> 7B(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging the other person as mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.
>
> (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
>
> (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
>
> (b) the feasibility of overcoming or mitigating the disadvantage; and
>
> (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

1.57 The present reasonableness test requires essentially a balancing of interests. Clear guidelines on the meaning of reasonableness were produced in the Full Federal Court's decision in *Styles v Secretary, Department of Foreign Affairs and Trade.*[50] At first instance, Mr Justice Wilcox articulated a reasonableness test:

> [T]he proper course...is to ascertain the reason underlying a respondent's insistence upon the relevant requirement or condition...and to ask whether, having regard to...discriminatory effects...[it is] objectively justified.[51]

This test was subsequently endorsed on appeal.

1.58 Under the existing system, the burden is on the complainant to establish that the respondent's act or practice was 'unreasonable', because it is part of the necessity of establishing that discrimination occurred. The Bill will reverse this situation, by placing the onus on the respondent to show that his or her act or practice was reasonable, by inserting a new section 7C into the Act.

1.59 The proposed section 7C reads:

> In a proceeding under this Act, the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act.

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50 (1989) 23 FCR 251.

51 *Styles v Secretary, Department of Foreign Affairs and Trade* (1988) 84 ALR 408 at 429.

1.60 The Explanatory Memorandum to the Bill explains the reason for the change as follows:

> It is recognised that requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination. It is a particularly onerous burden on the complainant who does not usually have access to the information needed to prove that actions allegedly amounting to indirect discrimination are unreasonable in the circumstances. By contrast, the respondent is likely to have access to the information needed to prove that such action is reasonable in the circumstances. Thus the respondent is better able to bear this burden of proof. For this reason reasonableness is provided as a defence to the respondent who must prove the elements of the defence in order to rely on it rather than as an element of the test for indirect discrimination to be proved by the complainant.[52]

Criticism of the reversal of the onus of proof

1.61 The main criticism of the reversal of the onus of proof is that it runs counter to established principles for the administration of justice,[53] might encourage frivolous complaints and imposes unreasonable burdens on business.

1.62 Ms Rohan Squirchuk, Executive Director of the Council for Equal Opportunity in Employment expressed 'grave concerns regarding the proposed changes to indirect discrimination and onus of proof'. Her primary concern:

> is the issue of the employer needing to bear the onus of proof in respect of demonstrating that the procedures or the rule that is imposed is reasonable or it is the least discriminatory option.[54]

1.63 Ms Squirchuk considered that if the amendments are passed:

> it would be useful for employers to have some detail provided as to the kinds of factors that will be considered in determining whether or not a particular action is reasonable in respect of that particular employer.[55]

1.64 Mr Hamilton, of the Australian Chamber of Commerce and Industry, was strongly critical of the drafting of clause 7C, in his evidence before the

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52 Explanatory Memorandum, at para 35.

53 Mr Scott Carter, Queensland Law Society, *Submission* No. 2 at p. 1.

54 Ms Rohan Squirchuk, Executive Director, Council for Equal Opportunity in Employment, *Submission* No. 11; *Hansard*, SLCLC, 14 August 1995 at p.103.

55 *Hansard*, SLCLC, 14 August 1995 at p. 103 per Ms Rohan Squirchuk.

Committee. He considered that it represented a reversal of the onus of proof and an unfair burden on business:

> What you are doing is taking that element and saying that it is not the applicant who has to prove it, it is the defendant that has to disprove it. If that is not a change in the onus of proof on that particular element, I am not sure what is. In the way things operate it is a change in the onus of proof.[56]

1.65 Mr Hamilton suggested that the onus of proof should be 'split':

> [A] sensible compromise would be to delete the proposed clause 7C and replace it with the following:
>
> The person who does the act shall bear the burden of proving that an act (sic) does not constitute discrimination because of section 7B. This burden shall arise where the complainant demonstrates a prima facie case that the condition referred to in section 7B is not reasonable under the circumstances.[57]

1.66 There was some debate at the public hearing as to whether the onus of proof is already split, because the complainant must make out a prima facie case of discrimination.[58] Subsection 52(2) provides that the Commissioner may accept a complaint for consideration if it is not frivolous or vexatious and is not 'lacking in substance'. This was interpreted by representatives of the Attorney-General's Department as amounting to a requirement to establish a 'prima facie case'.[59] When Senator Ellison asked why the Act could not be amended to spell out that the onus is on the complainant to establish a prima facie case, in order to satisfy the Australian Chamber of Commerce and Industry, the Department responded that if the establishment of a prima facie case included the necessity to establish unreasonableness, it would have the same effect as the current provisions.[60] The Department concluded that this places too heavy an onus on complainants when the relevant facts about business efficiency and costs will normally be readily available to the respondent, but not to the complainant.[61]

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56 *Hansard*, SLCLC, 14 August 1995 at p. 114 per Mr Hamilton.

57 Mr Reg Hamilton, Australian Chamber of Commerce and Industry, *Submission* No. 3 at p.7.

58 *Hansard*, SLCLC, 14 August 1995, per Mr Colin Neave at p 80; and per Ms Sheedy and Ms McLean at p. 81.

59 *Hansard*, SLCLC, 14 August 1995, p. 82 per Mr Neave.

60 *Hansard*, SLCLC, 14 August 1995, p. 83 per Ms Rosenthal and Ms Sheedy.

61 *Hansard*, SLCLC, 14 August 1995, p. 83, per Ms Sheedy.

1.67 Committee members noted that in other civil cases, where life and limb are involved in negligence claims against companies, the company will have greater access to information to prove or disprove its negligence, but the burden is still on the bereaved spouse or injured worker to prove negligence.[62]

Support for the reasonableness defence

1.68 Several witnesses supported the proposed amendment. Mr John Basten QC was in favour of the amendment stating in his submission:

> In practical terms most of the relevant information is within the knowledge of the respondent. This can be tested by considering the considerations helpfully set out in s7B(2). Indeed, wherever the burden is said to lie in law, the practical consequences are generally that the respondent must provide some level of justification of its conduct. The practical needs of a business or other operation can only be guessed at by outsiders: if those who know sit back and say nothing, a court or tribunal will readily infer that there is no real justification for the condition or requirement or practise. In my view, the proposed amendment clarifies the law and reflects the practicalities of most situations. Accordingly I support the proposal.[63]

1.69 Ms Hunter completely agreed with the current drafting of section 7C on the grounds advanced by John Basten. Ms Hunter stated that the:

> UK legislation as well as the US legislation currently place the onus on respondents. This does not seem to have caused major problems. In addition, the EC, the European Court of Justice, the various directives and areas that it administers that deal with sex discrimination also place an onus of proof on employers, and that is provisions that apply across the European Union. Again, employers seem to have managed to justify their practices in particular situations where they have been challenged, without any serious detriment to business. [64]

Conclusion

1.70 Although the Committee expresses its concern at the growing tendency for Parliament to be asked to reverse the onus of proof,[65] it accepts the evidence

62 *Hansard*, SLCLC, 14 August 1995, p. 83 and pp 110-11 per Senator Cooney; and p 108 per Senator Vanstone.

63 Mr John Basten QC, *Submission* No. 4, at p 3.

64 *Hansard*, SLCLC, 14 August 1995 at p. 114 per Ms Rosemary Hunter.

65 *Hansard*, SLCLC, 14 August 1995, pp. 108-112.

of officers of the Attorney-General's Department that there is a cogent reason for doing so in this case.

Potential pregnancy as an unlawful ground of discrimination

1.71 Clause 9 of the Bill will repeal and substitute a new section 7. The present section deals with discrimination on the grounds of pregnancy and follows the general schema of discrimination. In subsection 7 discrimination is defined as less favourable treatment. The new section 7 will define indirect discrimination on the ground of pregnancy and potential pregnancy. The Bill defines potential pregnancy as a reference to:

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

1.72 The Queensland Council for Civil Liberties ('QCCL') submitted that it supports the proposal to include the ground of 'potential pregnancy' in the SDA.[66] In its view the amendments mirror current provisions under the *Anti-Discrimination Act 1991* (Qld) ('QADA'). QCCL argued that potential pregnancy is already covered under s. 8 of the QADA.[67] QCCL viewed the Bill as 'catching up' with the Queensland provisions.

1.73 In contrast, Mr Carter of the Queensland Law Society considered that extension of protection of aggrieved women on the ground of 'potential pregnancy' under the Bill is 'unnecessary'.[68] Mr Carter maintained that the characteristic of 'potential for pregnancy' is a 'characteristic that appertains generally' to women and is already covered by section 5(1)(b) of the Act.

1.74 Mr David Munro, Secretary and General Counsel to M.I.M. Holdings Limited, was critical of the amendment and considered that it would create specific difficulties for the lead industry.[69] He argued that sex discrimination

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66 Mr Ian Dearden, President, Queensland Council for Civil Liberties, *Submission* No. 13 at p. 1.

67 Mr Ian Dearden, President, Queensland Council for Civil Liberties, *Submission No. 13* at p. 1.

68 Mr Scott Carter, Queensland Law Society Inc., *Submission* No. 2 at para 2.

69 Mr David M. Munro, Secretary and General Counsel, M.I.M. Holdings Limited, *Submission* No. 9 at page 3.

legislation should have proper regard for occupational health and safety considerations.[70] The submission was particularly concerned with the employment of women of reproductive capacity in lead-risk jobs.[71]

1.75 Mr Munro argued that:

- businesses which are providing a safe workplace for their employees should not be required to seek an exemption from the Act;
- occupational health and safety issues are of equal importance to sex discrimination issues and the Act should be amended to reflect this; and
- exemptions have time limits and conditions causing unnecessary uncertainty for employers.[72]

1.76 Mr Munro recommended that a provision based on section 108 of the *Anti-Discrimination Act 1991* (Qld) be inserted in the Bill:

> Nothing in this Act renders it unlawful for a person to discriminate against another person to the extent reasonably necessary to protect the health and safety of the other person at a place of work.[73]

1.77 Ms Susan Walpole, Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission took issue with M.I.M.'s submission. Ms Walpole argued that the Worksafe standard applies a test that deals with reproductive health for men and women. It is designed to provide maximum

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70 Mr David M. Munro, Secretary and General Counsel, M.I.M. Holdings Limited, *Submission* No. 9 at page 3 stated that Article 11(1) of CEDAW provides that: 'State Parties should take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular....(f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.' Mr Munro argued that to protect the health and safety of women...measures need to be adopted which differentiate women who are of reproductive capacity.

71 Mr David M. Munro, *Submission* No. 9 at page 3. Mr Munro referred to Worksafe Australia guidelines which place a series of limits at which employees are required to be removed from jobs where lead is present in the workplace. Worksafe Standard Australia, *Control of Inorganic Lead at Work*, National Standard for the Control of Inorganic Lead at Work [NOHSC:1012(1994)] at clause 15(24).

72 Mr David M. Munro, *Submission* No. 9 at page 4.

73 Mr David M. Munro, *Submission* No. 9 at page 5.

compliance with occupational health and safety standards with the least possibility of breach of the Act.[74]

1.78 There is a grey area in relation to the lead industry issue. Ms Walpole argued that M.I.M.'s submission indicated that it was in breach of the Act and possibly the national occupational health and safety code.[75] However, it is unclear on what basis this claim is made. M.I.M.'s submission in respect of the removal limits from jobs where lead is present in the workplace appears to be in accord with the Worksafe Standard Australia, *Control of Inorganic Lead at Work.*

1.79 Under the Code, males and females of non-reproductive capacity are treated equally and a blood level of 50 micrograms of lead per decilitre of blood requires the employee to be removed from a workplace where lead is in the atmosphere. However the Code does differentiate between males and females of reproductive capacity, and females who are pregnant or breastfeeding.[76]

1.80 There are provisions for return of the employee to a workplace which has lead present, after the confirmed blood lead level reduces to 40 micrograms of lead per decilitre of blood, for males and females of non-reproductive capacity and for males of reproductive capacity. For females of reproductive capacity who have ceased their pregnancy and are not breast feeding the level is 10 micrograms of lead per decilitre of blood.

1.81 So whilst it is true that the *Control of Inorganic Lead at Work* Code prescribes equal treatment for males and females of non-reproductive capacity - it does provide for differentiation on the basis of reproductive capacity and pregnancy. On this basis, there is some force in M.I.M.'s submission that some 'lead-risk jobs' may pose an occupational health risk to pregnant women or women of reproductive capacity. However, there is no basis for distinction between men and women of non-reproductive capacity. Employment of only

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74 *Hansard*, SLCLC, 14 August 1995 at p122 per Ms Susan Walpole, Sex Discrimination Commissioner, Human Rights and Equal Opportunity Commission.

75 *Hansard*, SLCLC, 14 August 1995 at p123 Ms Susan Walpole.

76 These removal limits are: 50 micrograms of lead per decilitre of blood for males and females of non-reproductive capacity; 20 micrograms of lead per decilitre of blood for females of reproductive capacity and 15 micrograms of lead per decilitre of blood for females pregnant or breastfeeding. Worksafe Standard Australia, *Control of Inorganic Lead at Work*, National Standard for the Control of Inorganic Lead at Work [NOHSC:1012 (1994)] at clause 15(24).

men of non-reproductive capacity in lead risk jobs would be direct discrimination, because women of non-reproductive capacity face an equal health risk to men.[77] However, not placing pregnant women in a lead risk job once they exceeded the blood lead levels would be in compliance with the Code.

1.82 Ms Sheedy, from the Attorney-General's Department, responded to M.I.M.'s call for a permanent exemption from the Act, by pointing out the policy reasons for granting temporary exemptions:

> There has been a series of these administrative exemptions granted to the lead industry both under Commonwealth and State legislation; it is the way that they have been proceeding. The benefit of having administrative exemptions is that they can be made subject to conditions. I understand that at least the exemptions that were granted by the South Australian Equal Opportunity Commission to the lead industry in that State had conditions of getting the industry to move towards a safer industry in terms of its workers. The government would be very supportive of handling the issue in that way. It is government policy not to put further permanent exemptions into the Sex Discrimination Act, but rather to go through and remove those that are already there.[78]

1.83 Ms Sheedy also commented that the conditions placed on exemptions are 'meant to be an encouragement to business to be able to fix up whatever the problem is that is causing the discrimination to occur'.[79]

Conclusion

1.84 The Committee accepts that the availability of temporary exemptions from the Act resolves any problem that might arise due to a conflict between occupational health and safety standards and the *Sex Discrimination Act 1984.* The Committee supports the policy of attempting to make all workplaces safe for members of both sexes.

Special measures

1.85 A means by which the injustice or unreasonableness of formal equality can be diminished or avoided is the taking of 'special measures'.[80] The Act

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77 Mr John Basten QC, *Submission* No. 16 at p. 2.

78 *Hansard,* SLCLC, 14 August 1995, p 74 per Ms Joan Sheedy.

79 *Hansard,* SLCLC, 14 August 1995, p 75 per Ms Joan Sheedy.

80 *Municipal Officers' Association of Australia & Anor; Approval of Submission of Amalgamation to Ballot* (1991) EOC 92-344, Deputy President Moore at p78,404. In

presently incorporates the concept of 'special measures' at section 33. The section states:

> Nothing in Division 1 or 2 renders it unlawful to do an act a purpose of which is to ensure that persons of a particular sex or marital status or persons who are pregnant have equal opportunities with other persons in circumstances in relation to which provision is made by the Act.

1.86 The main criticism of section 33 is that it does not clearly articulate that it is designed to mandate special measures and offers Courts no real assistance in a difficult area. The Attorney General's discussion paper summarises the case law in this area.[81]

1.87 The proposed section 7D reads as follows:

> 7D(1) A person may take special measures for the purpose of achieving equality between:
>
> (a) men and women; or
>
> (b) people of different marital status; or
>
> (c) women who are pregnant and people who are not pregnant; or
>
> (d) women who are potentially pregnant and people who are not potentially pregnant.
>
> (2) A person does not discriminate against another person under sections 5, 6 or 7 by taking special measures authorised by subsection (1).
>
> (3) A measure is to be treated as being for a purpose referred to in subsection (1) if it is taken:
>
> (a) solely for that purpose; or
>
> (b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.

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this case, Moore DP favoured a 'liberal construction' of s. 33 (the 'special measures' provision) because it was consistent with the Convention and the observations of Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70.

81 Attorney-General's Department, *Proposals to Amend the Sex Discrimination Act 1984*, October 1993, at p.28-29. Evidence of conflicting decisions of tribunals and commissions can be seen in *Re Australian Journalists Association* (1988) EOC 92-224; *Municipal Officers' Association of Australia & Anor; Approval of Submission of Amalgamation to Ballot* (1991) EOC 92-344; and *Proudfoot and Ors v ACT, ACT Board of Health, Commonwealth of Australia and Canberra Women's Health Centre Inc* (1992) EOC 92-417.

> (4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

1.88 Under international human rights law, 'special measures' play an important role in ensuring equality for disadvantaged groups. They are the means by which the achievement of substantial equality is accelerated by allowing prima facie discriminatory acts to be done which assist the disadvantaged group.[82]

1.89 The notion of special measures originated in the CERD.[83] The CEDAW describes 'special measures' in a similar manner to the CERD, providing at article 4:

> (1) Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
>
> (2) Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

1.90 In the context of discrimination law two models of equality are important. There is **substantive equality** which has an objective of equality of outcomes and **formal equality** which is process orientated and interested in equality of opportunity. The two concepts provide the broad theoretical and practical basis for anti-discrimination legislation. The proposed amendment to

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82 R. Leon, 'W(h)ither Special Measures?: How Affirmative Action for Women can Survive Sex Discrimination Legislation' (1995) 1 *Australian Feminist Law Journal* 89 at 93. Ms Leon argues that viewing special measures as permissible 'discrimination' taints those measures, fostering resentment of and challenge to such affirmative action programs. Ms Leon highlights the fact that within domestic legislation 'special measures' are technically discrimination, whereas under CEDAW such measures 'shall not been considered discrimination'.

83 Article 1(4): 'Special measures for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

section 33 is directed at achieving substantive equality for the disadvantaged group.[84]

1.91 The provision in the *Racial Discrimination Act 1975* mandating special measures was held to be constitutionally valid by the High Court in *Gerhardy v Brown*[85] in relation to a State law which granted special rights to a group of Aboriginal people in terms of control over their traditional land. This is the primary case where the High Court considered the meaning of a 'special measure'. In *Gerhardy v Brown* the High Court held that any right specifically granted to an Aboriginal group by a State legislature will have to be justifiable as a special measure so as not to conflict with the *Racial Discrimination Act 1975.*

1.92 Special measures in both the context of the CERD and the CEDAW must be 'temporary' and not promote 'separate existence.' The High Court took a fairly fluid view of what 'temporary' and 'separate existence' meant, indicating that it was not necessary to specifically limit the measure, but where the measure ceased to be necessary to achieve substantive equality, it would constitute racial discrimination in terms of the *Racial Discrimination Act 1975* and would be questionable.[86] The measure would need to be taken for the **sole purpose**[87] of securing advancement of the beneficiaries in order that they might enjoy equality in their exercise of other human rights and fundamental freedoms.

1.93 The Bill does not require special measures to be for the sole purpose of advancing the disadvantaged group.[88] Special measures **may** be taken for the purpose of achieving equality between:

- men and women; or

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84 For further reading on the theories of equality, see Rosemary Hunter, *Indirect Discrimination in the Workplace,* Federation Press, Leichhardt, 1992 at pp. 3-15; Evelyn Ellis, *Sex Discrimination Law,* Gower Publishing Company, Aldershot, 1988 at pp. 4-17; Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No. 69 Part II, Chapter 3.

85 *Gerhardy v Brown* (1985) 159 CLR 70.

86 *Gerhardy v Brown* (1985) 159 CLR 70 per Brennan J. at 140.

87 Under CERD special measures must be taken for the sole purpose of securing 'adequate advancement of certain racial or ethnic groups or individuals', however, under CEDAW 'special measures' need not be for the 'sole purpose' of accelerating *de facto* equality between men and women.

88 Paragraph 7D(3)(b) of the Bill.

- people of different marital status; or
- women who are pregnant and people who are not pregnant; or
- women who are potentially pregnant and people who are not potentially pregnant.[89]

1.94 However, paragraph 7D(3)(b) broadens the basis on which a special measure may be implemented. This means that 'special measures' may have another 'dominant' purpose and still be a special measure for the purposes of the Act.

1.95 In the context of sex discrimination 'special measures' were considered in the *Proudfoot* case.[90] The case concerned the provision for women's health in the ACT . Three men complained that the program discriminated against men in that the service provided medical and information services that were not specific to women in a physiological sense. The President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson, found that the Women's Health Centre did not discriminate against men as it was preserved by section 33. Sir Ronald stated that 'all section 33 requires is that those who undertake the measure must do so with that purpose [of promoting equal opportunity].'[91] This decision has been criticised on the basis that it concentrates on equality of opportunity rather than the broader issue of any possible substantive inequality in health outcomes between men and women.[92]

1.96 The CEDAW defines special measures as measures 'aimed at accelerating *de facto* equality.' The model of equality intended to apply is substantive equality. This is made clear in the Explanatory Memorandum but not on the face of the legislation.[93]

1.97 Ms Rosemary Hunter proposed an amendment to proposed section 7D, which would reflect that provision:

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89 Paragraph 7D(1) of the Bill.

90 *Proudfoot & Ors v ACT Board of Health & Canberra Women's Health Centre* (1992) EOC 92-417.

91 *Proudfoot & Ors v ACT Board of Health & Canberra Women's Health Centre* (1992) EOC 92-417 at p. 78,984.

92 Attorney-General's Department, *Proposal to Amend the Sex Discrimination Act 1984*, October 1993 at p. 30.

93 Ms Jenny Morgan, Associate Professor, Law School, University of Melbourne, *Submission* No. 18 at p. 3.

> A person may take special measures for the purpose of ensuring *de facto* equality for persons of a particular sex or marital status or women who are pregnant or potentially pregnant.[94]

1.98 Ms Jenny Morgan argued that it is important to emphasise on the face of the legislation that it is equality of outcomes (also known as 'substantive' or 'de facto' equality) not formal equality which is sought.[95] This approach clearly follows the CEDAW and might assist in clarifying what has proved a difficult jurisprudential issue in Australian anti-discrimination law.

1.99 Mrs Horsfield, National Executive Officer of the Girl Guides Association of Australia supported the amendments and emphasised the need to retain 'special measures' for specific purposes:

> [W]e are an affirmative action organisation and we see the need for us to be around until women really are equal.[96]

Conclusion

1.100 The Committee considers that it is desirable to make it clear on the face of the legislation that the provision relating to special measures is directed at achieving equality of outcomes or 'substantive' equality for the disadvantaged group.

Certifying special measures

1.101 Ms Hunter acknowledged that employers and service providers who have taken or propose to take what they perceive to be 'special measures' are uncertain whether their particular policy or program is lawfully a 'special measure'.[97] She suggested a mechanism whereby the:

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94 Ms Rosemary Hunter, *Submission* No. 5, at paragraph 3.1.6.

95 Ms Jenny Morgan, Associate Professor, University of Melbourne, *Submission* No. 18 at p.3. Ms Morgan expressed a preference for use of the language 'substantive' equality rather than "de facto" equality at page 3.

96 *Hansard*, SLCLC, 14 August 1995 at p.77 per Mrs Barbara Horsfield. Mrs Horsfield commented that: 'as an all female organisation, the Association provides opportunities for girls and women to try new experiences and activities in a non-competitive and supportive environment. Women provide positive leadership role models for girls who are encouraged to develop their self confidence and self esteem away from the social pressures to conform with stereotypic gender expectations.'

97 Ms Rosemary Hunter, *Submission* No. 5, at paragraph 3.3.1.

> Sex Discrimination Commissioner could issue a non-binding certification that a particular program fulfilled the statutory requirements of a special measure...[T]his would merely extend the Commissioner's current practice in complaint handling. Complaints may now be declined on the ground that the treatment complained of constitutes a special measure.[98]

1.102 Ms Walpole, the Sex Discrimination Commissioner, advised that where a commercial operation provides information about a 'special measure' in an effort to check whether it complies with the Act, a 'letter of comfort' can be provided.[99] However, it is not legally binding.

1.103 Ms Walpole recommended an amendment to the Act to allow the Commissioner to grant a certificate which could be used as prima facie evidence of compliance with the Act:

> The change that I think would be an extremely desirable one in this special measures provision is to adopt something that was the old system under the very much earlier regime of the Race Discrimination Act, and that is for the Commission or for me as Commissioner to have the ability to issue a certificate at the point that somebody comes to you with that evidence saying that they have formed the opinion that this is a special measure, and for that to act as a prima facie defence against a complaint - not as a total defence but as a prima facie defence. So a person would have a whole lot more security in commercial terms than they currently do.[100]

1.104 The Committee agrees that a certification system would give more security to organisations that are genuinely seeking to comply with the Act, and considers that the Government should give this suggestion due consideration.

Combat related duties

1.105 The Bill at clause 31 will remove any reference to 'combat related duties' in section 43 of the Act. The section provides an exemption from the Act for the Australian Defence Force in relation to 'combat and combat related duties'. The exemption will still apply to 'combat' duties. Both are duties declared by the regulations as such [subsection 43(2)].[101]

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98 Ms Rosemary Hunter, *Submission* No. 5, at paragraph 3.3.2.

99 *Hansard*, SLCLC, 14 August 1995 at p.124 per Ms Walpole.

100 *Hansard*, SLCLC, 14 August 1995, pp 124-5 per Ms Walpole.

101 The Explanatory Memorandum states that the Australian Defence Force 'has amended its policy in relation to assigning women to combat related duties thus rendering this exemption unnecessary.' The categorisation of what constitutes combat duties will still

1.106 The exemption given to the Australian Defence Force which allowed it to restrict women from employment in combat related duties is no longer necessary as women can now serve in all Defence Force positions except those involving 'direct physical combat'.[102]

Other Issues

The role of education

1.107 Ms Squirchuk advocated the expenditure of further funds on education, rather than focussing on dealing with discriminatory actions once they have already occurred. She stated:

> ...the legislation is allegedly being simplified to make it easier for people to complain when there does not appear to be any particular focus on educating people to behave in a more appropriate way.[103]

1.108 Ms Hunter highlighted the fact that the role of the Act is to influence decision-making and change entrenched behaviour:

> [M]ost of the action under the legislation is taken by employers and service providers who are saying, 'What am I supposed to do here?' It is taken by conciliation officers and legal officers who receive complaints from individuals in the Human Rights and Equal Opportunity Commission.[104]

1.109 Mrs Leotta, President of the Women Lawyers Association of New South Wales, commented that:

> Australia is at the forefront of change for women's rights and remedies and protection. The only reason we have come so far is because we have had legislative support for educative change and attitudinal change within the community.[105]

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be 'declared' by regulation therefore it could cover matters previously termed 'combat related.'

102 Bills Digest, *Sex Discrimination Amendment Bill 1995*, Parliamentary Research Service, Department of the Parliamentary Library, No. 70 of 1995 at p.4-5.

103 *Hansard*, SLCLC, 14 August 1995 at p. 104 Ms Rohan Squirchuk.

104 *Hansard*, SLCLC, 14 August 1995 at p.118 per Ms Rosemary Hunter.

105 *Hansard*, SLCLC, 14 August 1995, p. 128 per Mrs. Kerrie Leotta.

Discrimination on the grounds of identity of spouse and family responsibilities

1.110 Marian Sawer, Associate Professor in Politics, Faculty of Management, University of Canberra, was supportive of the amendments designed to make indirect discrimination provisions more workable.[106] However, Ms Sawer and Ms Ingrid McKenzie, National Co-ordinator of the Women's Electoral Lobby, expressed disappointment that the remainder of the Lavarch Committee recommendations relating to discrimination on the grounds of identity of spouse and family responsibilities have not yet been implemented.[107] Ms Sawer criticised the Bill on the grounds that:

> [T]he government has still not introduced amendments relating to prohibition of discrimination on the ground of identity of spouse as recommended by the Lavarch Committee in 1992 and the Australian Law Reform Commission in 1994.

1.111 Mr Neave and Ms Sheedy, from the Attorney-General's Department, responded that this is a matter for consideration by the Government in the third stage of the Government's response to the Lavarch Report. It will not be dealt with under this Bill, but will be considered for future amendments.[108]

1.112 Senator Neal also raised the issue of whether 'identity' of spouse is a sufficient ground, because it may not cover discrimination on the grounds of a characteristic relating to a person's spouse. Ms Walpole responded that the case law has extended to cases concerning a characteristic of a spouse,[109] but

106 Ms Marian Sawer, Associate Professor in Politics, University of Canberra, *Submission* No.1 at p. 1. Ms Jayeann Carney, Spokeswoman, Women's Electoral Lobby ('WEL'), *Hansard*, SLCLC, 14 August 1995 at p.138 agreed with Ms Sawer's arguments in relation to family responsibilities as a ground of discrimination. In addition, WEL were concerned that the Act had not been amended in relation to exemption of religious institutions.

107 Ms Marian Sawer, Associate Professor in Politics, University of Canberra, *Submission* No. 1 at p. 1 and Ms Ingrid McKenzie, National Co-ordinator of the Women's Electoral Lobby, *Submission* No. 15 at p. 1-2.

108 *Hansard*, SLCLC, 14 August 1995, p 79 per Mr Neave and Ms Sheedy.

109 Ms Tongue, from the Australian Law Reform Commission, also considered that 'identity of spouse' would be interpreted by case law to cover a characteristic of a spouse: *Hansard*, SLCLC, 14 August 1995, p 141.

conceded that it is preferable to have the matter clear on the face of the legislation.[110]

110 *Hansard,* SLCLC, 14 August 1995, p 140 per Ms Walpole.

Recommendations

A majority of the Committee recommends:

1. that clauses 6, 8 and 9 of the Bill be amended to reflect the discrimination against the aggrieved person as a member of a group, rather than as an individual, in accord with the principle suggested by Ms Hunter (see paragraph 1.41 of this report);

2. that consequential amendments should be made to clause 10; and

3. that clause 10 should be amended to make clear that the proposed s7D refers to equality of outcomes, provided that this can be achieved without causing undue delay (see paragraphs 1.93-1.95 of this report).

A majority of the Committee recommends that subject to the above recommendations, the Bill be passed as introduced.

Senator B Cooney
Chair
Senate Legal and Constitutional Legislation Committee