number of different forms - a lump sum plus pension; a pension payable to a partner; payment of various benefits to a surviving partner on the death of the contributor. Different schemes are also in operation and some of these require different contribution rates according to gender.¹⁶⁰

6.123 The major legislation affecting payment of superannuation includes the *Taxation Act 1946* which affects the rate of taxation charged on any superannuation contribution or payment and the specific superannuation legislation such as the *Superannuation Industry (Supervision) Act 1993*. The major problem for superannuation companies regarding payment of benefits is that, unless they are given an exemption, or the superannuation legislation is amended, they will be in breach of their act or of the anti-discrimination legislation:

'It would be of great benefit to the superannuation industry if the various pieces of anti-discrimination legislation could be consistent with superannuation legislation. Indeed, unless such consistency is achieved, superannuation trustees will find themselves unable to comply with the various pieces of anti-discrimination legislation to the detriment of some members of funds. By complying with anti-discrimination legislation, trustees may incur a penalty under the Commonwealth's superannuation legislation. These penalties are quite severe...'¹⁶¹

Dependency

6.124 The major problems experienced by all parties who are not 'dependants' of the contributor is that they must demonstrate some form of dependency in order to receive certain forms of payment or to receive certain level of favourable tax treatment. Heterosexual de facto and married persons are automatically assumed to have been dependent, even if there is no financial interdependence or dependence.¹⁶² As same sex partners are not classified as spouses¹⁶³ in superannuation legislation they must currently be able to demonstrate that they were *financially* dependent on the deceased contributor. A case concerning an unsuccessful application for death benefits by the survivor of a same sex relationship, demonstrating interdependency and some dependency, however, concluded in 1995 that changes to the superannuation legislation of 1992 did not make the survivor eligible.¹⁶⁴

¹⁶⁰ Evidence, Association of Superannuation Funds of Australia, p. 150.

¹⁶¹ Evidence, Association of Superannuation Funds of Australia, p. 149.

¹⁶² Evidence, Association of Superannuation Funds of Australia, pp. 146-147. Evidence, Australian Council of Trade Unions (ACTU), p. 313. Submission, ACTU, Vol. 8, p. 1666.

¹⁶³ Submission, Ms J Millbank, Vol. 1, p. 118. Submission, Mr Ron Keamy, Vol. 4, p. 703.

¹⁶⁴ Submission, Mr Gregory Brown, Vol. 10, p. 2405-2406. Submission, Homodefactors Association Inc, Vol. 10, p.2431.

6.125 The limited range of persons considered to come into the category of being dependent rules out a range of other people who may have had some relationship with married or single persons, regardless of their sexuality.¹⁶⁵

6.126 The ACTU noted that the situation with respect to payment of benefits was discriminatory, and believed that superannuation should more clearly be seen as a work-related issue:

'Superannuation payments are now an integral part of wage, remuneration and conditions negotiated at the Australian industrial bargaining table. Superannuation is form of enforced savings for the benefit of workers and their families. The families of lesbian and gay workers do not enjoy these benefits to the extent enjoyed by the families of heterosexual workers though they make the same superannuation contributions as their heterosexual workmates.'¹⁶⁶

6.127 The ACTU also detailed several areas where discrimination occurred including failure to pay pensions, death or disability benefits and failure to recognise a dependency claim of a child of a lesbian or gay relationship.¹⁶⁷

6.128 Changes to the *Income Tax Assessment Act 1936* would also be required even if superannuation funds adopted broader categories of 'dependents'. Unless the taxation laws accept similar categories, or were more flexible about the interpretation of 'dependency', payments may be subject to tax regardless of whether the payment is made to an individual or to the legal personal representative of the deceased person.¹⁶⁸

6.129 The inequitable basis of payments has been studied at some length in the report of the Senate Select Committee on Superannuation, *Super and Broken Work Patterns* (1995). At November 1997 no government response to this report had been received.

6.130 The *Sexuality Discrimination Bill 1995*'s provisions require appropriate changes to all Commonwealth legislation unless an exemption is obtained. The effect of any changes would be amendment of the various superannuation Acts and taxation Acts in order to make the provisions regarding couples consistent:

'...it must be made clear that discrimination against same sex couples is both marital status and sexual orientation discrimination.'¹⁶⁹

6.131 However, this would not change the situation with respect to single people or transgender couples (unless transgender couples are covered through new Clause 17 (3)).

¹⁶⁵ Evidence, Association of Superannuation Funds of Australia, p. 149: 'The definition usually is 'including a spouse or child of the member'. The other categories [brother, sister, father or mother] are generally not within that, unless there is a different definition of the word 'dependent'.

¹⁶⁶ Submission, Australian Council of Trade Unions (ACTU), Vol. 8, p. 1657.

¹⁶⁷ Submission, Australian Council of Trade Unions (ACTU) Vol. 8, pp. 1659-1660.

¹⁶⁸ Evidence, Association of Superannuation Funds of Australia, p. 147.

¹⁶⁹ Submission, Ms J Millbank, Vol. 1, p. 118.

Submission, Gay and Lesbian Rights Lobby, Vol. 5, pp. 1022, 1023-1024.

Clause 10(5) of the *Sexuality Discrimination Bill 1995* only prohibits discrimination in respect of sexuality or gender status, not discrimination in respect of status as a 'single' person, a non-dependent person or as a member of a couple which is neither heterosexual nor homosexual. Those who do not believe they would be effectively covered by the provisions relating to 'genuine domestic basis' may believe they are being discriminated against on the basis of their 'non-couple' status or on the basis that their relationship, while supportive, is defined out of various benefits.

6.132 Thus, to be fully effective, superannuation and taxation legislation would need to address issue of dependency as well, and consider payments to nominated persons. A more appropriate solution would be to impose a similar taxation rate on all superannuation paid, regardless of the dependency of the recipient. Again, this would not avoid any specific problems that may occur with a challenge to an estate, if legislation does not exist prohibiting discrimination in settlement of estate solely on a person's sexuality or gender status.

Recommendation 7

That, in conjunction with new Clause 17, all Commonwealth superannuation legislation, and any related legislation, directly or indirectly affecting payment to people on the grounds of their sexuality or their gender status, be reviewed and amended.

Recommendation 8

That, in light of its previous work - *Super and Broken Work Patterns* (1995) - the Senate Select Committee on Superannuation be asked to consider and report further on any barriers to superannuation contributors being able to nominate a specific beneficiary or beneficiaries of lump sums, pensions or other payments. In particular, the Committee is asked to examine the situation of persons who, whether or not previously married or in a de facto relationship (including a same sex or transgender relationship) are single at the time of death.

6.133 Other State and Territory legislation would be required to establish certain rights to property or assets which could make appropriate provision for those members of a person's household or 'family'.¹⁷⁰

Other Taxation Benefits

6.134 There are relatively few additional taxation benefits that would be accessible to people on the basis of their being deemed to be a couple. Of these, the most important is probably the dependent spouse rebate.¹⁷¹ This was not perceived as a major gain on the grounds that many same sex couples were both employed or were not in financially dependent relationships.¹⁷²

¹⁷⁰ Such legislation does exist, but the laws of family provision can affect the provisions made in wills and from intestate estates.

¹⁷¹ This may also be paid out through the year in the form of a child care allowance and hence may be claimed by the primary carer of a child.

¹⁷² Submission, Ms J Millbank, Vol. 1, p. 123.

Other benefits, including work-related benefits

6.135 According to the ACTU, organisations representing workers had an obligation to protect the rights of all members. However the union recognised that there were some limitations to its role and that, in spite of ILO 111, there were many sexuality related issues which they could not deal with effectively:

'...the capacity of unions to achieve equal entitlements for lesbian and gay workers is constrained in the long term by the discriminatory and unclear legislative regime which exists for gay and lesbian workers.'¹⁷³

6.136 The areas where the ACTU believed people were most discriminated against included those referred to by many other witnesses: superannuation payments; various forms of leave (which are sometimes covered by federal awards and sometimes by state legislation); harassment at work;¹⁷⁴ and legislation which provided exemptions to employers in several fields.¹⁷⁵

6.137 The Commonwealth *Industrial Relations Act 1988* did address the issue of discrimination on the basis of sexuality or sexual preference, requiring that there be:

'...progressive removal of discrimination on the grounds of sexual preference from industrial awards and ... that an employer ... not terminate an employee's employment because of the employee's sexual preference, subject to limitations and exemptions.'¹⁷⁶

6.138 *The Workplace Relations Act 1996* contains these provisions.¹⁷⁷ However, as with the *Industrial Relations Act 1988*, the *Workplace Relations Act* only allows individual complaints about termination of employment on grounds of sexual preference. It does not cover offers of employment or promotion or training opportunities.¹⁷⁸ The Queensland branch of the ACTU welcomed the provisions in the *Sexuality Discrimination Bill 1995* which would refer 'a discriminatory act under an award to the Australian Industrial Relations Commission' on the grounds that:

'...it will provide for the removal of discriminatory acts against employees based upon their sexuality or because they are a transgenderist. This significantly widens the review of awards

¹⁷³ *Submission*, Association of Superannuation Funds of Australia, Vol. 8, p. 1854.
Submission, Australian Council of Trade Unions (ACTU), Queensland Branch, referred to bisexual and transgender people as well as gays and lesbians, Vol. 11, p. 2437.

¹⁷⁴ *Submission*, Association of Superannuation Funds of Australia, Vol. 8, pp. 1854-1861.

¹⁷⁵ Particularly in education and services for children and young people - See Chapter 4, Paragraphs 4.110-4.115, 4.203-4.208.
Submission, Australian Council of Trade Unions, Vol. 8, pp. 1670-1671.

¹⁷⁶ *Submission*, HREOC, Vol. 5, p. 1573.

¹⁷⁷ *Workplace Relations Act 1996*, Clause 170CK (2)(f) (Part VIA, Division 3).

¹⁷⁸ *Submission*, Ms A. Chapman, Vol. 4, p. 677.

process available through S 150A of the Commonwealth *Industrial Relations Act 1988*.¹⁷⁹

6.139 However, people on State based awards, with no access to the Commonwealth Industrial Relations Commission (AIRC) must have their case referred to the State industrial relations commission which assesses the case.¹⁸⁰ The existence of Commonwealth anti-discrimination legislation will not affect such State legislation unless the employment is within the public sector.¹⁸¹

6.140 A range of other benefits including various forms of leave and workers compensation may also not be available to people who are working under State awards and who are excluded because of definitions such as 'spouse' which presuppose or specify an opposite sex couple.¹⁸²

Changes in the Commonwealth Public Sector

6.141 There has been a gradual change in the attitudes and practices of various government bodies reflecting a greater awareness of different personal relationships. Most of the changes that have occurred have been a direct result of complaints made, particularly with respect to changes in the Australian Defence Force (ADF).¹⁸³ In 1992, the Australian Defence Force changed its rules regarding homosexual members of the forces.¹⁸⁴ Previously obliged to leave the services,¹⁸⁵ homosexuals not only gained the right to be accepted and not to be dismissed on the basis of sexuality alone, but also gained access to certain of the benefits available to other ADF members although certainly not to all.¹⁸⁶

6.142 *The Public Service Act 1922*¹⁸⁷ provides that there be no discrimination with respect to some aspects of employment such as appointments, promotions, and transfers. Other issues

¹⁷⁹ *Submission*, Australian Council of Trade Unions, Queensland Branch, Vol. 11, p. 2446. However, this process was seen as unnecessary according to one witness, since it did not reflect any historical inequity. It was recommended that any such discrimination in awards 'should simply be unlawful' - *Submission*, Ms Rosemary Hunter, Vol. 6, p. 1266.

¹⁸⁰ *Submission*, Australian Council of Trade Unions, Queensland Branch, Vol. 11, p. 2447.

Submission, Australian Council for Lesbian and Gay Rights (West Australian Branch) Vol. 11, pp. 2575-2576.

¹⁸¹ *Submission*, Australian Council of Trade Unions, Queensland Branch, Vol. 11, pp. 2446-2447.
Submission, Australian Council for Lesbian and Gay Rights (West Australian Branch), for information on industrial legislation in Western Australia, Vol. 11, pp. 2571-2573.

¹⁸² *Submission*, Australian Council of Trade Unions, Queensland Branch, Vol. 11, pp. 2453, 2455.

¹⁸³ *Submission*, Dr M Seah, Vol. 2, pp. 323-324.

¹⁸⁴ *Submission*, HREOC, Vol. 5, p. 1559.

¹⁸⁵ *Evidence*, Australian Defence Force, p. 18.

¹⁸⁶ See above, Paragraphs 6.78-6.79. However, in some of the submissions made to the Committee regarding discrimination in the APS or in the forces, claimants could not establish that action at a particular time was unlawful, although it may have been discriminatory.

¹⁸⁷ *Submission*, Australian Council of Trade Unions, Vol. 8, p. 1667, refers to other legislation with similar principles, such as the *Health Legislation (Private Health Insurance Reform) Amendment Act 1995*.

including the payment of public service allowances,¹⁸⁸ the extension of some benefits to same sex couples; and the acceptance of formal transgender change have been resolved through various agreements rather than through the legislation itself.¹⁸⁹ These changes occurred after some complaints had been made in respect of variations in the conditions of employment and also as a result of ILO 111.

6.143 Some benefits for APS staff have been extended to same sex relationships as well as de facto relationships, with some distinction between APS staff and persons in other Commonwealth employment such as the ADF.¹⁹⁰ The reasons for both increasing and limiting access are not entirely clear, although in part they seem to be related to cost¹⁹¹ rather than an acceptance or otherwise of social changes.

6.144 Until 1992 a range of benefits was available to married and de facto heterosexual persons only. Although these were extended to same sex relationships, directly or implicitly, the development of individual agency agreements and eventually individual workplace agreements may change the contents of 'general' terms and conditions.¹⁹² Uniformity in the sense of ensuring that access to employment and employment related conditions (with the possible exception of superannuation) is consistent may only be possible through legislation which overrides other provisions.

Citizens or Residents

6.145 The Committee was also required, inter alia, to assess the need 'to protect Australian citizens against discrimination...'¹⁹³ While all states have an obligation to legislate for the

¹⁸⁸ It has been argued that benefits available to some public servants as a part of their employment have been denied to people on grounds of sexuality. However in some instances it appears that, although there may be instances of indirect discrimination (whereby people cannot qualify for a benefit because the law does not permit them to be married) some restrictions are primarily imposed on the grounds of marital status.

Submission, Mr Roger Muller, Vol. 1, pp. 192-193, stated that he had been denied benefits while on an overseas posting because of his sexual preference, see also

Submission, Mr Roger Muller, Vol. 9, pp. 1961-1969, and

Submission, HREOC, The decision of HREOC that discrimination had occurred was based on its understanding of ILO 111. The regulations under which DFAT worked required that a person be accompanied overseas by the relevant spouse. It is understood that this requirement - that the stable relationship exist at the time of the posting - is still retained. Thus, although there have been changes to the arrangements under which DFAT operates, and these specifically include same sex couples, the same proviso regarding relationships exists. A person could claim discrimination on grounds of sexuality if it was demonstrated that other persons in an other sex relationship did receive benefits in spite of not being partners at the time of posting. Vol. 5, p.1573.

¹⁸⁹ *Submission*, HREOC, Vol. 5, p. 1580.

¹⁹⁰ *Evidence*, p. 20, for example, the benefits available to Defence Force personnel (as distinct from staff of the Department of Defence).

Submission, Department of Defence, Vol. 8, pp. 1796-1797. While civilian members of the Department of Defence are entitled to the same benefits, members of the ADF are not. It would require legislative change such as that proposed at Clause 17 (previously 107) to override the current regulations which limit access to benefits by the ADF.

¹⁹¹ *Evidence*, Department of Defence, pp 19, 20.

¹⁹² *Submission*, Department of Industrial Relations, Vol. 12, pp. 2897B-C.

¹⁹³ Terms of reference (1), see Chapter 1, Paragraph 1.6.

welfare of their citizens,¹⁹⁴ they do not thereby exclude others from coverage, and covenants such as the ICCPR discourage discrimination on the basis of race and national origin.

6.146 The issue of rights applying equally to all residents rather than citizens was not discussed in detail. Apart from areas such as immigration, where a country may wish to make distinctions in order to limit acceptance of some groups of people or individuals and some instances of businesses with an external base,¹⁹⁵ anti-discrimination laws apply to all persons resident in the country, regardless of whether they are citizens, permanently resident, or visitors.

6.147 As noted above, sexuality in itself is not a reason for prohibiting immigration, and the more important factor is the citizenship status of one of the partners in a couple, and the acceptance of interdependency.¹⁹⁶

6.148 Sexuality is also an accepted ground of refugee status if it can be demonstrated that a person's sexuality would cause them to be discriminated against in their own country.¹⁹⁷

'There has been a series of cases where men ... have claimed refugee status on the basis they have been persecuted in their home country because of their sexuality.'¹⁹⁸

6.149 International cases also demonstrated that sexuality-based intimidation was recognised as a ground for refugee status, a fact which should help support sexuality as an acceptable ground for granting such status in Australia.¹⁹⁹

6.150 Some witnesses suggested that it appeared illogical and inconsistent to provide benefits to people who were migrating or seeking refuge in Australia and not allow such factors to become part of Australian legislation benefiting Australian citizens. It was also suggested that, while the *Migration Regulations* could accommodate some non-heterosexual relationships, other regulations might be discriminating against people on the basis of their HIV status (and hence, presumably, on the ground of being homosexual). It was suggested that the basis of access to a country should not be the status of one's health but the capacity to support oneself regardless of health status, or presumed sexuality status:

'Where a person who has any health problem or disability can support themselves or someone else can support them, they should

¹⁹⁴ *Evidence*, Victorian Council for Civil Liberties, p. 801.

¹⁹⁵ *Submission*, Mr W. Morgan, 'The broad scope of the corporations power will support legislation governing the acts and activities of corporations...[and] would thus support legislation prohibiting all corporations from engaging in sexuality or transgender discrimination.' Vol. 7, p. 1377. See Chapter 3, Paragraph 3.73 .

¹⁹⁶ *Submission*, Ms J. Millbank, Vol. 1, pp. 115-116.

Evidence, Department of Immigration and Multicultural Affairs, pp. 27-28.

¹⁹⁷ *Submission*, Ms J Millbank, Vol. 1, p. 116.

Evidence, Department of Immigration and Multicultural Affairs, pp. 30-31.

¹⁹⁸ *Evidence*, Ms K Walker, p. 287.

Submission, Ms K Walker, Vol. 9, p. 2161.

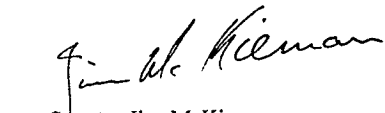
Submission, Ms Walker, Vol. 5, p. 952.

¹⁹⁹ *Evidence*, Ms K Walker, p. 287

Submission, Ms K Walker, Vol. 9, p. 2161.

be allowed to immigrate, particularly if they are the partner of a person that can work and contribute to the community...²⁰⁰

6.151 Other problems affecting those born overseas and living in Australia, or people seeking to migrate to Australia, concerned the difficulties in obtaining appropriate documentation for transgender people.²⁰¹ In particular, transgender people from overseas may experience difficulty in obtaining appropriate documentation either in order to apply to come to Australia; to notify a change of gender status in Australia; and in order to obtain a passport, if they acquired Australian citizenship.²⁰² Special provisions may need to be made to meet these problems if any system of uniform documentation is established.



Senator Jim McKiernan
Chair
References Committee

Additional comments by Senator Eric Abetz

Throughout the course of the hearings on the Sexuality Discrimination Bill, I was invited by former transsexual and homosexual people to discuss their situations and life experiences.

It is to be regretted, although understandable, that they did not talk to the Committee as a whole on the public record.

Whilst some believed they had some innate tendency toward homosexuality they believed it was largely a learned behaviour and conduct which they adopted and then rejected.

Upon rejection of the lifestyle, other elements in the homosexual community considered them to be "traitors" and they were the subject of vilification by elements of that community.

One former transsexual with whom I spoke, had unfortunately only been affirmed in her situation. Her history and life were not fully explored by "therapists" prior to undergoing hormone treatment and surgery. The simply tragic consequences for this young lady who has now changed back to her true and original sex are devastating. The physical damage is horrendous. From having a double mastectomy to having double breast implants and the removal of body hair gained through hormonal treatment is not the product of a caring society but a "Brave New World" experimentation where individuals don't count in the pursuit of a dogma or theory. For these people there is no return to their former state. The surgery is permanent. There is no return.

It is not possible by personal decision to alter one's race or sex. Yet, the facts of these real personal experiences as relayed would indicate that a person's homosexual or transexual behaviour is a learned behaviour and not a characteristic such as sex or race.

Some practising homosexuals have also sought to be distinguished from the aggressive, "in your face" as it was described, lobby. Their own reservation at the antics and "shock" tactics of this lobby begs the question as to whether the lobby is representative.

In those circumstances society must ask itself a threshold question. Is this the type of behaviour we as a society would wish to promote or encourage?

As a society we should and largely do condemn violence, hatred and vilification regardless of its motivation. That is not the issue. The issue is do we consider certain lifestyles desirable and worthy of encouragement and affirmation or do we learn the lesson of history and all the major religions of the world.

Some will say these are moral issues and individuals ought to be allowed to pursue their own lifestyles.

However conflicts arise with those who would wish to pursue their own religious lifestyle, for example. An individual is not an island. They are a part of their society. Their individual conduct does not occur in isolation. It has an influence and impact on society as a whole.

²⁰⁰ Evidence, Australian Bisexual Network, p. 680.

²⁰¹ Submission, Ms Abbie Hughes, Vol. 6, p. 1289.

²⁰² Evidence, Department of Immigration and Multicultural Affairs, p. 27.
Evidence, Department of Foreign Affairs and Trade, pp. 819-822, 832.

I fully respect and acknowledge that my other Committee colleagues have not been privy to the private briefings that I was privileged to receive. The people that did share their life experience exposed their very soul and vulnerability describing intimate details of their lives. It was an honour to be trusted with this highly personal and sensitive information.

Their advice to me is that the legislation should not proceed. The voice of these people needs to be given an avenue for expression. These additional comments are designed to provide that avenue.



ERIC ABETZ
Liberal Senator for Tasmania

SEXUALITY DISCRIMINATION BILL REPORT

RESPONSE BY COALITION SENATORS

Discrimination Generally

As Coalition Senators we do not condone discrimination as a general principle. The basis for this is that discrimination generally attacks the social cohesion which should be the basis of a harmonious and well ordered society.

There is already a range of measures at a federal level which seek to outlaw discrimination. Their effectiveness in many situations is open to question. Legislation itself does not end discrimination. Legislating against racial discrimination has not demonstrably reduced the level of racial intolerance in Australia. It is not possible, and never will be possible, to make people like others, nor will it be possible to control peoples feelings or thoughts towards others who are different from them.

Merely being concerned to prevent discrimination, however, does not justify legislation unless the consequences of that legislation are carefully thought out. Particularising and distinguishing between one form of discrimination and another creates an inconsistent legal framework which perpetuates division, and can itself be discriminatory.

Sport

In many although not all sports, competition is based on gender. Notable exceptions, such as equestrianism, do exist, but they are few.

There are good reasons to separate men and women in sport. The most important is that men and women are not physiologically equal. Men generally tend to be heavier, taller, more muscular and more explosive. Women tend to be smaller, and have a higher body fat score (and therefore a lower power to weight ratio), although they may have advantages in terms of body awareness and perhaps endurance in certain circumstances.

Consider a transsexual track and field athlete who is born as a biological male. Just because they consider themselves a female does not justify their being allowed to participate in women's sporting events, such as the women's 100m sprint. They are born with a male body type, and with the strength and power advantages that accompany it. To allow them to compete in women's sporting events would discriminate against women who do not naturally have that body type.

Even if such an athlete were to undergo surgery to become female, they would retain the height, muscle and bone structure (e.g. pelvic shape, shoulder width and limb

length) of a man, as well as the power to weight of a man. A natural woman of comparable ability would be incapable of competing on a fair and equal basis.

Accordingly, we strongly oppose allowing transsexual individuals being allowed to choose the gender under which they compete.

Violence

Violence based on hate is not acceptable. This is true whether the violence is based upon race, religion, sex or sexuality.

Acts of violence are, and have always been, criminal offences in all jurisdictions of the Commonwealth. The question to be answered is whether it is appropriate and desirable to create separate offences in relation to violence against individuals based upon their sexuality. We see this as similar in principle to whether or not there should be separate offences regarding other hate based crimes.

One must assume the intention of creating these offences is to appropriately punish the perpetrators of these crimes. If that is the case, then the effect at sentencing of having a separate offence should be considered. One problem with such an approach is that it begs distinctions between different hate based offences. Should violence based on sexuality carry a higher penalty than violence based on religious or racial grounds?

Even if a higher maximum penalty were to be set (and in the Racial Hatred Act the maximum penalties for race related crimes are in some cases less than the maximum penalties which could be imposed if the offences were to be dealt with under comparable provisions of the ordinary criminal law) there is no guarantee that a Judge would necessarily impose the higher penalty.

We believe that a better deterrent effect is achieved by a consistent approach to hate based crime. We believe in all cases that such crimes should be prosecuted under the ordinary criminal law, but that where hate is found to be a motivation, then at sentencing it should be considered an aggravating circumstance which attracts a higher penalty. This avoids arbitrary distinctions between one type of discrimination and another, as well as achieving the desired deterrent effect.

Religion

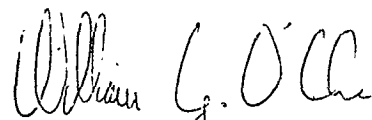
The majority report advocates extending the provisions of the Bill to religious organisations, by specific inclusion of a clause 23(2) precluding them from claiming an exemption on the grounds of religious belief.

This is an almost unprecedented provision. It has generally been the case where Commonwealth legislation contains provisions of compulsion, that there be exemptions on the basis of conscientious belief. If this clause of the Bill is to be accepted then we

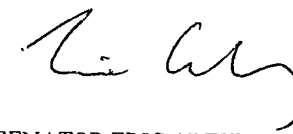
Miscellaneous

Irrespective of any other concern to rectify disadvantage and discrimination, there is no apparent justification for spending taxpayers' money to provide for educational services for transgender issues. On the evidence available, homosexuals and lesbians constitute a small portion of the general population, and transgender individuals an even smaller portion.

To allocate moneys from the budget of HEREOC for these purposes does not appear to be justified. Taking into consideration all of the demands upon HEREOC, we feel that this is a lower priority matter which does not deserve funding in this fashion. To fund such an education programme would go beyond the alleviation of discrimination and become a political campaign with which we do not concur.



SENATOR BILLO'CHEE
Senator for Queensland



SENATOR ERIC ABETZ
Senator for Tasmania

COMMENT

SENATOR HELEN COONAN

Liberal Party

My involvement with the inquiry into the *Sexuality Discrimination Bill 1995* ("the Bill") has been minimal as the official proceedings and public hearings were nearing completion well in advance of my substantive membership of the Legal and Constitutional References Committee. I am therefore reluctant to reach concluded views on this very complex matter. However, against the background of the Bill, my preliminary consideration of the issues leads me to highlight the following factors:

- Most State and Territories have already enacted specific anti-discrimination legislation recognising sexuality and to a lesser extent gender status as possible grounds upon which a person can experience adverse discrimination. Six of the eight Australian States and Territories prohibit discrimination on the grounds of sexuality and four prohibit discrimination on the grounds of transgender identity.¹
- Although it can be said that the various legislative enactments in force in the States and Territories do not provide a totally comprehensive and thorough response to some of the areas of concern identified in the inquiry, as a generalisation there are few areas where the States and Territories cannot act.
- The day to day practicalities and issues raised by persons experiencing discrimination involve matters over which the States and Territories exercise control and where focused and effective outcomes can be delivered locally.
- It is said in the Majority Report that the development of the Bill was based on the *premise* that the Commonwealth could pass the Bill as an exercise of the external affairs power and as a domestic law implementing Australia's international obligations pursuant to the International Covenant on Civil and Political Rights.
- Assuming for the purposes of the argument, that this is legally correct, the question is whether the Commonwealth should pass an omnibus law which will cover the field on subject matters where there are valid State and Territory laws in existence thereby rendering inoperative those laws to the extent of any inconsistency.
- Of course there are areas primarily under Commonwealth control where legitimate concerns may need to be addressed by a precise legislative response to ensure that people are not accorded different treatment by reason of sexuality or gender status.

¹ Majority Report; 1997, Chapter 4, p. 87.

- The terms of reference and the Bill do not contemplate such precision which in my opinion is essential not only to avoid the pitfalls of an overarching and poorly thought out Commonwealth law, but in order to comprehensively identify and address those areas where existing State and Territory legislation falls short of the mark.



SENATOR HELEN COONAN
27 November 1997

ADDITIONAL COMMENTS

SENATOR B. BROWN

Australian Greens

The Sexuality Discrimination Bill goes a long way towards addressing many of the concerns of bisexual, gay, and lesbian people in Australia. It is a means of bringing the law into alignment with the changes in public attitude that have seen sexual orientation towards members of one's own sex more accepted and understood in the community as an aspect of human diversity. Ignoring the debates about why some people have such orientation, this bill reflects the understanding in the community that all societies in all nations at all times have included people with such orientation, and that these people have been valuable, and valued contributors to society. It recognises that public opinion supports an end to tolerance of discrimination, vilification and violence against this segment of society, and that there is widespread support to end systemic discrimination embodied in law and directed against this part of our community. We heard that the shift in understanding and acceptance even goes as far as the many major Christian churches, such as the Catholic, Anglican and Uniting Churches. They may not support same-sex marriage, because this is seen as a quasi-religious institution, but submissions by the Australian Conference of Catholic Bishops have supported recognition of same-sex couples at least to the extent that *de facto* heterosexual couples are recognised. A major regret is that the main report of the committee did not make that broad acceptance more obvious.

This Bill, and the majority report of the committee, is one of the first attempts by Federal Parliament to actually address the issue of transgendered people. The majority report does not fully represent the situation and issues of transgendered people, although paradoxically, it deals better with transsexuals than other transgendered people. This is reflected with the focus on 'stability' of gender identity. The point of inclusion of transgendered people is so that people were not discriminated against on the basis of their gender identification, or of someone else's *perception* of their gender identity. Transsexuals are the group who most strongly assert a definite gender identity, and go to great lengths through surgery, hormone regimes, and other things to bring their appearance into line with established gender identification. But they are only a part of the transgendered community, which includes people for whom gender is ambivalent, and people who are effectively, or biologically, of mixed gender, and people with a gender-neutral identity. These people do face discrimination, and a range of assumptions and presumptions and generalisations about who they are, and how they behave. There should not be discrimination against them simply because they seem different. Difference is not a crime. This is the principle behind human rights and anti-discrimination legislation.

Those who innerly have a dissociation with identification of their gender of birth represent a diversity of experience, identification and solutions to their personal issues. As long as what they do harms no-one, there should be no discrimination directed against them.

I support the initial broad approach of the Sexuality and Gender Identity Discrimination Bill in respect of transgendered people, and call on others to recognise that all people who are subject to discrimination on the basis of simple difference need protection against such discrimination, in an Australia which is all-embracing and caring.

I demur from recommendation 8, chapter 6. Serious discrimination and disadvantage in matters relating to superannuation is well documented and was dealt with by the Senate Select Committee on Superannuation in 1995. Asking the Senate Select Committee to revisit the matter reflects unnecessary equivocation and delay. The committee's recommendation in 1995 was "that the superannuation regulations be amended so that those in bona fide domestic relationships and single people are treated in the same manner as married and de facto superannuants." It should be adopted.

Bob Brown
Australian Greens Senator for Tasmania
27 November 1997

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

| Submission No. | Name of Individuals/Organisations |
|----------------|-----------------------------------------------------------------------------------------|
| 167 | Aboriginal and Torres Strait Islander Commission, Phillip, Australian Capital Territory |
| 280 | Abram, Esther,* Coburg, Victoria |
| 146 | Acceptance Melbourne Inc., South Carlton, Victoria |
| 188 | ACT Government, Canberra, Australian Capital Territory |
| 153 | ACT Queer Ink, O'Connor, Australian Capital Territory |
| 380 | Adelaide College of Ministries Inc., Adelaide, South Australia |
| 290 | Administrative Law Section, Law Institute of Victoria, Melbourne, Victoria |
| 379 | Allan Newbold, Mr E., Woodlands, Western Australia |
| 297 | Allan, Ray,* Norlane, Victoria |
| 296 | Allan, Shirley,* Norlane, Victoria |
| 181 | Allen, David, North Adelaide, South Australia |
| 157 | Altman, Professor Dennis, Bundoora, Victoria |
| 242 | Amore, Natalie,* Reservoir, Victoria |
| 57 | Anderson, Don and Ivy, Kyabram, Victoria |
| 292 | Anderson, Peter,* Norlane, Victoria |
| 50 | Anderson, Welwood Leslie, Port Willunga, South Australia |

| Submission No. | Name of Individuals/Organisations |
|-------------------|-------------------------------------------------------------------------------------|
| 427 | Andryce, Mrs Carmel, Ingham, Queensland |
| 173 | Anti-Discrimination Board of New South Wales, Redfern, New South Wales |
| 5 | Aspen, Miss J., Karrinyup, Western Australia |
| 323 | Assemblies of God In Australia, Queensland |
| 63, 63A, 63B, 63C | Association of Catholic Parents, Brisbane, Queensland |
| 176 | Association of Superannuation Funds of Australia Limited, Sydney, New South Wales |
| 152, 152A | Attorney-General's Department, Barton, Australian Capital Territory |
| 378 | Attorney-General's Department (Victoria), Melbourne, Victoria |
| 204 | Australian Association of Christian Schools, Canberra, Australian Capital Territory |
| 158 | Australian Bisexual Network, Lutwyche, Queensland |
| 105 | Australian Catholic Bishops Conference Canberra, Australian Capital Territory |
| 289 | Australian Council for Lesbian and Gay Rights, North Perth, Western Australia |
| 161 | Australian Council of Trade Unions Melbourne, Victoria |
| 223 | Australian Council of Trade Unions, Queensland Branch, South Brisbane, Queensland |
| 134 | Australian Feminist Law Foundation Inc., Parkville, Victoria |
| 132 | Australian Gay & Lesbian Inter-Faith Federation East Melbourne, Victoria |

| Submission No. | Name of Individuals/Organisations |
|----------------|-----------------------------------------------------------------------------------|
| 174, 174A | Australian Law Reform Commission, Sydney, New South Wales |
| 142 | Australian Sports Commission, Bruce, Australian Capital Territory |
| 110 | Australian Transgender Support Association Queensland. Inc., New Farm, Queensland |
| 2, 2A | Banner, Mr R.J., Beerwah, Queensland |
| 177 | Baptist Churches of Tasmania, Launceston, Tasmania |
| 29 | Barber, Mrs Leeann, and Mr Robin Barber, Horsham, Victoria |
| 53 | Barclay, Peter, North Balwyn, Victoria |
| 269 | Barnett, Michael,* South Yarra, Victoria |
| 304 | Barrow, Paul,* Geelong, Victoria |
| 232 | Baxter, Gregory,* West Footscray, Victoria |
| 385 | Bell, Adam |
| 245 | Bell, Shirley,* Vermont, Victoria |
| 73 | Bensley, David, Koondoola, Western Australia |
| 230 | Bergani, Richard,* Sunbury, Victoria |
| 178 | Besanko, Darren, Yarraville, Victoria |
| 121 | Best, David, Croydon, Victoria |
| 394 | Blee, Michael,* Prahran, Victoria |
| 95 | Blue Mountains Community Legal Centre Inc., Katoomba, New South Wales |
| 33 | Blue Mountains Lesbian/Gay Community Liaison Committee, Katoomba, New South Wales |

| Submission No. | Name of Individuals/Organisations |
|----------------|---------------------------------------------------------------------------|
| 370 | Blyth, Valda,* Carlton, Victoria |
| 338 | Bolton, Kathryn,* Melbourne, Victoria |
| 44 | Bosansky, Mrs E.B., Joondanna, Western Australia |
| 352 | Boucher, Andrew,* North Fitzroy, Victoria |
| 250 | Breit, Emily,* Hawthorn East, Victoria |
| 37 | Bristow, Nola, Rainbow, Victoria |
| 285 | Brookes, Hon. H.G., MLC, Launceston, Tasmania |
| 117 | Brown, Dr J., Samford, Queensland |
| 212 | Brown, Gregory Paul, Yarraville, Victoria |
| 407 | Bryant, Karl,* Glen Iris, Victoria |
| 321 | Bua, Ria,* Ocean Grove, Victoria |
| 353 | Buchanan, Andrew,* South Yarra, Victoria |
| 328 | Buffet, Daniel,* Yarraville, Victoria |
| 341 | Burroughs, Pippa,* Preston, Victoria |
| 217 | Byrne, John and Beth,* Monbulk, Victoria |
| 254 | Caligiuzi, Joanne,* Windsor, Victoria |
| 366 | Caligiuri, Helen,* Prahran, Victoria |
| 103 | Calvinistic Political and Social Association, Armadale, Western Australia |
| 20 | Cameron, Stuart, Pearce, Australian Capital Territory |
| 183 | Carden, Michael, West End, Queensland |

| Submission No. | Name of Individuals/Organisations |
|----------------|-----------------------------------------------------------------------------------------------|
| 138 | Carpenter, Mrs Y., Whyalla Norrie, South Australia |
| 320 | Carroll, Jason,* Hamlyn Heights, Victoria |
| 312 | Cass, Dr Vivienne, South Perth, Western Australia |
| 120 | Catholic Womens League Australia, Curtin, Australian Capital Territory |
| 227 | Chalmers, Donald,* Coburg, Victoria |
| 98 | Chapman, Anna, Melbourne, Victoria |
| 324 | Christian Outreach Centre, Mansfield, Queensland |
| 390 | Clarke, Rob, * Keysborough, Victoria |
| 1 | Clifford, Mr D., Kelmscott, Western Australia |
| 86 | Coalition of Activist Lesbians, Waterloo, New South Wales |
| 205 | Coleman, Caitlin,* East Brunswick, Victoria |
| 255 | Coleman, Matt,* North Brighton, Victoria |
| 268 | Collier, Henry W., Warilla, New South Wales |
| 391 | Collier, Joshua,* Coburg, Victoria |
| 392 | Collier, Peter,* Maiden Gully, Victoria |
| 48 | Commissioner for Equal Opportunity, Adelaide, South Australia |
| 286 | Commonwealth Department of Health and Family Services, Canberra, Australian Capital Territory |
| 298 | Commonwealth Department of Industrial Relations, Canberra, Australian Capital Territory |

| Submission No. | Name of Individuals/Organisations |
|-------------------|---------------------------------------------------------------------------------------|
| 97, 97A, 97B, 97C | Community & Family Rights Council, Sandy Bay, Tasmania |
| 333 | Coniglio, Paulo,* Fairfield, Victoria |
| 199 | Connexion, Hampton Park, Victoria |
| 40 | Context: Crowhurst, Michael; Fischer, Debra; and Seale, Ian, West Brunswick, Victoria |
| 364 | Cook, Steven,* Prahran, Victoria |
| 346 | Copeland, Martina & Rebekah,* Elwood, Victoria |
| 148B | Council for Equal Opportunity in Employment, Melbourne, Victoria |
| 224 | Couper, Diaz, Armadale, Victoria |
| 52 | Cowling, Rachel, Clifton Hill, Victoria |
| 421 | Crema, Robert, Woree, Queensland |
| 400 | Cunnington, Susan,* Belgrave, Victoria |
| 402 | Cunnington, Theresa,* East St Kilda, Victoria |
| 401 | Cunnington, Travers,* Belgrave, Victoria |
| 257 | Curr, Nathan,* Glen Iris, Victoria |
| 368 | Daly, Lisa,* Kilmore, Victoria |
| 371 | Dand, Helen,* Brighton, Victoria |
| 24 | Darling, Linda, Haberfield, New South Wales |
| 411 | Davis, Jonathan,* Kensington, Victoria |
| 19 | Day, W B., Nedlands, Western Australia |

| Submission No. | Name of Individuals/Organisations |
|-----------------------|----------------------------------------------------------------------------------------------|
| 130 | de Lafontaine, Mrs W., Gladstone, Queensland |
| 318 | Demertzidis, Billy,* Melbourne, Victoria |
| 330 | Dempsey, Brendan,* Port Melbourne, Victoria |
| 172, 172A | Department of Defence, Canberra, Australian Capital Territory |
| 315, 315A, 315B, 315C | Department of Foreign Affairs and Trade, Canberra, Australian Capital Territory |
| 162 | Department of Immigration and Multicultural Affairs, Belconnen, Australian Capital Territory |
| 10, 10A | Department of Social Security, Canberra, Australian Capital Territory |
| 310 | Deraad, Barbara,* Leopold, Victoria |
| 77 | Dickson, Nola, Morley, Western Australia |
| 334 | Dolby, Paul,* Springvale, Victoria |
| 216 | Doolan, Kate,* Hawthorn East, Victoria |
| 163 | Duffy, Ms E.C., Coalition of Activist Lesbians (COAL) (WA) Booragoon, Western Australia |
| 426 | Duffy, Mr Tom, Ingham, Queensland |
| 13 | Dunlop, Mr J., Campbells Creek, Victoria |
| 233 | Dutton, Sylvie, Graham & Andrew,* Wantirna, Victoria |
| 32 | East, Philip, Woden, Australian Capital Territory |
| 381 | Edwardstown Baptist Church Inc., Melrose Park, South Australia |
| 82 | Elkins, Ken and Rosemary; and Nickson, Doug and Robyn, Kelso, Queensland |
| 220 | Elliott, Jody,* North Melbourne, Victoria |

| Submission No. | Name of Individuals/Organisations |
|-----------------|-----------------------------------------------------------------------------|
| 61 | Else, Ms S.C., Forestville, New South Wales |
| 66 | Endeavour Forum, Toorak, Victoria |
| 54 | Entrekin, Brendon, Bayswater, Western Australia |
| 148, 148A | Equal Opportunity Commission Victoria, Melbourne, Victoria |
| 113 | Equity Office, University Of Western Australia, Nedlands, Western Australia |
| 15 | Eyre, Eric, West Leederville, Western Australia |
| 231 | Falzon, Paul,* North Melbourne, Victoria |
| 159 | Feminists Lawyers Melbourne, Victoria |
| 14 | Fenton, Mike, Bunbury, Western Australia |
| 135 | Ferguson, R. & G., Kootingal, New South Wales |
| 343 | Fernandes, Paulo,* South Yarra, Victoria |
| 151 | Festival of Light (SA), Adelaide, South Australia |
| 171, 171A, 171B | Finlay, Dr H.A., Sandy Bay, Tasmania |
| 422 | Finlay, Mrs Jan, Condon, Queensland |
| 25 | Fitzpatrick, Rev A., Quorn, South Australia |
| 137, 137A | Focus on the Family Australia, Clayton, Victoria |
| 306 | Ford, Kerry,* Whittington, Victoria |
| 198, 198A | Frame, John, Wavell Heights, Queensland |

| Submission No. | Name of Individuals/Organisations |
|----------------|------------------------------------------------------------------------------------|
| 314 | Francis, W.J., Mirrabooka, Western Australia |
| 282 | Fringedwellers Community, Rye, Victoria |
| 26 | Gair, Mrs Faye, Armadale, Victoria |
| 235 | Gale, David,* St Kilda, Victoria |
| 356 | Galea, Joseph,* East Brighton, Victoria |
| 355 | Garner, Lisa,* South Yarra, Victoria |
| 388 | Gawler, Dr David, Essendon, Victoria |
| 23 | Gay & Lesbian Counselling Service of WA Inc, Perth, Western Australia |
| 377 | Gay & Lesbian Police Employees Network (Victoria), Thornbury, Victoria |
| 373 | Gay & Lesbian Teachers & Students Association, Inc., Darlinghurst, New South Wales |
| 241 | Gay & Lesbian Welfare Association Inc., Fortitude Valley, Queensland |
| 305 | Gay Adolescent Support Project*, Geelong, Victoria |
| 123 | Gay and Lesbian Rights Lobby Inc., Darlinghurst, New South Wales |
| 144 | Gay Men and Lesbian Against Discrimination Incorporated, East Melbourne, Victoria |
| 127 | Gender Council of Australia (WA) Inc., Perth, Western Australia |
| 313, 313A | Gethin, Stephen, Wembley Downs, Western Australia |
| 408 | Glare, Eric,* Glen Iris, Victoria |

| Submission No. | Name of Individuals/Organisations |
|----------------|----------------------------------------------------------|
| 238 | Glare, Jenny,* Essendon, Victoria |
| 182 | Goldsmith, Hon Dr M., Sydney, New South Wales |
| 84 | Goque, G., St Helens Park, New South Wales |
| 225 | Gorst, Judith,* Prahran, Victoria |
| 139 | Gration, Noelene, Carlton North, Victoria |
| 42 | Guinness, Sue, Hawthorn, Victoria |
| 164 | Gunawan, Lyn, Traralgon, Victoria |
| 267 | Hagger, Brian, Mile End, South Australia |
| 367 | Hansberry, Martyne,* Seaford, Victoria |
| 12 | Hartwig, Dr A., Carina East, Queensland |
| 431 | Hatfield, A.P. & L.A., Aitkenvale, Queensland |
| 253 | Headland, Elizabeth,* Windsor, Victoria |
| 350 | Healy, Una,* Elsternwick, Victoria |
| 344 | Hemsworth, Scott,* South Yarra, Victoria |
| 122 | Hinson, Sandy, Weston, Australian Capital Territory |
| 192 | HIV/AIDS Legal Centre Inc., Surry Hills, New South Wales |
| 189 | Hobart Women's Health Centre, North Hobart, Tasmania |
| 222 | Homodefactors Association Inc., Prahran, Victoria |
| 300 | Hose, Kathie,* Norlane, Victoria |
| 283 | Hosken, Anthony, Perth, Western Australia |

| Submission No. | Name of Individuals/Organisations |
|----------------|-----------------------------------------------------------------------------|
| 128 | Hughes, A.A., Eaglemont, Victoria |
| 396 | Hughes, Craig,* West St Kilda, Victoria |
| 412 | Hughes, Mr T.,* Preston, Victoria |
| 156, 156A | Human Rights and Equal Opportunity Commission, Sydney, New South Wales |
| 187, 187A | Human Rights and Equal Opportunity Commission, Tasmania Hobart, Tasmania |
| 303 | Humphries, David,* Leopold, Victoria |
| 126 | Hunter, Rosemary, Parkville, Victoria |
| 91 | Hutton, C.J., Kyabram, Victoria |
| 111 | Illawarra Legal Centre Inc., Warrawong, New South Wales |
| 109, 109A | Inner City Legal Centre Darlinghurst, New South Wales |
| 90 | Ivatts, F.J. & E.M., Armadale, Western Australia |
| 336 | Jackson, Angie,* South Yarra, Victoria |
| 133 | Jaeger, W., M., A. & E., Lobethal, South Australia |
| 119 | Jago, Arnold, Mildura, Victoria |
| 93 | Jamieson, Libby, Brunswick, Victoria |
| 329 | Jeau, Christian,* Yarraville, Victoria |
| 430 | Johnson, Mrs A., Ravenshoe, Queensland |
| 240 | Johnson, Peter,* Thornbury, Victoria |
| 397 | Jones, Craig,* Hughesdale, Victoria |

| Submission No. | Name of Individuals/Organisations |
|----------------|-----------------------------------------------------------------------------------------------------------|
| 331 | Jones, Jean,* Yarraville, Victoria |
| 47 | Jones, Mr. M., Highgate, Western Australia |
| 165 | Jones MLC, The Hon Richard, Sydney, New South Wales |
| 190 | Kay, Mr & Mrs J., Werribee, Victoria |
| 102 | Keamy, Ron, Beechworth, Victoria |
| 361 | Kelly, Joanne,* Seaford, Victoria |
| 62 | Kelsey, Richard, Stevens, Peter and Way, John, Oak Park, Victoria |
| 201 | Kendall, Christopher, Perth, Western Australia |
| 108 | Kennedy, Robert, Winnellie, Northern Territory |
| 359 | Kietonga, Andrew,* Endeavour Hills, Victoria |
| 114 | Kingsford Legal Centre, Kingsford, New South Wales |
| 149 | Kiper, Debbie, East St Kilda, Victoria |
| 256 | Kirby, James, and Holland, Jason,* Northcote, Victoria |
| 327 | Knipe, Jason,* Prahan, Victoria |
| 347 | Kontogiannis, Jim,* Malvern, Victoria |
| 247 | Kyvernitakis, Thalia,* Carnegie, Victoria |
| 249 | Lajoie, Ivan,* Noble Park North, Victoria |
| 101 | Law Institute of Victoria, Melbourne, Victoria |
| 424 | Law Institute of Victoria, Maintenance and Property Committee, Family Law Section, Melbourne, Victoria |

| Submission No. | Name of Individuals/Organisations |
|----------------|--------------------------------------------------------------------------------|
| 129 | Law Reform Commission of Nova Scotia, Halifax, Nova Scotia |
| 375 | Laybutt, Jasper, Petersham, New South Wales |
| 166 | Leach, Renee, Trigg, Western Australia |
| 294 | Lean, Angelique,* Corio, Victoria |
| 81, 81A | Lennon, Jim, Gay and Lesbian Lawyers (GALL), Subiaco, Western Australia |
| 186 | Lesbian and Gay Anti-Violence Project, Darlinghurst, New South Wales |
| 195 | Lesbian and Gay Community Action, Adelaide, South Australia |
| 34 | Levi, Roger, Sydney University Nursing Society, Camperdown, New South Wales |
| 209 | Lewis, Mal,* Camberwell, Victoria |
| 234 | Lim, Maureen,* Chelsea, Victoria |
| 335 | Lobel, Ron,* South Yarra, Victoria |
| 317 | Logan Uniting Church, Springwood, Queensland |
| 337 | Love, Marianne,* Deer Park, Victoria |
| 64 | Lovett, Kendall, Maryville, New South Wales |
| 258 | Lynch, Ben,* Mt Waverley, Victoria |
| 237 | Mackay, M.,* Preston, Victoria |
| 185, 185A | Mahamati and Miller, Kenton, Adelaide, South Australia |
| 60 | Mahoney, Max, Warwick, Western Australia |

| Submission No. | Name of Individuals/Organisations |
|----------------|--------------------------------------------------|
| 131 | Mahony, Sue, Kensington, New South Wales |
| 74 | Major, Elizabeth, Kyabram, Victoria |
| 264 | Mangan, Nicola,* Thornbury, Victoria |
| 410 | Marinkovic, Branko,* Geelong, Victoria |
| 399 | Matera, Michael,* Lower Templestowe, Victoria |
| 272 | Matthews, Rebecca,* South Yarra, Victoria |
| 184 | May-Welby, Norrie, Darlinghurst, New South Wales |
| 295 | McClaren, Helen,* Norlane, Victoria |
| 405 | McCracken, Bridgee, Thornbury, Victoria |
| 404 | McCracken, Peter,* Thornbury, Victoria |
| 252 | McDonald, David,* Balwyn North, Victoria |
| 239 | McDonough, V.,* Northcote, Victoria |
| 433 | McDowell, Mr & Mrs P., Ravenshoe, Queensland |
| 92 | McElroy, Brian, Salisbury Downs, South Australia |
| 251 | McGrath, T.,* Mt Waverley, Victoria |
| 307 | McKay, Sue,* Newtown, Victoria |
| 210 | McKenna, Michael,* Heidelberg West, Victoria |
| 406 | McMahon, Daniel,* Coburg, Victoria |
| 75 | McPherson, James, Lesmurdie, Western Australia |
| 79 | Mellings, Janice, Donald, Victoria |

| Submission No. | Name of Individuals/Organisations |
|----------------|-----------------------------------------------------------------------------------------------------|
| 200 | Metropolitan Community Church Brisbane Inc., Fortitude Valley, Queensland |
| 88 | Meyer, Damian, Inglewood, Western Australia |
| 22 | Millbank, Jenni, Sydney, New South Wales |
| 8 | Minchio, Mrs D., Wyndhamvale, Victoria |
| 118 | Mirowski, Mrs L., Bolhannah, South Australia |
| 71 | Mitten, Gail, Dimboola, Victoria |
| 107 | Modra, Anne-Marie, Nunawading, Victoria |
| 28 | More, David, Innisfail, Queensland |
| 219 | Morgan, Stacey,* Williamstown, Victoria |
| 141 | Morgan, Wayne, Parkville, Victoria |
| 194 | Mountbatten, J., Adelaide, South Australia |
| 39, 39A | Muller, Roger, Surry Hills, New South Wales |
| 417 | Mullins, T.J., Silkwood, Queensland |
| 374 | Murphy, Michael, Chatswood, New South Wales |
| 67 | Murray, Carl, Scarborough, Western Australia |
| 206 | National Council of Independent Schools' Associations, Deakin West, Australian Capital Territory |
| 413 | Neill, Scott,* Ascot Vale, Victoria |
| 246 | Nolan, D.S.,* Prahran, Victoria |
| 145 | Northern Territory Government, Darwin, Northern Territory |

| Submission No. | Name of Individuals/Organisations |
|----------------|--------------------------------------------------------------------------------------------------|
| 342 | Noutsos, Dean,* Brunswick, Victoria |
| 147 | New South Wales Council for Civil Liberties Inc., Sydney, New South Wales |
| 150 | New South Wales Working Women's Centre, Wollongong, New South Wales |
| 244 | O'Leary, Eileen,* Noble Park, Victoria |
| 403 | Om-Nama-Veda, Guru Jai,* East Doncaster, Victoria |
| 226 | O'Shea, Barbara,* Carlton, Victoria |
| 94 | Palser, Samantha, Boronia, Victoria |
| 179 | Parents - Flag Victoria Inc., Endeavour Hills, Victoria |
| 191, 191A | Parents and Friends' Federation of Western Australia, Wembley, Western Australia |
| 389 | Parents and Friends of Lesbians and Gays - Perth Incorporated, Northbridge, Western Australia |
| 266 | Parents, Families and Friends of Lesbians and Gays, Washington DC, USA |
| 308 | Parker, Denis,* Leopold, Victoria |
| 259 | Paxton, Susan,* North Fitzroy, Victoria |
| 270 | Peck, James, Elwood, Victoria |
| 340 | Perry, Tania,* Elsternwick, Victoria |
| 276 | Peters, Josh,* Essendon, Victoria |
| 3 | Peters, Julie, and Langley, Jane, Fitzroy, Victoria |

| Submission No. | Name of Individuals/Organisations |
|----------------|----------------------------------------------------------------------------|
| 358 | Phipps, Paul,* Endeavour Hills, Victoria |
| 16 | Pilgrim, Kelly, Southern River, Western Australia |
| 369 | Pinder, Judy,* East Burwood, Victoria |
| 7 | Popping, Mr F., Belmont, Victoria |
| 277 | Pritchard, Matthew,* St Kilda, Victoria |
| 229 | Probert, Wendy,* South Melbourne, Victoria |
| 382 | Prospect Baptist Church, Prospect, South Australia |
| 319 | Psimaris, Peter,* Bell Post Hill, Victoria |
| 196 | Purvis, Joan Isabel,* Camberwell, Victoria |
| 106 | Quaker, J. & H.M., Kelso, Queensland |
| 291 | Queensland Aids Council, South Brisbane, Queensland |
| 46, 46A | Queensland Anti-Discrimination Commission, West End, Queensland |
| 202 | Queensland Association for Gay and Lesbian Rights, Moorooka, Queensland |
| 281 | Queer Sexuality Collective, St Lucia, Queensland |
| 211 | Rainbow Male Survivors Network, Richmond South, Victoria |
| 299 | Rea, Epati,* Norlane, Victoria |
| 419 | Recklies, Mr & Mrs S., El Arish, Queensland |
| 365 | Redmond, Bradley,* Prahran, Victoria |
| 143, 143A | Reece, Dr A.S., Highgate Hill, Queensland |

| Submission No. | Name of Individuals/Organisations |
|----------------|--------------------------------------------------------------------|
| 386 | Rees, Mrs M., Wallan, Victoria |
| 215 | Registrar General's Office, Perth, Western Australia |
| 221 | Registrar-General's Office, Canberra, Australian Capital Territory |
| 423 | Registrar-General's Office, Darwin, Northern Territory |
| 243 | Rice, Daniel,* Collingwood, Victoria |
| 302 | Richards, Matthew,* St Leonards, Victoria |
| 332 | Riddle, Lana,* Carnegie, Victoria |
| 136 | Riley, Mark, St Kilda, Victoria |
| 363 | Ritchie, Michael,* West Heidelberg, Victoria |
| 262 | Roberts, Steven,* Prahran, Victoria |
| 409 | Robinson, Annette,* Pascoe Vale South, Victoria |
| 414 | Robinson, James,* Pascoe Vale South, Victoria |
| 59 | Rogers, Michelle, Broadview, South Australia |
| 55 | Ronalds, Chris, Sydney, New South Wales |
| 325 | Rosevear, Dr. W.J., Highgate Hill, Queensland |
| 21, 21A | Ryan, Dr Neil, Blackburn, Victoria |
| 248 | Ryan, Ruby,* Hawthorn East, Victoria |
| 41 | Salkin, Victoriaki, Lyneham, Australian Capital Territory |
| 140, 140A | Salt Shakers Inc., Forest Hill, Victoria |
| 228 | Sawyers, Eldon,* Port Melbourne, Victoria |

| Submission No. | Name of Individuals/Organisations |
|----------------|-----------------------------------------------------|
| 208 | Schwind, Norman,* Northbridge, Western Australia |
| 213 | Scott, Ms Jennifer, Kent Town, South Australia |
| 326 | Scott, Robyn,* Endeavour Hills, Victoria |
| 372 | Seaborn, Linda, South Hobart, Tasmania |
| 18 | Seach, Mrs W J., Kangaroo Flat, Victoria |
| 58 | Seah, Dr Michael, Mount Hawthorn, Western Australia |
| 68 | Seaton, Mrs B., Mt. Martha, Victoria |
| 309 | Shaw, Tracey,* Corio, Victoria |
| 416 | Sheridan, Mr Paul, Maylands, Western Australia |
| 345 | Sheringham, Peter,* Caulfield, Victoria |
| 398 | Shortis, Brendan,* Elwood, Victoria |
| 354 | Silver, Gabriel,* Blackburn, Victoria |
| 387 | Simmons, Neil, Tarragindi, Queensland |
| 38 | Smeaton, John, Sorrento, Victoria |
| 65 | Smeaton, Mrs J., Endeavour Hill, Victoria |
| 271 | Smith, Wendy,* Borwood, Victoria |
| 35 | Songailo, Peter, Nuriootpa, South Australia |
| 420 | Sordelli, Paul, Silkwood, Queensland |
| 395 | Spencer, Ricky,* Prahran, Victoria |
| 357 | Spinks, Melinda,* Endeavour Hills, Victoria |

| Submission No. | Name of Individuals/Organisations |
|----------------|---------------------------------------------------------------------------------|
| 6 | Stanfield, Stan, Palm Beach, New South Wales |
| 349 | Stellini, Leah,* East St Kilda, Victoria |
| 124 | Streetwise Comics Ltd., Leichhardt, New South Wales |
| 9 | Suiter, Wendy, Northcote, Victoria |
| 11 | Summers, Mr N., Clayton, Victoria |
| 207 | Sumner, Ronald W. and Erica A.,* Ringwood, Victoria |
| 180 | Sunshine Christian Community Services, Sunshine, Queensland |
| 104 | Sutherland, Frances, Kaleen, Australian Capital Territory |
| 263 | Swinburne Student Union, Lilydale, Victoria |
| 99 | Tahmindjis, Associate Professor P., Brisbane, Queensland |
| 168 | Tasmanian Gay & Lesbian Rights Group, Hobart, Tasmania |
| 214 | Taylor, Yvonne & Robert,* Mentone, Victoria |
| 45 | Team Sydney Inc., Darlinghurst, New South Wales |
| 72 | Tebble, Robert and Iris, Redland Bay, Queensland |
| 154 | Thansen, Megan, West Perth, Western Australia |
| 418 | The Australian Family Association (Townsville), Townsville, Queensland |
| 49, 49A | The Australian Family Association (WA Division), South Perth, Western Australia |
| 100, 100A | The Australian Festival of Light (WA Branch), Claremont, Western Australia |

| Submission No. | Name of Individuals/Organisations |
|----------------|--------------------------------------------------------------------------------------------------------------------|
| 316 | The Law Society of New South Wales, Sydney, New South Wales |
| 284 | The Religious Society of Friends (Quakers) in Australia Inc., North Hobart, Tasmania |
| 384 | The Returned & Services League of Australia Limited, Canberra, Australian Capital Territory |
| 125 | The Social Responsibilities Commission of The Anglican Province of Western Australia West Perth, Western Australia |
| 31 | Thomas, Bruce, Kyabram, Victoria |
| 287 | Thomas, Rob,* Nunawading, Victoria |
| 30 | Thomas, Wendy, Kyabram, Victoria |
| 115 | Thompson, Ms A., & Connor, Ms S., Ipswich, Queensland |
| 301 | Thorrington, Terrance,* Norlane, Victoria |
| 432 | Toomey, Mrs Theresa, Currajong, Queensland |
| 274 | Torney, Matthew,* North Carlton, Victoria |
| 339 | Trand, Helen,* East Kew, Victoria |
| 288 | Tulk, Brent,* Nunawading, Victoria |
| 155, 155A | Uniting Church in Australia, Sydney South, New South Wales |
| 360 | Vicious Fish Cafe,* Prahran, Victoria |
| 376 | Victorian Council for Civil Liberties, Melbourne, Victoria |
| 260 | Victorian Gay Pride,* Hawksburn, Victoria |
| 51 | Vidler, Olga, Fingal Head, New South Wales |

| Submission No. | Name of Individuals/Organisations |
|----------------|---------------------------------------------------------------|
| 70 | Vinson, Mrs A., East Reservoir, Victoria |
| 429 | Waddell, Ms Caroline, Ravenshoe, Queensland |
| 116, 116A | Walker, Ms. Kristen, Parkville, Victoria |
| 311 | Walker, Natalie,* Geelong, Victoria |
| 218 | Wall, David,* Port Melbourne, Victoria |
| 425 | Wall, Patrick, Margaret and James, Railway Estate, Queensland |
| 279 | Ward, Ken,* Erskineville, New South Wales |
| 393 | Warwick, Lyle,* Prahran, Victoria |
| 80 | Watson, David, Eumemmerring, Victoria |
| 348 | Webb, John,* St Kilda, Victoria |
| 322, 322A | Wesleyan Methodist Church, Everton Hills, Queensland |
| 351 | Wickham, Brendan,* Prahran, Victoria |
| 415 | Wieringa, Margaret,* London, England |
| 96 | Williams, Adele, Douglas, Queensland |
| 428 | Williams, Clare, Ravenshoe, Queensland |
| 278 | Williams, Margarita,* Prahran, Victoria |
| 434 | Williams, Dr Mark, Cannonvale, Queensland |
| 17 | Wilson, Betty, Pinnaroo, South Australia |
| 265 | Wilson, Fiona,* Richmond, Victoria |
| 383A | Winsor, Adam,* Pascoe Vale South, Victoria |

| Submission No. | Name of Individuals/Organisations |
|----------------|------------------------------------------------------------------------------------------------------|
| 170 | Women's International League for Peace and Freedom (Australian Section) Adelaide, South Australia |
| 203 | Women's Legal Service (Tas), Hobart, Tasmania |
| 69, 69A | Women in Sport Foundation, Kingsford, New South Wales |
| 160 | Womensport and Recreation New South Wales Inc, Castlecrag, New South Wales |
| 175 | Womensport Australia, O'Connor, Australian Capital Territory |
| 87 | Wood, Robert, Horsham, Victoria |
| 261 | Woods, Mark,* Balaclava, Victoria |
| 362 | Woolley, John,* East St. Kilda, Victoria |
| 236 | Wright, Wayne,* Windsor, Victoria |
| 293 | Wyatt, Marina,* Corio, Victoria |
| 275 | Yeung, Mayyee,* Canterbury, Victoria |
| 78 | Yoeman, Dane, Byron Bay, New South Wales |
| 273 | Young, Imogen,* South Yarra, Victoria |

*** Form Submissions**

Confidential Submissions

Nos. 4, 27, 36, 43, 56, 76, 83, 85, 89, 112, 169, 193, 197, 383, 435, 436

**WITNESSES WHO APPEARED BEFORE THE COMMITTEE
AND DATE OF TRANSCRIPT OF EVIDENCE**

**6 August 1996
Canberra**

Council for Equal Opportunity in Employment
Ms Rohan Squirchuk, Executive Director

Attorney-General's Department
Mr Henry Burmester, Chief General Counsel
Mr William Campbell
Ms J Sheedy, Senior Government Counsel, Human Rights Branch

Department of Immigration and Multicultural Affairs
Ms M Carseldine, Family Residence Section
Mr G Fleming, Director, Citizenship Policy Section
Mr P Vardos, Assistant Secretary, Protection and
Family Residence Branch

Australian Sports Commission
Miss Andrea Coss, Women and Sport Unit
Ms D Simms, Manager, Women and Sport Unit

Department of Social Security
Mr A Denholm
Mr M Sassella, First Assistant Secretary, Legal Services Division

Office of International Law
Ms A Devereux, Counsel

Ms Sandy Hinson, private citizen

Australian Law Reform Commission
Mr A Rose, President
Dr David Kinley

Department of Defence
Mr C Neumann, Acting First Assistant Secretary,
Human Resources and Management

Australian Defence Force
Commodore RAN J O'Hara, Director General
Personnel Policy and Plans

Womensport Australia

Ms H Reid, Executive Officer

Uniting Church in Australia

Reverend R Stringer, Secretary for Social Justice

7 August 1996
Sydney**Association of Superannuation Funds of Australia**

Dr M Anderson, Policy and Research

Anti-Discrimination Board of NSW

Mr C Puplick, President

Ms C Brown, Acting Legal Officer

Ms N Hennessy, Legal and Policy Branch

AIDS Council of New South Wales

Mr N Carrington

Gay and Lesbian Rights Lobby

Ms S Clayton, Co-Convenor

Women in Sport Foundation

Mrs Katherine de Bry, President

Mrs J Jones

2010 Lesbian and Gay Youth Services

Ms J Wade, Secretary and Public Officer

Ms J Golding

NSW Council for Civil Liberties

Mr K O'Rourke, Vice-President

Ms L Goodsell, Committee Member

Lesbian and Gay Anti-Violence Project

Mr B Grant, Coordinator

Ms J Millbank, private citizen**Ms C Ronalds, private citizen****Australian Human Rights and Equal**

Mr C Sidoti, Commissioner

Metropolitan Community Church

Reverend G Smith, Pastor and Australian Coordinator

Mr S Spindler, private citizen8 August 1996
Melbourne**Ms A Chapman, private citizen****Australian Council of Trade Unions**

Ms L Connor

Gay Men and Lesbians Against Discrimination

Mr D Cooper

Mr J Davey

Mr A Shaw

Equal Opportunity Commission Victoria

Mr M Gorton, Commissioner

Ms Debbie Kiper

Mr T Keenan, private citizen**Mr R Kelsey, private citizen****Gender Dysphoria Clinic, Monash Medical Centre**

Dr T Kennedy

Transgender Law Reform Association

Ms Jane Langley

Ms J Peters

**North Melbourne Legal Service and
Federation of Community Legal Centres**

Ms Kate Lawrence

Mr W Morgan, private citizen**Focus on the Family Australia**

Mr B Muehlenberg, National Research Coordinator

The ALSO Foundation

Mr D Ray

Ms C Ryan, private citizen**Mr S Spindler, private citizen****Mr P Stevens, private citizen**

Salt Shakers

Mr P Stokes

Ms K Walker, private citizen**Mr J Way, private citizen**9 August 1996
Hobart**Human Rights and Equal Opportunity Commission**

Mr R Henderson

Baptist Churches of Tasmania

Reverend H Pell, Superintendent

Mr G Barnett

Tasmanian Gay and Lesbian Rights Group

Mr R Croome, Campaign Coordinator

Mr J Rostant, Community Education Coordinator

Ms L Savell

Dr Henry Finlay, private citizen**The Community and Family Rights Council**

Mr R Gibbs, Secretary

16 August 1996
Adelaide**Equal Opportunity Commission**

Ms Linda Matthews, Commissioner

Mr M Ahern, Assistant Commissioner

Lesbian and Gay Community Action

Ms B Baird

Mr J Robertson

Festival of Light (SA)

Mr David d'Lima

Mrs R Phillips

Dr D Phillips

The Chameleons

Ms M D'Orsay-Lawrence

Ms E Gauntlett, private citizen**Temple Christian College**

Mr B Hagger, Headmaster

SA Branch of Women's International League for Peace and Freedom (Australian Section)

Ms M Heath

Miss J Thomson

AIDS Council of South Australia

Ms Mahamah

Mr K Miller, Gay Men's Health

Ms M Rogers, private citizen**Gay and Lesbian Counselling Service of SA Inc.**

Ms J Scott

23 September 1996
Perth**Australian Family Association**

Mr J Barich, President

Mr R Egan, Executive Member

Dr V Cass, private citizen**Gay and Lesbian Counselling Service of Western Australia Inc.**

Dr K Franklin, Assistant Director

Ms J Froome, Director and Chair of Board

Mr S Gethin, private citizen**Australian Council for Lesbian and Gay Rights (WA)**

Mr B Greig

Anglican Social Responsibilities Commission

Canon G Harvey

Mr A Hosken, private citizen**Mr C Kendall, private citizen****Equal Opportunity Commission**

Ms J Williams, Commissioner

24 September 1996
Perth

Calvinistic Political and Social Association

Mr P Dekker
Mr F Den Boer, Secretary
Mr H Pitlo

Parents and Friends of Lesbians and Gays

Ms L Garmony
Mrs M Pugh
Mr J Pugh
Mrs N Schwind, Secretary
Miss A Shepherd
Mrs J Smythe

1 October 1996
Brisbane

Wesleyan Methodist Church of Australia in Queensland

Reverend Peter Breen

Queensland Anti-Discrimination Commission

Mr John Briton
Ms Margo Couldrey

Queensland Association of Gay and Lesbian Rights

Mr Michael Carden
Ms Merran Lawler
Mr Adrian Lovney
Ms Shayne Wilde

Christian Outreach Centre

Mr Peter Earle
Pastor Brian Mulheran

Association of Catholic Parents

Mr Peter Howard
Mr Michael O'Dowd

Australian Transgender Support Association Inc.

Ms Kristine Johnson
Ms Gina Mather

Queensland AIDS Council

Mr Adrian Lovney

Dr Albert Reece, private citizen

Australian Bisexual Network

Mr Wayne Roberts

Gay and Lesbian Health Service

Dr Wendall Rosevear

Mr Alec Spencer, private citizen

22 October 1996
Canberra

Department of Foreign Affairs & Trade

Mr Robert Browne, Australian Passport Service
Mr Robert Hamilton, Consular & Passports Branch
Mr Graeme Middleweek, Passport Operations

Australian Association of Christian Schools

Mr Peter Crimmins

Victorian Council for Civil Liberties

Mr Joseph O'Reilly

Health Insurance Commission

Mr Geoffrey Gillett, Medicare Eligibility

Department of Health and Family Services

Mr Ian McNeil, Health Benefits Division

**INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND
CULTURAL RIGHTS**

Adopted by General Assembly res 2200 A (XXI) of 16 December 1966. Entry into force 3 January 1976 in accordance with article 17.

PREAMBLE

THE STATES PARTIES TO THE PRESENT COVENANT

CONSIDERING that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

RECOGNIZING that these rights derive from the inherent dignity of the human person,

RECOGNIZING that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

CONSIDERING the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

REALIZING that the individual, having duties to other individuals and the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

AGREE upon the following articles:

PART I

Article 1

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

(3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

(1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including in particular the adoption of legislative measures.

(2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

(1) Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

(2) No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be

admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

(2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safe-guarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

- (1) The States Parties to the present Covenant undertake to ensure:
 - (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are

necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

(2) This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

(3) Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

(1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

(2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

(3) Special measures of protection and assistance should be taken on behalf of all children and young persons without discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

(1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

(2) The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure the equitable distribution of world food supplies in relation to need.

Article 12

(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

(1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively

in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

(2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

(3) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

(4) No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

- (1) The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and diffusion of science and culture.
- (3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
- (4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

- (1) The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.
- (2) (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant.
- (b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

- (1) The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.
- (2) Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Covenant.

(3) Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under Article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Convention shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

(1) The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

(2) The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

(3) The present Covenant shall be open to accession by any State referred to in Paragraph 1 of this article.

(4) Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

(5) The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or instrument of accession.

Article 27

(1) The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

(2) For each State ratifying the present Covenant or acceding to it after the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into

force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

(1) Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendment to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

(2) Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

(3) When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under Article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under Article 26;
- (b) The date of the entry into force of the present Covenant under article 27 and the date of entry into force of any amendments under article 29.

Article 31

(1) The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

(2) The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Adopted & opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 Dec 1966. Entry into force 23 March 1976 in accordance with article 49.

PREAMBLE

THE STATES PARTIES TO THE PRESENT COVENANT,

CONSIDERING that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

RECOGNIZING that these rights derive from the inherent dignity of the human person,

RECOGNIZING that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

CONSIDERING the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

REALIZING that the individual, having duties to other individuals and the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

AGREE upon the following articles:

PART I

Article 1

(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

(3) The States Parties to the present Covenant, including those having responsibility of the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status.

(2) Where not already provided for by existing legislative or other measures, each State Party to the Present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

(3) Each State Party to the Present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation may have been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the Present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

(2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

(3) Any State Party to the Present Covenant availing itself to the right of derogation shall immediately inform the other States Parties to the Present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated

and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

(1) Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

(2) There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the Present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(2) In countries which have not abolished the death penalty, sentence of death may only be imposed for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

(3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the Present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

(4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death shall be granted in all cases.

(5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

(6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the Present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

- (1) No one shall be held in slavery; slavery and slave-trade in all their forms shall be prohibited.
- (2) No one shall be held in servitude.
- (3) (a) No one shall be required to perform forced or compulsory labour;
 - (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
 - (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
 - (i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
 - (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
 - (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
 - (iv) Any work or service which forms part of normal civil obligations.

Article 9

- (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
- (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

- (1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
 - (2) (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
 - (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible to adjudication.
 - (3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the grounds of inability to fulfill a contractual obligation.

Article 12

- (1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- (2) Everyone shall be free to leave any country, including his own.
- (3) The above-mentioned rights shall not be subject to any restriction except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
- (4) No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the Present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit reasons against this expulsion and to have his case reviewed by, and be represented for the purpose

before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

(1) All persons shall be equal before courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and public may be excluded from all or part of the trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

(2) Everyone charged with a criminal offense shall have the right to be presumed innocent until proven guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defense and to communicate with a counsel of his own choosing;
- (c) To be tried without undue delay;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

(4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

(6) When a person has by final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice,

the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact is wholly or partially attributable to him.

(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

Article 18

(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

(2) No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.

(3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(4) The States Parties to the Present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be only as are provided by law and are necessary:
 - (a) For respect of the rights of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

- (1) Any propaganda for war shall be prohibited by law.
- (2) The advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

- (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
- (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this rights.
- (3) Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the

Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

- (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
- (2) The right of men and women of marriageable age to marry and to found a family shall be recognized.
- (3) No marriage shall be entered into without the free and full consent of the intending spouses.
- (4) States Parties to the Present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of the children.

Article 24

- (1) Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures or protection as are required by his status as a minor, on the part of his family, society and the state.
- (2) Every child shall be registered immediately after birth and shall have a name.
- (3) Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country. Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

(1) There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

(2) The Committee shall be composed of nationals of the States Parties to the Present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

(3) The members of the Committee shall be elected and serve in their personal capacity.

Article 29

(1) The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the Present Covenant.

(2) Each State Party to the Present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

(3) A person shall be eligible for renomination.

Article 30

(1) The initial election shall be held no later than six months after the date of entry into force of the present Covenant.

(2) At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the Present Covenant to submit their nominations for membership of the Committee within three months.

(3) The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the Present Covenant no later than one month before the date of each election.

(4) Elections of the members of the Committee shall be held at a meeting of the States Parties to the Present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the Present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

(1) The Committee may not include more than one national of the same State.

(2) In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilizations and of the principal legal systems.

Article 32

(1) The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

(2) Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

(1) If, in the unanimous opinion of the other members of the Committee, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall declare the seat of that member to be vacant.

(2) In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

(1) When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the Present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

(2) The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the Present Covenant.

The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

(3) A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the members who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibility.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

(1) The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

(2) After its initial meeting, the Committee shall meet at such times as shall be provided by its rules of procedure.

(3) The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

(1) The Committee shall elect its officers for a term of two years. They may be re-elected.

(2) The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

(1) The States Parties to the Present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

(2) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

(3) The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

(4) The Committee shall study the reports submitted by the States Parties to the Present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

(5) The States Parties to the Present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

(1) A State Party to the Present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the Present Covenant considers that another State Party is not giving effect to the provisions of the present covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.

- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State.
 - (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
 - (d) The Committee shall hold closed meetings when examining communications under this article.
 - (e) Subject to the provisions of sub-paragraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution to the matter on the basis of respect for human rights and fundamental freedoms as recognized under this article.
 - (f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in sub-paragraph (b), to supply any relevant information.
 - (g) The States Parties concerned, referred to in sub-paragraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing.
 - (h) The Committee shall, within twelve months after the date of receipt of the notice under sub-paragraph (b), submit a report:
 - (i) If a solution within the terms of sub-paragraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and the solution reached;
 - (ii) If a solution within the terms of sub-paragraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submission and record of the oral submission made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.
- (2) The provisions of this article shall come into force when ten States Parties to the Present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under the article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 42

- (1) (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;
 - (b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.
- (2) The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State party to the present Covenant, or of a State Party which has not made a declaration under article 41.
- (3) The Commission shall elect its own Chairman and adopt its own rules of procedure.
- (4) The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.
- (5) The secretariat provided in accordance with article 36 shall also service the Commission appointed under this article.
- (6) The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.
- (7) When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:
 - (a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;
 - (b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of sub-paragraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submission made by the States Parties concerned;

(d) If the Commission's report is submitted under sub-paragraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

(8) The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

(9) The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

(10) The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and conventions of the United Nations and the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report of its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

(1) The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

(2) The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary General of the United Nations.

(3) The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

(4) Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

(5) The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

(1) The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

(2) For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The Provisions of the present Covenant shall extend to all parts of federal States without any limitation or exceptions.

Article 51

(1) Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of all States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendments adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

(2) Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

(3) When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and earlier amendments which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 48;
- (b) The date of the entry into force of the present Covenant under article 49 and the date of entry into force of any amendments under article 51.

Article 53

(1) The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

(2) The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.