THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SEX DISCRIMINATION AMENDMENT

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Report by the
Senate Legal and Constitutional Legislation Committee

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Ms Octavia Doerschmann

The Senate
Parliament House
CANBERRA ACT 2600

Telephone: (06) 277 3561

SEX DISCRIMINATION AMENDMENT BILL 1995

Referral of the Bill

1.1 On 28 June 1995 the Senate referred the *Sex Discrimination Amendment Bill 1995* to the Legal and Constitutional Legislation Committee.[1] The reporting date was 31 August 1995. On 30 August 1995 the reporting date was extended to 21 September 1995.[2]

The Committee's Inquiry

1.2 The Committee received 18 submissions in relation to its inquiry into the Bill. A list of those who provided submissions is included in this report at **Appendix 1.**

1.3 The Committee also took evidence at a public hearing in Sydney on Monday 14 August 1995. Further information about those who gave evidence to the Committee at the hearing is included in this Report at **Appendix 2.**

Introduction

1.4 The *Sex Discrimination Amendment Bill 1995* ('the Bill') proposes to amend the *Sex Discrimination Act* 1984 ('the Act'). If passed, the Bill will implement Stage 2 of the Government's response to the recommendations made by the House of Representatives Standing Committee on Legal and Constitutional Affairs *Half Way to Equal* Report[3] (the 'Lavarch Committee Report').

1.5 The Bill will amend the Act to:

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1 *Journals of the Senate*, No 120, 28 June 1995

2 *Journals of the Senate*, No. 182, 30 August 1995.

3 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia*, April 1992.

(a) insert a Preamble incorporating both a general prohibition on discrimination on the grounds covered by the Act and an equality before the law provision;

(b) alter the Act's definition of indirect discrimination to simplify the test for indirect discrimination and include a reasonableness defence for certain sorts of indirect discrimination;

(c) repeal and replace section 7 to include potential pregnancy as an unlawful ground of discrimination;

(d) repeal section 33, the 'special measures' provision, and replace it with a new provision which indicates that such measures are not discrimination for the purposes of the Act and are designed to achieve 'equality' [of outcomes];[4]

(e) remove the reference to 'combat related duties' in section 43; and

(f) make minor technical and consequential amendments.

Background

1.6 The general Federal approach to anti-discrimination legislation has been to rely on international human rights covenants as the jurisprudential basis for domestic legislation in the area. This is in contrast with the approach in the United States of America, where guarantees of equality found within its Constitution have been the primary basis for legislation. Consequentially Commonwealth legislation in the area has been characterised as a law with respect to 'external affairs' but the legislation also relies on a range of other heads of power.

1.7 In international human rights law, the archetypal approach to discrimination is found in the *Convention on the Elimination of All Forms of Racial Discrimination* ('CERD'). Australia implemented its obligation under CERD by enacting the *Racial Discrimination Act* 1975 (hereafter 'RDA').

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4 Paragraph 7D(1) of the Bill does not specify 'equality of outcomes' as its objective. The Explanatory Memorandum at paragraph 40 states that the provision seeks to achieve equality of outcomes and is based on Australia's international obligations to achieve equality.

1.8 The RDA, at section 9, comprehensively makes racial discrimination unlawful. Subsection 9(1) states that:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[5]

1.9 The *United Nations Convention on the Elimination of All Forms of Discrimination Against Woman* ('CEDAW') is the key international instrument dealing with women and closely follows the pattern of the CERD in its schema of discrimination. The CEDAW entered into force on 3 September 1981 and ratification by Australia followed on 27 August 1983. CEDAW provides the basis for the *Sex Discrimination Act* 1984 and the *Affirmative Action (Equal Opportunity for Women) Act* 1986. Subsection 3(a) of the *Sex Discrimination Act* 1984, for example, prominently states that an object of the Act is to give effect to the CEDAW.

Convention on the Elimination of All Forms of Discrimination Against Women

1.10 The definition of sex discrimination found in the CEDAW **blends overt and indirect discrimination together** and defines discrimination against women, at article 1, as:

> ...any distinction, exclusion or restriction made on the basis of sex which has the **effect or purpose** of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. [Emphasis added]

1.11 Significantly, the definition is very similar to the CERD's definition, at article 1, of racial discrimination, in terms of defining discrimination as any

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5 Section 10 of the RDA deals with the right to equality before the law and states at subsection 10(1) that: 'If, by reason of, or a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.'

distinction which has the effect or purpose of impairing the enjoyment of rights. This definition of discrimination encompasses both direct and indirect discrimination, although both the RDA and the Act have explicit provisions relating to indirect discrimination. The CERD's definition of discrimination is replicated in the RDA. The same is not the case with the CEDAW's definition of discrimination, which has not been inserted in the Act.

1.12 The Act seeks to prohibit discrimination on the basis of sex, marital status and pregnancy in a number of key areas such as employment, education and the provision of services. Sexual harassment is unlawful in the context of employment, education, the provision of goods and services, the provision of accommodation, the acquisition or disposal of land or membership of a club. The Act has an acknowledged educative role, being the promotion of the 'recognition and acceptance within the community of the principle of the equality of men and women.'[6] Generally the Act's definition of discrimination is narrower than the definition given to racial discrimination in the *Racial Discrimination Act* 1975.

1.13 The Act defines sex discrimination at subsection 5(1) in terms of whether the person discriminated against has received less favourable treatment than a person of the opposite sex. Indirect discrimination is defined at subsection 5(2). The elements of indirect discrimination are where the 'discriminator' requires the 'aggrieved person' to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons of the opposite sex are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply.

Similar standards for direct and indirect discrimination on the basis of marital status are set out in section 6 of the Act.

1.14 Discrimination on the ground of pregnancy is defined at section 7 as having occurred if the aggrieved person is treated less favourably by reason of her pregnancy or a characteristic appertaining to, or generally imputed to pregnant women, and where the less favourable treatment is not reasonable in the circumstances. Indirect discrimination on the grounds of pregnancy is defined as requiring the aggrieved person to comply with a requirement or

6 Subsection 3(d) of the Act.

condition with which a substantially higher proportion of persons who are not pregnant comply or are able to comply, which is not reasonable having regard to the circumstances of the case, and with which the aggrieved person does not or is not able to comply.

1.15 Indirect discrimination is based on an assumption that social structures which perpetuate disadvantage appear neutral but produce discriminatory outcomes. The Act and the Bill aim for substantive equality between the disadvantaged group and the rest of society. Equality of outcomes rather than formal equality is the objective. The legislation is based on an assumption that, from a practical and logical point of view, substantial equality is attainable.[7]

Griggs v Duke Power Company

1.16 The case law on indirect discrimination has drawn from the experience of the civil rights movement in the United States of America.[8] The notion of indirect discrimination or adverse impact discrimination was first accepted and elaborated on by the United States Supreme Court in the 1971 race discrimination case, *Griggs v Duke Power Company.*[9] The case concerned a complaint by an African American employee of a power company that the employer's requirement that employees have a high school diploma or have passed a standardised general intelligence test as a condition of employment or transfer, unfairly operated against them. In respect of both requirements African Americans performed at a lower level and were effectively screened out. The Court held that equality of employment legislation was directed towards practices which are not only overtly discriminatory, but which are fair in form but discriminatory in operation. These practices were described as 'built in headwinds' and were not justified by any business necessity.

1.17 The concept of indirect discrimination, derived from *Griggs v Duke Power Company,* concerns superficially 'neutral' criteria which have the effect of disproportionately excluding a particular group. The exclusion is not based

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7 Part II Division 3 of the Act deals with sexual harassment. Part II Division 4 of the Act provides for exemptions from the Act and Part III of the Act deals with Inquiries and Civil Proceedings under the Act. Inquiries may be made by the Sex Discrimination Commissioner and the Human Rights and Equal Opportunity Commission. Part IV specifies offences under the Act and Part V establishes the office of the Sex Discrimination Commissioner.

8 Chris Ronalds, *Anti-Discrimination Legislation in Australia*, Butterworths, Sydney, 1979 at p. 1.

9 (1971) 401 US 424.

on any objective or compelling justification. Indirect discrimination reflects the entrenched barriers which are 'wired' into social structures. It is argued that traditional and unquestioned 'habits and practices' work to the detriment of women and unfairly exclude them from opportunities available to their male counterparts.[10] 'Indirect discrimination' is considered 'institutionalised'[11] discrimination.

The Proposed Amendments

1.18 A number of written submissions indicated full support for the Bill.[12] Some written submissions agreed with the broad aim of the amendments but suggested changes to the Bill.[13] Other submissions were critical of the Bill or considered that it was either unnecessary or undesirable to introduce the amendments.[14]

Preamble

1.19 The proposed new preamble reads as follows:

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10 E. Ellis, 'The Sex Discrimination Law of the European Union', (December 1994) vol. 25, no. 4, *The Law Librarian* 186-191 at p. 187.

11 E. Ellis, 'The Definition of Discrimination in European Community Sex Equality Law', (December 1994) vol. 19, no. 6, *European Law Review* 563-580 at p. 572.

12 Ms Marian Sawer, Associate Professor in Politics, University of Canberra, *Submission* No.1 at page 1; Mr John Basten QC, *Submission* No. 4 at page 1; Mr Alan Rose, President, Australian Law Reform Commission, *Submission* No. 6 at p. 2; Mr Michael L. Abbott QC, President, South Australian Bar Association, *Submission* No. 7, at p. 1; Mr Milen White, Assistant General Manager, Human Resources and Corporate Administration Branch, Aboriginal and Torres Strait Islander Commission, *Submission* No. 8 at page 1; Ms Mary McNish, NSW Council for Civil Liberties, *Submission* No. 10 at page 2; Ms. Kathleen Townsend, Office of the Status of Women, *Submission* No. 12 at page 1; Mr Ian Dearden, Queensland Council for Civil Liberties, *Submission* No. 13 (QCCL's position was one of 'not opposing' the Bill); Ms Barbara Horsfield, National Executive Officer, Girl Guides Association of Australia; *Submission* No. 14.

13 Ms Rosemary Hunter, Senior Lecturer in Law, University of Melbourne *Submission* No. 5; Ms Ingrid McKenzie, National Co-ordinator, Women's Electoral Lobby Australia Incorporated, *Submission* No. 15; *Hansard*, Senate Legal and Constitutional Legislation Committee, ('SLCLC'), 14 August 1995 at p.137 per Ms Jayeann Carney, Spokeswoman, Women's Electoral Lobby; and Ms Jenny Morgan, Associate Professor, Law School, University of Melbourne, *Submission* No. 18.

14 Mr Scott Carter, Queensland Law Society Inc., *Submission* No. 2; Mr Reg Hamilton, Australian Chamber of Commerce and Industry, *Submission* No. 3; Ms Rohan Squirchuk, Council for Equal Opportunity in Employment, *Submission* No. 11.

> Recognising the need to prohibit, so far as is possible, discrimination against people on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs:
>
> Affirming that every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law, without discrimination on the grounds of sex, marital status, pregnancy or potential pregnancy:

1.20 The Lavarch Committee recommended that two general provisions should be included in the Act. One stating that discrimination on the basis of sex, marital status, potential pregnancy and family responsibilities is unlawful and another which would allow for equal protection before the law, similar to the provisions in the RDA relating to race.

1.21 Under the Act, the definition of sex discrimination is more circumscribed. The purpose of the Lavarch Committee recommendation was that there should be a general justiciable provision similar to sections 9 and 10 of the RDA making all distinctions based on gender illegal. The amendments do not achieve this.

1.22 Preambles are generally not justiciable. They are interpretative tools, to be used when the operative text of a statute is unclear or ambiguous. Griffith CJ in *Bowtell v Goldsbrough Mort & Co Ltd*[15] stated that the words of a statute cannot be cut down if they are plain and clear, by reference to the preamble. In *Wacando v The Commonwealth* Mason J (as he then was) stated more liberally that:

> It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object.[16]

1.23 The alterations to the preamble proposed by the Bill, therefore, will be likely to have only symbolic effect.[17]

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15 (1905) 3 CLR 444 at 451.

16 (1981) 148 CLR 1 at 23.

17 Mr Alan Rose, President, Australian Law Reform Commission, *Submission* No. 6 at p. 2.

1.24 In 1994, the Australian Law Reform Commission released its report *'Equality Before the Law: Justice for Women'* [Part 1] (hereafter ALRC 69). Recommendation 3.1 of ALRC 69 recommended that:

> a) the SDA should contain a general prohibition of discrimination in accordance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) article 1.
>
> b) the reference to human rights and fundamental freedoms in the general prohibition of discrimination should relate to the rights and freedoms articulated in CEDAW, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The international conventions provide an expanded reference point for the rights and freedoms to be protected by a general prohibition.

1.25 Volume Two ALRC 69 is titled *'Equality Before The Law: Women's Equality'*. It recommended that equality before the law should be protected by a comprehensive *Equality Act*. The Act would provide that any law, policy, program, practice or decision which is inconsistent with equality law, on the grounds of gender, should be inoperative to the extent of the inconsistency.[18] The Women's Electoral Lobby expressed concern that the Bill does not insert an equality before the law provision in the Act.[19]

1.26 Ms Sheedy, from the Attorney-General's Department, informed the Committee that the question of putting an 'equality before the law type provision in the *Sex Discrimination* Act is something that the government has under consideration as part of its response to the Law Reform Commission's *Equality Before the* Law report.' She noted that the Department is currently undertaking consultations on the concept of an *Equality Act*, and that the Attorney-General has written to all State and Territory Governments and key Commonwealth Departments seeking comments on it.[20]

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18 Recommendations 4.1-6.1

19 Ms Ingrid McKenzie, National Co-ordinator, Women's Electoral Lobby, *Submission* No. 15 at p. 1.

20 *Hansard,* SLCLC, 14 August 1995, at p. 97 per Ms Joan Sheedy, Senior Government Counsel, Human Rights Branch, Civil Law Division, Attorney-General's Department.

Definition of indirect discrimination

The proposed amendments

1.27 The Act **presently** defines indirect discrimination at subsection 5(2) as follows:

> For the purpose of this Act, a person (in this subsection referred to as the 'discriminator') discriminates against another person (in this subsection referred to as the 'aggrieved person') on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:
>
> (a) with which *a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply; (italics added)*
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply.

1.28 The Bill **proposes** that this definition be replaced by new subsections 5(2) and (3) as follows:

> (2) For the purpose of the Act a person (the 'discriminator') discriminates against another person (the 'aggrieved person') on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, *the effect of disadvantaging the aggrieved person because of his or her sex. (italics added)*
>
> (3) This section has effect subject to sections 7B and 7D.

1.29 The indirect discrimination test is similar for indirect discrimination on the grounds of marital status and pregnancy or potential pregnancy. See clauses 8 and 9 of the Bill for proposed subsections 6(2) and 7(2), respectively.

1.30 Clause 10 of the Bill contains the proposed section 7B which deals with the reasonableness defence and section 7D which deals with special measures.

1.31 The new definition of indirect discrimination is intended to be simpler, and clearer and to provide greater guidance as to what amounts to indirect discrimination on the grounds of sex.[21] According to the Explanatory Memorandum, this object will be achieved because the proposed new definition will not require complainants to prove that a substantially higher proportion of

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21 Mr Alan Rose, President, Australian Law Reform Commission, *Submission* No. 6 at p. 2.

people of one sex can or cannot comply with the requirement or condition. This is generally termed the 'proportionality test'. The proportionality test requires definition of the groups to be compared and then consideration of whether a higher proportion of persons of a different status than the complainant's status comply with the requirement or condition. The new definition of indirect discrimination will also apply to discrimination on the grounds of marital status, pregnancy and potential pregnancy.

Background to indirect discrimination - Australian Iron and Steel v Banovic

1.32 The leading Australian case concerning indirect discrimination is *Australian Iron and Steel v Banovic.*[22] The case concerned the practices of Iron and Steel Pty. Ltd. which operated a steel work at Port Kembla, New South Wales. Before 1980 its practice had been to give preference to male employees and, by delay and other means, to deny 'gate seniority' to female employees. In 1982 the company decided, for commercial reasons, to retrench staff on a 'first on first off' basis. This disproportionately affected female employees. Eight female ironworkers were retrenched and with others they made a complaint under the *Anti Discrimination Act* 1977 (NSW) on the basis of indirect discrimination. The definition of indirect discrimination in subsection 24(3) of the *Anti Discrimination Act* 1977 (NSW) was substantially similar to that in the Act. The eight women succeeded in their claim of indirect discrimination at the New South Wales Equal Opportunity Tribunal. The NSW Court of Appeal upheld the Tribunal's decision, although it reduced the women's damages. The company appealed to the High Court.

1.33 The High Court rejected the appeal brought by the company against the finding of indirect discrimination made by NSW's Equal Opportunity Tribunal The general approach articulated by the High Court incorporated the concept of 'base groups.' The notion that a substantially higher proportion of, say, men can comply with a particular requirement or condition, begs the question of what is the appropriate unit of comparison between the men and women.[23] The High Court in *Banovic* made it clear that the base group for comparison will vary from case to case depending on the circumstances of the case and particularly the nature of the condition or requirement imposed.[24] The group

22 (1989) 169 CLR 165.

23 R. Hunter, *Indirect Discrimination in the Work Place,* Federation Press, Leichhardt, 1992 at p 206.

24 *Australian Iron and Steel Pty. Ltd .v Banovic* (1989) 169 CLR 165 per Brennan J at 169, Deane and Gaudron JJ at 178, Dawson J at 187, McHugh J at 199.

might be the entire population or the employees in one particular workplace. Its size and character:

> ...must be identified by reference to the particular activity in which, or the particular act by means of which, one person is said to discriminate against another. In that way, the nature of the criterion is ascertained in the practical context in which it operates. In cases arising under section 25, the group is constituted by the persons of whom the employer requires compliance with the relevant "requirement or condition" when the employer engages in the particular activity or does the particular act mentioned in that section. That is the group to whom the employer applies the supposed sex-related criterion.[25]

Support for proposed new definition of indirect discrimination

1.34 Ms Annie McLean, Principal Counsel, Sex Discrimination and ILO 156 Section of Attorney-General's Department, argued that the government's policy objectives were achieved in this Bill.[26] Ms McLean considered how the proposed indirect discrimination test under the Bill would work:

> [T]he person...alleging discrimination has to show....that there has been discrimination...[then] that the requirement or the practice...is likely to have the effect of disadvantaging...[I]t is then a matter for the respondent...to...avail himself or herself of the defence of reasonableness...[i]t then falls back on the complainant to decide whether or not to rebut the matters that are going to be put forward by the respondent in the respondent's defence.[27]

1.35 Ms Marian Sawer, Associate Professor in Politics, Faculty of Management, University of Canberra, in her written submission to the Committee, was supportive of the Bill and considered that it was designed to make the indirect discrimination provisions more workable.[28]

1.36 Ms Kathleen Townsend, First Assistant Secretary, Office of the Status of Women, fully supported the Bill. She commented:

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25 *Australian Iron and Steel Pty. Ltd.v Banovic* (1989) 169 CLR 165 per Brennan at 169.

26 *Hansard*, SLCLC, 14 August 1995 at p. 95-96 per Ms Annie McLean.

27 *Hansard*, SLCLC, 14 August 1995 at p. 81 per Ms Annie McLean.

28 Ms Marian Sawer, Associate Professor in Politics, University of Canberra, *Submission* No.1 at p. 1. Ms Sawer's submission was discussed in *Hansard*, SLCLC, 14 August 1995 at pp. 78-79 by Senator Cooney, Ms Sheedy and Mr Neave.

> The amendments contained in the Bill are designed to simplify the definition of indirect discrimination and address the lack of public awareness of the indirect discrimination provisions.[29]

Criticism of the proposed new definition of indirect discrimination

1.37 The Committee received conflicting evidence about whether or not the new definition simplifies the test for indirect discrimination. The proposed definition deals with the 'problem' posed by the proportionality test by deleting it from the definition.

1.38 Under the Bill, it is important that the definition of indirect discrimination accurately reflects the intended objectives because there is no 'fall back position' in the general definition of discrimination.[30]

1.39 The new definition defines discrimination in terms of individual rather than group effects. The complainant needs to suffer disadvantage because of his or her sex. It was argued that the definition does not adequately capture the group differential aspect which is intrinsic to indirect discrimination.[31]

1.40 The definition could be said to have the same outcome as the definition of direct discrimination in subsection 5(1) except that the measure must 'disadvantage' a person rather than amount to 'less favourable treatment'. Ms Rosemary Hunter makes this point very clearly in her submission:

> Indeed, on its face, the proposed definition is simply an alternative definition of direct discrimination. Imposing a condition, requirement or practice that has the effect of disadvantaging a person because of their sex, marital status or (potential) pregnancy is synonymous with treating a person less favourably by reason of their sex, marital status or potential pregnancy. Thus, the proposed definition of indirect discrimination is not a definition of indirect discrimination at all.[32]

1.41 The 'proportionality' test may be difficult to apply in practice but it indicates what actions are intended to be captured by the definition of indirect discrimination. The proportionality test will be subject to some statistical

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29 Ms Kathleen Townsend, *Submission* No. 12 at page 1.

30 This is in contrast to a comparable provision in section 9 of the *Racial Discrimination Act 1975* which encompasses both direct and elements of indirect discrimination. The RDA also has an explicit indirect discrimination provision at subsection 9(1A).

31 Ms Rosemary Hunter, *Submission* No. 5 at para 2.3.2-2.3.3; *Hansard*, SLCLC, 14 August 1995 at p.116.

32 Ms Rosemary Hunter, *Submission* No. 5 at para 2.1.4.

slipperiness. However, Ms Hunter's submission argued that by removing the notion of proportionality from the test for indirect discrimination, more is lost than is gained.[33]

1.42 Ms Hunter compared the current provision to the proposed change to the test for indirect discrimination in the Bill:

> Under the current definition a complainant has to show that a substantially higher proportion - say it is a woman who is complaining - of men than of women are able to comply with the requirement that is being opposed. In other words, the requirement has the effect of disadvantaging women as a group. The proposed definition talks about the effect of disadvantaging the aggrieved person; just the individual. **It focuses attention on the individual rather than the group effect of particular requirements.**[34] [Emphasis added]

1.43 Ms Hunter observed that one of the indicia of indirect discrimination is that requirements appear to be neutral on their face but have an adverse impact on outcomes for women. To explain her criticism of the definition of indirect discrimination as it is drafted in the Bill, Ms Hunter described a scenario which highlights the elements of proving indirect discrimination under the Act as it stands, and under the Bill:

> [T]ake, say, the height requirement. You have got a requirement that people in order to have this job have to be over five foot ten. Previously you could have said that a substantially higher proportion of men than of women will be able to comply with that requirement. If you take the proposed new definition, you say, 'Does the requirement to be over five foot ten have the effect of disadvantaging the aggrieved person because of her sex?' You say, 'Well, no, it's not because of her sex. It is because she is short.' What the **proposed definition loses is the whole notion of adverse effects on a particular group**; it treats groups differently.[35] [Emphasis added]

1.44 Ms Hunter provided several possible options for a redrafted definition of indirect discrimination.[36] She argued that it is important to clarify that it is the

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33 Ms Rosemary Hunter, *Submission* No. 5 at para 2.3.2-2.3.3; *Hansard*, SLCLC, 14 August 1995 at p.116.

34 *Hansard*, SLCLC, 14 August 1995 at pp. 115-6 per Ms Rosemary Hunter.

35 *Hansard*, SLCLC, 14 August 1995 at p.116 per Ms Rosemary Hunter.

36 Ms Rosemary Hunter, *Submission* No. 5 at paras 2.6.1-2.6.2.

complainant's group that is disadvantaged.[37] Ms Hunter indicated a preference for the following option, set out in paragraph 2.6.1 of her written submission:

> For the purposes of the Act, a person ('the discriminator') discriminates against another person (the 'aggrieved person') on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.[38]

1.45 Mr John Basten QC did not agree with Ms Hunter's redraft of the indirect discrimination provisions. Mr Basten QC said:

> Quite frankly, I do not think that Ms Hunter's draft takes us very much further than that because it looks at other people of the same sex....Indirect discrimination is difficult, and there is no way you can avoid a proportionality approach.[39]

1.46 The Attorney-General's Department also took a different view to Ms Hunter on the appropriate drafting of the indirect discrimination provisions. The Department stated:

> [B]y leaving the SDA as it stands, the disadvantage is that it does not appear to be an effective means of combating indirect discrimination...the provision is little used and the jurisprudence on it is not well developed.[40]

The Base Group

1.47 A further criticism of the new definition of indirect discrimination proposed in the Bill is that it will throw open the issue of 'base groups'.[41] The

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37 Ms Jenny Morgan, Associate Professor, School of Law, University of Melbourne, *Submission* No. 18 at p. 3 supported Ms Hunter's arguments. She said: '[t]he new definition fails to capture the group-based harm of indirect discrimination.'

38 Ms Rosemary Hunter, *Submission* No. 5 at paras 2.6.1-2.6.2; *Hansard*, SLCLC, 14 August 1995 at p.116. Ms Hunter also suggested an option based on the definition provided in section 5(1) of the *Discrimination Act 1991* (ACT): For the purposes of this Act, a person (the 'discriminator') discriminates against another person (the 'aggrieved person') on the ground of [sex] if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons because of their sex. Ms Hunter referred to the Attorney-General's Department, *Proposals to Amend the Sex Discrimination Act 1984,* Discussion Paper, October 1993, at p. 17, for this option.

39 *Hansard*, SLCLC, 14 August 1995 at pp. 116-117 per Mr John Basten QC.

40 Attorney-General's Department, *Proposals to Amend the Sex Discrimination Act 1984,* Discussion Paper, October 1993, p. 16.

concept of the 'base group' was explained in *Australian Iron and Steel Pty. Ltd. v Banovic.*[42]

1.48 The base group is the benchmark against which the proportion of persons who complied with the defining characteristic are calculated. It is the group to whom the employer applies the supposed sex-related criterion.[43] The High Court in *Banovic* noted that the base group for comparison will vary from case to case depending on the circumstances of the case and the nature of the condition or requirement imposed.[44] The group might be the entire population or the employees in one particular workplace.

1.49 The tribunal hearing a case at first instance is required to determine for itself the appropriate base group in that case.[45] The decision to select a particular base group involves a question of law, because the base group selected must actually allow the tribunal to determine whether group membership is a significant factor in a person's ability to comply with the requirement or condition.[46] Once a base group is selected, the persons in the base group of the complainant's status provide the numbers for one side of the proportion calculation, and the persons in the comparable base group provide the numbers for the other side of the proportion calculation.[47]

1.50 See paragraphs 1.32 -1.33 for further explanation of the concept of the 'base group' as formulated in the *Australian Iron and Steel Pty. Ltd. v Banovic* case.

1.51 Identifying the relevant groups of persons who should form the base groups for the purpose of determining whether there has been indirect discrimination has been a difficulty in the case law. Ms McLean argued that

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41 *Hansard*, SLCLC, 14 August 1995 at p. 95 per Senator Ellison and Ms Annie McLean.

42 *Australian Iron and Steel Pty. Ltd .v Banovic* (1989) 169 CLR 165 per Brennan J at 169, Deane and Gaudron JJ at 178, Dawson J at 187, McHugh J at 199.

43 *Australian Iron and Steel Pty. Ltd.v Banovic* (1989) 169 CLR 165 per Brennan at 169.

44 *Australian Iron and Steel Pty. Ltd .v Banovic* (1989) 169 CLR 165 per Brennan J at 169, Deane and Gaudron JJ at 178, Dawson J at 187, McHugh J at 199.

45 *Australian Iron and Steel Pty. Ltd .v Banovic* (1989) 169 CLR 165 per Deane and Gaudron JJ at 178.

46 R. Hunter, *Indirect Discrimination in the Work Place,* Federation Press, Leichhardt, 1992 at p 207.

47 R. Hunter, *Indirect Discrimination in the Work Place,* Federation Press, Leichhardt, 1992 at p 207.

under the Bill, identification of the base group has been specifically left to the circumstances of the case.[48]

1.52 The definition as it stands does not spell out the notion of a base group, however, the proportionality test at least raises an inference about which men and which women should form the basis for the calculation. Under the Bill, the breadth of the base group is unclear. If the new test were to require the base group to be effectively the whole population or the individual this could produce unfair results.

1.53 For example, a company may have a practice which disadvantages women in a particular town. When considered globally it might not disadvantage women generally. Presently the test of indirect discrimination could take women in the town as the relevant base group. Alternatively, if the individual is the base group then the section effectively ignores group effects. If a complainant works in a small workplace, gathering meaningful statistical data may be impossible, whereas, in a large workplace it may be too expensive.

Conclusion and Recommendation

1.54 The Committee agrees with Ms Hunter that the new definition of indirect discrimination does not achieve its objective, and is merely direct discrimination in another guise. The Committee recommends that clauses 6, 8 and 9 of the Bill be amended, according to the principle raised by Ms Hunter, to reflect the discrimination against the aggrieved person as a member of a group, rather than as an individual. Consequential amendments should be made to clause 10.

The 'reasonableness' defence - reversal of the onus of proof?

The existing onus and the proposed amendment

1.55 The Bill will also insert a reasonableness defence to indirect discrimination (the proposed section 7B). The present section makes the unreasonableness of the 'requirement or condition' an element of the definition of indirect discrimination at paragraph 5(2)(b).[49]

1.56 Clause 10 will insert the proposed section 7B:

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48 *Hansard*, SLCLC, 14 August 1995 at p. 95 per Ms Annie McLean.

49 The corresponding provisions relating to discrimination on the grounds of marital status and pregnancy are at paragraph 6(2)(b) and paragraph 7(2)(b), respectively.

> 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

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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

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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

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

Appendix 1

Submissions Released for Publication

APPENDIX 1

SEX DISCRIMINATION AMENDMENT BILL 1995

Sub No.	Individual/Organisation	Date of Submission
1	Ms Marian Sawer AO, Associate Professor in Politics University of Canberra - Faculty of Management, ACT	14.7.95
2	Mr Scott S. Carter, Solicitor to the Society Queensland Law Society Inc., QLD	14.7.95
3	Mr Reg Hamilton, Legal Officer Australian Chamber of Commerce and Industry, VIC	17.7.95
4	Mr John Basten QC, Barrister, NSW	22.7.95
5	Ms Rosemary Hunter, Senior Lecturer in Law The University of Melbourne, VIC	27.7.95
6	Mr Alan Rose, President Australian Law Reform Commission, NSW	28.7.95
7	Mr Michael L. Abbott QC, President South Australian Bar Association, SA	31.7.95
8	Mr Milen White, Assistant General Manager Human Resources & Corporate Administration Branch, ACT	2.8.95
9	Mr David M. Munro, Secretary and General Counsel M.I.M. Holdings Limited, QLD	7.8.95
10	Ms Mary McNish, Secretary NSW Council for Civil Liberties Inc., NSW	8.8.95
11	Ms Rohan Squirchuk, Executive Director Council for Equal Opportunity in Employment, VIC	8.8.95
12	Ms Kathleen Townsend, First Assistant Secretary Office of the Status of Women, ACT	8.8.95
13	Mr Ian Dearden, President Queensland Council for Civil Liberties, QLD	10.8.95
14	Ms Barbara Horsfield, National Executive Officer Girl Guides Association of Australia, NSW	11.8.95
15	Ms Ingrid McKenzie, National Co-ordinator Women's Electoral Lobby Australia Incorporated, ACT	16.8.95
16	Mr John Basten, QC, Barrister-at-Law, NSW	25.8.95
17	Ms Joan Sheedy, Senior Government Counsel Human Rights Branch - Civil Law Division Attorney-General's Department, ACT	23.8.95
18	Ms Jenny Morgan, Associate Professor The University of Melbourne, VIC	29.8.95

Appendix 2

Details of Meetings and Witnesses

APPENDIX 2

Details of Meetings and Witnesses

PUBLIC HEARING: 14 August 1995

Senate Legal and Constitutional Legislation Committee

Reference: Sex Discrimination Amendment Bill 1995

Venue: Parliament House, New South Wales

WITNESSES:

Attorney-General's Department

Ms Annie McLean
Principal Counsel
Sex Discrimination and ILO 156 Section

Mr Colin Neave
Deputy Secretary

Ms Indira Rosenthal
Counsel
Human Rights Branch

Ms Joan Marie Sheedy
Senior Government Counsel
Human Rights Branch

Girl Guides Association of Australia

Mrs Barbara Horsfield
National Executive Officer

Mr John Basten QC
Barrister

Australian Chamber of Commerce and Industry
Mr Reginald Sydney Hamilton
Manager, Labour Relations

University of Melbourne

Ms Rosemary Claire Hunter
Senior Lecturer, Law Faculty

Council for Equal Opportunity in Employment

Ms Rohan Squirchuk
Executive Director

Women's Electoral Lobby

Ms Jayeann Carney

Women Lawyers Association of New South Wales (Inc)

Mrs Kerrie Leotta
President

Australian Law Reform Commission

Ms Susanne Patricia Tongue
Deputy President

Human Rights and Equal Opportunity Commission

Ms Susan Walpole
Sex Discrimination Commissioner

PRIVATE MEETING

29 August 1995
Commenced - 5.45 pm
Adjourned - 6.54 pm

Present - Senators Cooney, Spindler, Ellison, McKiernan, Neal, O'Chee and Abetz.

- Discussion of Chair's draft of report on *Sex Discrimination Amendment Bill 1995.*
- Agreement to seek extension until 21 September 1995.

PRIVATE MEETING

13 September 1995
Commenced - 5.40 pm
Adjourned - 6.00 pm

Present - Senators Cooney, Spindler, Ellison and McKiernan.

- Discussion of Chair's draft of report on *Sex Discrimination Amendment Bill 1995.*

PRIVATE MEETING

14 September 1995
Commenced - 1.56 pm
Adjourned - 2.30 pm

Present - Senators Cooney, Spindler, Ellison and McKiernan.

- The Committee resolved to adopt the Report.

PRIVATE MEETING

19 September 1995
Commenced: 11.35pm
Adjourned: 12.15pm

Present: Senators Cooney, Ellison, McKiernan, O'Chee, Abetz

- The Committee released remaining submissions.