DISSENTING REPORT

SEX DISCRIMINATION AMENDMENT BILL 1995

There are a number of "in principle" matters in the proposed Sex Discrimination Act Amendment Bill 1995 which need to be addressed.

1. REVERSAL OF ONUS OF PROOF

This is a matter of considerable concern.

Our system of law normally operates on the basis of "the person who asserts must prove". The reversal of the onus is a serious departure from an important principle. It is difficult to comprehend why the onus on a worker's compensation claim (where life and limb can be at stake) should be more onerous than under the Sex Discrimination Act.

An appropriate resolution of the matter would be to adopt the Australian Chamber of Commerce and Industry proposal which recommended that clause 7C be amended to read as follows:

> "The person who does the act shall bear the burden of proving that an act 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 that section".

It is noted that this approach has been adopted in unfair dismissal legislation and is, therefore, not without precedent.

2. DENIAL OF THE 'REASONABLENESS' DEFENCE

It is regretted that the defence of reasonableness does not apply to allegations of discrimination under the Sex Discrimination Act. It is now proposed to also extend this regime to discrimination on the grounds of pregnancy. At the outset, it must be said that it is difficult to see how

discrimination on grounds of pregnancy can be anything other than gender specific discrimination as only one gender is capable of pregnancy.

However, it is unfortunate when legislation seeking to outlaw certain behaviour does not allow for a defence of "reasonableness". The denial of such a defence must mean either -

(i) that the discrimination must always be unreasonable ; or

(ii) that the legislation will not stand up to a test of reasonableness, the corollary of a which is therefore that the legislation is unreasonable.

Issues such as health and safety and business dislocation may on the odd occasion provide a reasonable defence. For example:

- the financial or administrative or other burdens or costs occasioned to the business,
- the efficiency of the business,
- proper workforce planning and the labour needs of the business,
- the business and other needs of the workplace or enterprise,
- customer needs,
- the clarity or otherwise of the issue complained about.

Another example is the concern expressed by MIM Holdings Limited to the Committee in their submission. There are Worksafe Australia guidelines for the control of inorganic lead in the workplace. These guidelines establish a series of limits in which employees are required to be removed from jobs in which lead is present in the workplace. These removal limits are 50 micrograms of lead per deci-litre of blood for males and females of non-reproductive capacity. However, it reduces to 20 micrograms of lead per deci-litre for females of reproductive capacity and further to 15 micrograms of lead per deci-litre of blood for females pregnant or breast feeding.

Clearly, in those types of circumstances a test of reasonableness ought to be allowed.

The legislation and the principles on which it is based are not served by denying genuine citizens a defence of "reasonableness" in inappropriate circumstances. The positive educative impact on the community by recognition of "reasonableness" would be most helpful. To deny such a defence as currently exists and to further extend the regime denying the test of reasonableness will only impair the educative role of the legislation and will bring it into disrepute within the community at large.

It is to be noted that with a regime of indirect discrimination "reasonableness" will be a defence.

3. LEGISLATING AGAINST INDIRECT DISCRIMINATION

This is an esoteric area of the law and it will be difficult to ascertain clearly on what occasions certain conduct will be considered to be indirect discrimination.

There are many examples worldwide where legislative programmes outlawing indirect discrimination adversely affected the community.

For example, a requirement that firepersons be of a particular height and lifting capacity usually would mitigate against the vast number of women albeit also a certain number of men as well.

Supporting documentation tells us that this part of the legislation is based on the aim of achieving equality of outcomes rather than equality of opportunity.

In a fair and equitable society all people ought have equality of opportunity. The "outcomes" are not the measure by which equality ought to be judged. There may be very good and sound reasons why a particular gender grouping may not wish to avail itself of opportunities presented. It is noteworthy that the founder of the Australian Democrats on the 25th June 1995 was highly critical of the legislation.

It is noteworthy that the Attorney-General in his Second Reading Speech sought to attack Mr Chipp for his comments and to give his comments credibility he said that the Government is "... totally opposed to the use

of quotas ...". Yet his own party promotes the concept of a quota system for their endorsements. The hollowness of the Attorney-General's comments are thereby exposed.

Also there is the difficulty of whether indirect discrimination ought be based on the proportionality test of the gender concerned or whether the test ought be in relation to the particular individual and his/her sex.

4. SPECIAL MEASURES PROGRAMME

The legislation will allow for a special measures programme whereby "positive" discrimination can take place to correct the perceived imbalance between the sexes.

It ought be remembered that whenever one positively discriminates in favour of somebody one is negatively discriminating against somebody else.

Further, the regime that is set up to promote the special measures will only be allowed to continue until such time as the objective of the special measure has been "achieved". It is not beyond the realm of possibility that somebody who believes in providing special measures could, unwittingly, fall foul of section 7 D (4) which says that special measures are not authorised if the purpose for which the special measure was implemented has been achieved.

The question, therefore, needs to be asked --- how is it to be determined whether a special measure has been achieved?

During discussions at the hearing the responses were of a relatively vague nature because it is difficult to determine precisely and exactly when a particular special measure would have achieved its objective. It will undoubtedly be, once there are 50 per cent of each sex effectively involved in each particular occupation or pursuit and if that is the case then clearly we do have a quota system in operation - something which the Attorney-General sought to deny.

This was a matter of some discussion at the Legislation Committee's hearing into this legislation. In discussing this Ms Walpole said in part at page 147;

> "We are not talking about numerical equality here. This is where it always becomes extremely difficult ... "

Mrs Leotta at page 149 said,

> "If the special measure were purely limited to increase enrolments in engineering I would agree with you that 50/50 has to seem to be the base but the idea of the special measures is not to go to just the first step on the path of increasing numbers. The idea of the special measures is to change the attitudinal base of the profession."

The difficulty with this proposal is that those who would seek to provide special measures to assist a disadvantaged sex will not necessarily know whether or not the objectives for which they are undertaking the special measures have been achieved. This, with respect, detracts from the legislation.

6. COSTS UNDER THE SEX DISCRIMINATION ACT

We have also taken the opportunity of raising the question of whether or not costs ought to be awarded under the Sex Discrimination Act in those circumstances in which the Commissioner or Judge makes a determination that the matter was brought on a vexatious or frivolous basis and had no proper substance.

There is community concern that people bringing complaints, if they bring them in their own capacity, or through the Legal Aid Office, have no incentive to settle the matter, or not to bring frivolous and vexatious claims.

The situation is that it is often easy to convince somebody in an office as to the justice of one's claim and thereby have the matter progress.

However, under cross-examination the shallowness of the claims may be exposed. To expose the frivolous and vexatious claim the respondent will need to have spent considerable hours of their own time and dollars in legal representation.

In those circumstances, we believe it appropriate to give the Commissioner or Judge a discretion to award costs. This would avoid frivolous and vexatious claims being made as the complainant would then suffer a direct disincentive from bringing such a claim. Further, it would add some justice to the respondent.

Similarly, a Commissioner ought to have the power to order costs where a matter has been defended in a way which is considered to be inappropriate.

Senator C Ellison

Senator W O'Chee

Senator E Abetz