# PROTECTION OF MINORITIES AND EQUAL OPPORTUNITIES

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## I. INTRODUCTION

The right to equality of opportunity is but one of the basic human rights which can apply for the protection of minorities. Nevertheless, this paper will deal exclusively with equal opportunity and anti-discrimination laws. This area has been the subject of much legislation, case law and administrative action in Australia over recent years. As a result there have necessarily been some changes in the expectations of 'minority' groups and people who deal with them.

Before I discuss the extent of these changes, there are a number of preliminary matters to be traversed. This paper will then discuss the extent to which the expectations and aspirations of the various 'minority' groups have been affected by equal opportunity laws in this country.

I have placed the word 'minority' in quotation marks for the group which has benefited most from equal opportunity laws, namely women, are not in fact a numerical minority. Nevertheless, a discussion of sex discrimination will inevitably occupy a major portion of this paper.

## II. COMMON MISCONCEPTIONS ABOUT DISCRIMINATION

For most of my working life I have practised in traditional areas of the law. I regard it as a privilege also to have been involved in more socially oriented fields, such the area of equal opportunities. It is a subject which is frequently misunderstood by those who have not had cause to think about discrimination, including many lawyers.

It is pertinent here to mention a few misconceptions with which I have been confronted since I have been working in this field. Undoubtedly the most prominent and the most basic is the idea that anti-discrimination laws are

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designed to remove the differences between people. This is represented in the comment which, with variations, I receive often from male colleagues:

> [b]ut women are different. That's why I love them. I don't want my wife to be the same as me. In fact, I think she's much better than me.

If questioned closely, one frequently finds that the wife's superiority is confined to the domestic sphere; but that is another matter to which I shall return shortly.

The notion that anti-discrimination laws are committed to pressing people into the same mould, regardless of sex, race, marital status or other differences, could not be further from the truth. The essence of equality of opportunity is that each person should have the right to develop his or her capacities to the utmost, free of restrictions arising from stereotyped assumptions which are based on the person's status and which are irrelevant to his or her actual abilities. Far from being designed to eliminate differences between people, they are committed to enabling people to express their individuality by giving them the opportunity to achieve their own goals and aspirations.

Another associated misconception is that those who promote equality of opportunity, and particularly members of the women's movement, are dedicated to rescuing women from a domestic role, whether the women want to be rescued or not. In doing so, they themselves are perceived as discriminating against women who want to stay at home. Once again, this is the contrary of what is intended by equal opportunity laws. Take, for example, the lawyer's wife who is domestically superior. If home-making is the field in which she wishes to excel, then she is fulfilling her own aspirations and has achieved equality of opportunity. The anti-discrimination laws are in no way aimed towards undermining this. The contrary is the case. It is women whose aspirations lie elsewhere who are within the purview of this legislation.

Another misconception is that discrimination no longer exists. A number of people have made the following type of comment:

> I accept that there has been discrimination in the past. But that's all over now. There are no barriers left to prevent women or migrants or anyone else from doing precisely what they want.

To people who hold that view, I can only say, read on.

Finally, a degree of resentment is expressed that women and protected minorities gain favourable treatment, sometimes to the detriment of people who have done nothing to deserve it. This raises very difficult questions about affirmative action, which will be discussed later.

## III. LEGISLATIVE HISTORY

Australia has not been in the vanguard in relation to equal opportunity legislation. It was not until well into the 1970s that the first attempts were made to address the problem of discrimination in this country. This was well after anti-discrimination legislation had been enacted in other countries such

as England, Canada, the United States of America and New Zealand. It was the Federal Government which took the initiative. In 1973, committees on discrimination in employment were established in implementation of the International Labour Organisation Convention Number 111. These had no legislative basis and no legal powers of dispute resolution. They have recently been disbanded.

The first legislative step in Australia was the introduction into Federal Parliament, in 1973, of the Racial Discrimination Bill at the same time as the Human Rights Bill. Both bills had a turbulent passage. The Racial Discrimination Act was not passed until 1975 and the Human Rights Bill fell by the wayside.

The Racial Discrimination Act was largely modelled on the New Zealand Race Relations Act 1971 and the United Kingdom Race Relations Act 1968. It relied heavily on conciliation and established a Commissioner for Community Relations, with considerable powers relating to the conciliation and settlement of complaints. The Act was substantially amended in 1986, when the Office of the Commissioner for Community Relations was abolished and that of Race Discrimination Commissioner established. Unconciliated disputes are now referred for resolution to the newly established Human Rights and Equal Opportunity Commission, headed by Justice Einfeld of the Federal Court.

Anti-discrimination legislation has consistently provided a fertile field for important constitutional cases. In passing the Racial Discrimination Act, the Federal Government was, for the first time, assuming power in relation to a largely domestic matter by reference to its external affairs power under section 51 (xxix) of the Constitution. This was done upon the basis that it was necessary for the implementation of an international treaty. The considerable doubts as to the constitutional validity of the legislation were resolved in its favour by a four to three majority of the High Court in *Koowarta* v. *Bjelke-Petersen*.[1] This was a precursor to the even more famous *Franklin Dam case*, decided the following year.[2]

In 1981, the Commonwealth passed the Human Rights Commission Act. This scheduled the International Covenant on Civil and Political Rights and international declarations on the rights of children, disabled persons and mentally retarded persons. The Human Rights Commission was empowered to enquire into any breaches of human rights and, where appropriate, to endeavour to effect settlement of complaints.

In 1984, the Commonwealth passed the Sex Discrimination Act. The position of Sex Discrimination Commissioner was established, with power to conciliate individual complaints. Unresolved complaints, as with racial

1 (1982) 153 CLR 168.
2 *Commonwealth* v. *Tasmania* (1983) 158 CLR 1.

discrimination, are now referred to the Human Rights and Equal Opportunity Commission.

In 1986, the Human Rights Commission Act was repealed and replaced by the Human Rights and Equal Opportunity Commission Act 1986 (Cth). The new Commission has wide advisory, research and educative powers. It can also enquire into allegations of discrimination on the grounds of race, colour and sex.

Finally, the Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth) was enacted. This will be discussed later.

Turning, then, to the States. Typically, South Australia was the first State to introduce equal opportunity legislation. In 1975 the Sex Discrimination Act was passed in that State, followed in 1976 by the Racial Discrimination Act. Those Acts have now been repealed and replaced by the Equal Opportunity Act 1984 (SA).

In 1977, the Anti-Discrimination Act was passed in New South Wales and the Equal Opportunity Act in Victoria. The latter Act was repealed and replaced in 1984 by a further Equal Opportunity Act. Indeed, the New South Wales Act is the only piece of early anti-discrimination legislation which remains today substantially in its original form. Even so, it has undergone some important amendments and additions. The grounds of discrimination which were originally rendered unlawful, namely race, sex, and marital status, have been augmented by the grounds of physical and intellectual impairment, and homosexuality. The other significant addition to the New South Wales legislation was the introduction, in 1980, of Part IXA. For the first time in Australia this gave legislative sanction to the concept of affirmative action. A Director of Equal Opportunity in Public Employment was established, with substantial powers to implement affirmative action programmes within the New South Wales Public Service.

The most recent Australian State to introduce anti-discrimination legislation was Western Australia, which enacted its Equal Opportunity Act in 1984, effective from July 1985.

The overall position is as follows: The Commonwealth has specific legislation relating to racial and sexual discrimination. Each of the States, except Tasmania and Queensland, has its own anti-discrimination legislation, dealing with the grounds of race, sex, and marital status. In addition, the New South Wales Act covers physical and intellectual impairment and homosexuality; the Victorian Act covers physical and intellectual impairment, and political and religious beliefs; the South Australian Act covers physical impairment and sexuality and the Western Australian Act covers religious and political conviction and pregnancy.

An interesting fact emerges from this analysis. With two exceptions, every piece of equal opportunity legislation in this country has been introduced and enacted by a Labor government. The two exceptions (both now repealed) are: the Equal Opportunity Act of 1977 (Vic.), which was introduced by the Hamer government and the Human Rights Commission Act of 1981 (Cth). Otherwise, legislation introduced by a Labor government has lapsed when a

Liberal government has come into power, as happened in Tasmania in 1978. Presumably, this accounts for the absence of equal opportunity legislation from that State and from Queensland.

## IV. LEGISLATIVE SCHEME

Equal opportunity legislation in Australia is generally 'complaints oriented'. In other words, a discriminatory act normally comes to the notice of the relevant anti-discrimination agency only if it is made the subject of a specific complaint. In most cases, the complaint must be made by the victim of the alleged discrimination or by someone on the victim's behalf. There is provision in some legislation for matters to be referred to the anti-discrimination agencies, by, for instance, the relevant Minister. However, this has rarely been invoked in relation to specific allegations of discrimination.

In order to understand the operation of equal opportunity laws, it is necessary to have some knowledge, first, of the general procedures for dealing with complaints, and secondly of the statutory definitions of 'discrimination'.

### A. COMPLAINTS PROCEDURES

For obvious reasons, I am much more familiar with the complaint procedures in New South Wales than those adopted elsewhere. Accordingly, I propose to describe the New South Wales system, while pointing out any significant variations in other jurisdictions. Fortunately, the general scheme is virtually identical in all States.

As in all jurisdictions, two bodies are established under the New South Wales legislation: the Anti-Discrimination Board and the Equal Opportunity Tribunal. The Board has broad educative and research functions in all areas relating to the prohibited grounds of discrimination. In addition, the President of the Board is the person to whom all individual complaints of discrimination are to be made by members of the public.[3] In Victoria, South Australia and Western Australia, the person with equivalent powers is described as the Commissioner for Equal Opportunity.

Each complaint must be made within six months of the alleged act of discrimination (twelve months in Victoria and Western Australia). In all States, the President (or Commissioner), has power to extend the time limit.[4] The President is obliged to investigate each complaint.[5] If he or she considers that it is "frivolous, vexatious, misconceived or lacking in substance" then he or she can decline to entertain it. In that event, the complainant can require that it be referred to the Equal Opportunity Tribunal for resolution.[6]

3 Anti-Discrimination Act 1977 (NSW) s.88(1).
4 *Id.*, s.88(3) and (4).
5 *Id.*, s.89.
6 *Id.*, ss 90, 91.

There is a strong emphasis on conciliation in all equal opportunity legislation. If at all possible, the President (or Commissioner) must attempt to resolve complaints by conciliation. To that end, the President is empowered to require the attendance of the parties, either together or separately.[7] In practice, the great majority of complaints are resolved at this stage. Most are conciliated, although some are found to be unsubstantiated, and a significant number are withdrawn.

In general, it is only if the President considers that a complaint cannot be conciliated, or if attempts at conciliation have failed, that complaints are referred to the Equal Opportunity Tribunal for resolution. In that event, nothing which has occurred during the conciliation process is admissible in evidence before the Tribunal.

The Equal Opportunity Tribunal, called the Equal Opportunity Board in Victoria, deals only with complaints referred to it by the President. There is also power for the Minister to refer matters to it, but this has never happened in New South Wales. The Tribunal consists, in each individual case, of a presiding member and two lay members. Most legislation requires that the presiding member be a judge, a magistrate or a senior member of the legal profession, for the Tribunal's functions are almost entirely judicial. Its hearings are generally held in public, although there is now power to hold them in camera.[8] The Tribunal is bound to act judicially, but is not confined to strict rules of evidence. It applies the civil onus of proof. Parties are entitled to legal representation only by leave of the Tribunal (as of right in South Australia). In practice, however, both parties are legally represented in the great majority of cases. There is power in each jurisdiction for the Tribunal to treat certain complaints as representative complaints (or 'class actions', as they are called in the United States of America).

If the Tribunal finds a complaint substantiated, it can award damages (of up to $40,000 in New South Wales and Western Australia), can provide injunctive relief, or can order the respondent to perform positive acts towards redressing the complainant's losses. In New South Wales and Western Australia, the Tribunal can also declare void any contract or agreement which contravenes the anti-discrimination legislation.[9] In all States, appeals from the Tribunal's determinations lie as of right to the Supreme Court. In South Australia, the appeal operates as a complete review of the Tribunal's decision.[10] In other States the appeal is restricted to questions of law.

I want it to be clear that the above analysis is an entirely general and superficial description of the procedures adopted in anti-discrimination cases. It by no means purports to deal with all the procedural measures, and a large

7 *Id.*, s.92.

8 *Id.*, s.110A. In New South Wales this power was granted after a much publicised sexual harassment case, in which the prurient nature of the media interest almost completely obliterated the important issues at stake.

9 Note 3 *supra*, s.113. Equal Opportunity Act 1984 (WA) s.127.

10 Equal Opportunity Act 1984 (SA) s.98.

number of important provisions have not been mentioned. Nor have I referred to the Federal procedures. In fact, there are co-operative arrangements between each State and the Commonwealth whereby complaints under the Federal legislation are handled by the State Equal Opportunity Commissioners (or the Anti-Discrimination Board in New South Wales). In any event, the Federal procedures are generally similar to those in the States. Complaints are initially made to the Race Discrimination Commissioner or the Sex Discrimination Commissioner, as the case may be, or to the State agencies on their behalf. Unconciliated complaints are then referred to the Human Rights and Equal Opportunity Commission, which has powers similar to those of the State Equal Opportunity Tribunals. An important difference is that determinations of the Commission are not binding on the parties, and enforcement proceedings must be taken in the Federal Court. In practice, however, the parties have, in most cases, abided by the Commission's decisions, thereby obviating the need for recourse to the Court.

## B. DISCRIMINATION DEFINED

All anti-discrimination legislation in Australia, with the single exception of the Racial Discrimination Act 1975 (Cth), proscribes both direct and indirect discrimination, within particular fields.

Using sex discrimination as an example, direct discrimination occurs if, on the ground of a person's sex, that person is treated less favourably than someone of the opposite sex is or would be treated in comparable circumstances.

The phrase 'on the ground of . . . sex' includes discrimination on the ground of a characteristic generally appertaining to persons of that sex, as well as discrimination on the ground of a characteristic which is generally imputed to persons of that sex. The former category, a characteristic generally appertaining to persons of that sex, has been held to include the exclusive propensity of women to become pregnant. The latter category, a characteristic which is generally imputed to persons of that sex, enables the legislation to cover situations where the differential treatment is based upon stereotyped notions, not necessarily grounded in fact, about one or both of the sexes. It would include, for example, any preference for male employees in technical industries which was based upon the assumption that women were less technically adept than men.

The requirement that the less favourable treatment be 'on the ground of' sex (in its extended meaning) is satisfied if sex is a significant reason for the less favourable treatment. It need not be the only reason. The fact, however, that sex must be at least one of the reasons for the differential treatment, means that in all complaints of direct discrimination there is almost certain to be some analysis of the factors leading to the alleged discriminator's decision to treat the two sexes differently. To this extent, therefore, there is an element of subjectivity in relation to direct discrimination.

Indirect discrimination occurs when decisions which appear to be neutral on their face, in fact have the effect of preferring one sex over the other. If there is no reasonable basis for the preferential treatment, then it amounts to discrimination. Specifically, the legislation provides that discrimination occurs if a condition or requirement is imposed with which the complainant cannot comply, with which a substantially higher proportion of the opposite sex can comply and which is not reasonable in the circumstances. An unnecessary minimum height requirement would fall within this category.

Equal opportunity legislation does not purport to proscribe all discrimination, be it direct or indirect. It is only if the discrimination is based on one of the prohibited grounds (sex, race, marital status etc.) and within certain stipulated areas (employment, education, the provision of goods and services, accommodation and registered clubs) that the discrimination becomes unlawful. Even then there are a number of significant exceptions and exemptions from the legislation. A contentious one in virtually all jurisdictions exempts superannuation schemes from the operation of the Act. Less contentious is the 'genuine occupational qualification' exception in relation to both sex and racial discrimination, such as the employment of women to model female garments.

## V. DISCRIMINATION ON THE GROUND OF SEX

Equal opportunity laws have had a substantially different impact according to the minority group involved, a reflection of the obvious fact that each group has different problems and needs. The greatest impact has been in the area of sex discrimination. More complaints have been lodged on this ground than any other, mainly by women. Accordingly, this is an appropriate starting point for this discussion.

An appropriate commencing point in terms of time is the mid-1970s, when anti-discrimination legislation was first introduced in Australia.

In 1975, the Royal Commission on Human Relationships was collecting evidence on a wide range of subjects, including the problems faced by women and other disadvantaged groups. The evidence relating to sex discrimination covered a large area of life experiences. Central, however, was the problem of women at work. The education system was accused of fostering different expectations for boys and girls, thereby restricting girls in their subsequent career choices and employment opportunities. Employers were accused of systematically excluding women from the better paid and higher status jobs and restricting their opportunities for promotion. Women were conspicuously few in the hierarchies of power, such as politics, the judiciary, the churches and the professions. Their status was frequently seen to derive from the position of the men in their families, rather than from their own activities, a phenomenon rarely seen in reverse.[11]

11 Royal Commission on Human Relationships, *Final Report* (1975) vol. 5, 45-51.

How have anti-discrimination laws affected this? The answer to this question must be, only a little, and yet a lot. In order to explain this contradictory proposition, I must first say something about the nature of the Australian workforce, and then return to the general scheme which exists in this country for dealing with complaints of discrimination.

Australia has one of the highest segregated workforces in the western world. In 1980, it was the most segregated of all labour forces surveyed by the O.E.C.D. This means that there is substantial separation between areas which are female-dominated and those which are male-dominated. By way of illustration: in 1980, 63.5% of women within the workforce were engaged in the 'feminine' fields of clerical work, sales, service, sport and recreation. Only 10.6% of male workers were engaged in these occupations. The female-dominated fields have invariably been lower in status and remuneration than male-dominated ones. As a result, women earn significantly less than men: the average weekly earnings of full-time women workers are only 76% of the male equivalent. Moreover, the female occupations are more technologically vulnerable, and have thus been declining at a much faster rate than 'masculine' occupations.

The dramatic difference between the position of men and women in the workforce reflects much more than the mere preferment of male employees by individual employers, whether it be deliberate or inadvertent. It reflects what is described as 'systemic' or 'structural' discrimination. Sex discrimination has played such an integral part in the history of our workforce that it is built into its very structure.

One of the main criticisms of our complaint-based anti-discrimination system is that it is largely ineffective to remedy structural discrimination. This is particularly so in relation to complaints of direct discrimination, which normally focus upon the acts and intentions of individual employers towards particular employees. These are no doubt of very great importance to the immediate parties, but the rectification of such individual complaints is unlikely to have any real effect upon discrimination which is built into the structure of the workforce.

A further limitation on the potential impact of direct discrimination laws arises from the requirement of comparability. A complainant must show that he or she has been accorded less favourable treatment at the hands of the respondent than would have been meted to a person of the opposite sex in similar circumstances. If the respondent employs only women in a particular field, then, no matter how lowly and demeaning their conditions may be, they can have no basis for complaining of discrimination. For they lack evidence as to how the employer would have treated men in similar circumstances.

This is a significant limitation. For in our highly segregated workforce, there are a number of occupations which are confined almost exclusively to women. These are likely to be low in salary and poor in conditions, for that is a common feature of female-dominated occupations. Yet the very fact that these occupations are exclusive to women deprives the women of the right to complain of discriminatory treatment.

Turning to the concept of indirect discrimination. Unlike proscriptions on direct discrimination, the laws relating to indirect discrimination have some capacity to strike at fundamental discriminatory employment structures or policies. But such complaints are rare in Australia; indeed, there has been only one successful case involving a complaint of indirect discrimination on the ground of sex. That was a decision of the New South Wales Equal Opportunity Tribunal in *Najdovska* v. *Australian Iron and Steel Pty Ltd.*[12] At the time of writing it is the subject of an appeal to the New South Wales Court of Appeal and it would be inappropriate to discuss it at length. However, it is an important case and it illustrates how complaints of indirect discrimination can strike at apparently neutral although inherently discriminatory work practices. The complainants in that case were thirty-four current or former employees of the respondent company. They complained, first, of direct discrimination in that there had been a much longer delay between their applying for jobs and obtaining them than there had been for comparable male employees. Secondly, they complained of indirect discrimination in that the employer, in response to difficulties in the steel industry, commenced a policy of 'reverse gate' retrenchments. This policy was neutral on its face, but in fact had the effect of operating unfavourably to the women. They had less seniority than their male counterparts as a result of the previous delays in their hiring. The requirement of 'last on, first off', was not reasonable, the Tribunal held, as the disparate impact which the apparently neutral retrenchment policy had upon the women was itself caused by the unlawful discrimination which had preceded it.

The Tribunal in that case awarded the complainants a total of well over one million dollars by way of damages, by far the largest damages award in any equal opportunity case in this country. That in itself has had substantial impact. As in the United States of America, where discriminatory practices are generally recognised as potentially uneconomic, so too in Australia employers must now start to realise that the infringement of equal opportunity laws can have serious financial consequences.

We will probably see many more complaints of indirect discrimination in this country within the next decade or so, for we tend to follow North American trends in this area of the law, and 'disparate impact' cases (as they are called in the United States of America) have become commonplace there. These cases are not only capable of striking at discriminatory employment practices, they also have a strong educative function, for they illustrate how discrimination can be built into a system without any outward signs of unequal treatment.

I return, then, to the fundamental question raised above, namely to what extent have individual expectations been changed by sex discrimination laws? The overall answer must be only a little, for the general scheme of these laws is not adequate to deal with the more pervasive forms of discrimination which

12 (1985) EOC 92-140.

disadvantage the largest numbers of women. On the other hand, within those limitations, a substantial amount has been achieved under our equal opportunity laws — considerably more than might have been anticipated, given the inherent restrictions in our complaint-based scheme.

A large measure of this is due not to any legal process, but to the efforts and energies of the people charged with administering our equal opportunity laws. The President of the New South Wales Anti-Discrimination Board and her federal and interstate counterparts all have important research and educative functions. Would-be discriminators have been informed of the consequences of infringing the relevant legislation. Efforts have been made to change community attitudes generally. All these steps ultimately produce change, sometimes indiscernably, but sometimes very tangibly.

Decided cases themselves can perform an important educative role. One of the earliest sex discrimination cases in this country arose from Deborah Wardley's attempts to become a trainee pilot with Ansett. In fact there were two cases. The first arose out of her complaint that she had been passed over for traineeship in favour of males who were less qualified than she. That was heard by the Victorian Equal Opportunity Board in 1979.[13] The basis of the claim was not disputed by the respondent. The only reason advanced for its failure to employ her was the probability that she would have a higher absentee rate than men because of the likelihood of her becoming pregnant. The Board, not surprisingly, found that there had been unlawful discrimination and ordered Ansett to accept her amongst its next batch of trainee pilots. Ansett obeyed the order but then sought to dismiss her. It relied on a clause in the agreement between the company and its pilots, which gave each party the right to terminate the employment on seven days notice. The agreement had the same effect as an award and was therefore a Commonwealth law under section 109 of the Constitution. Ansett argued that the State anti-discrimination legislation was inconsistent with the agreement and therefore invalid insofar as it sought to restrict the grounds upon which a pilot could be dismissed. This was the first of many anti-discrimination cases involving the application of section 109 to come before the High Court. In *Ansett Transport Industries (Operations) Pty Ltd* v. *Wardley*,[14] the Court, by majority, found that there was no inconsistency. The majority said that the Agreement did not address itself to the grounds upon which the employment could be terminated. It could therefore sit consistently with the restrictions upon dismissal imposed by the State Equal Opportunity Act.

I have discussed the Wardley case quite fully for two reasons. The first is because of the educative role it played. It was highly publicised at the time and must have brought home to many people, who may not otherwise have thought about it, the enormous obstacles encountered by women who try to

13 *Wardley* v. *Ansett Transport Industries (Operations) Pty Ltd* (1979) EOC 92-002.
14 (1980) 142 CLR 237.

break new ground. The other reason is to illustrate how things have changed, even in the few years since 1980. I am not referring to changes in discriminatory practices — unfortunately, they still continue apace. But I think it unlikely that an employer today would be as blatantly discriminatory as Ansett was in its treatment of Miss Wardley. In other words, open sex discrimination is less fashionable now than it used to be.

I do not seriously suggest that this is because of any fundamental changes in community attitudes. It is much more likely to be caused by pragmatic considerations: no employer wants to be faced with a discrimination complaint if this can be avoided. Nevertheless, it is an early step towards the changing of attitudes, and is worthy of mention for that reason.

Most equal opportunity legislation in Australia provides for the making of representative complaints, or 'class actions', as they are called in the United States of America. This is a potential tool for exposing large-scale discriminatory practices, but it has rarely been invoked in Australia. Indeed, the only case of any real significance involving a representative complaint was the recent New South Wales case of *Leves* v. *Haines*.[15] This was a complaint of sex discrimination in the area of education. It was well-publicised locally, and most New South Wales lawyers will be familiar with it. I must give it some prominence, however, for it was an extremely important case in a number of respects. The complainant, Melinda Leves, was a schoolgirl in Year Ten at a single-sex public school in the Sydney area. Her twin brother was in the same year at a nearby single-sex boys' school. Amongst the boys' elective subjects for the School Certificate and the Higher School Certificate were the technologically-oriented subjects of technics and technical drawing (described as 'industrial arts' subjects). These were absent from the girls' school, which had, instead, the domestically-oriented subjects of domestic science and textiles and design (described as 'home economics' subjects). The evidence showed that this pattern was common to all single-sex public schools. Only in co-educational schools were the industrial arts subjects available to girls and the home economics subjects available to boys. There was a considerable body of evidence that the industrial arts subjects provided a far superior basis for productive employment opportunities and for tertiary education. Accordingly, it was held by the Equal Opportunity Tribunal, and upheld in the New South Wales Court of Appeal[16] that the relevant Minister had discriminated against Melinda by denying her access to the industrial arts subjects.

This case had considerable social and legal significance. It revealed how our education system has, at least in part, been actually creating conditions which lead to women being disadvantaged in the workforce. For the uncontroverted evidence in the case showed that whereas the industrial arts subjects equipped students for a wide variety of jobs in non-dwindling areas

15 (1986) EOC 92-167 (hereinafter the *Leves* case).
16 *Haines* v. *Leves* (1987) 8 NSWLR 442.

of the workforce, the home economics subjects trained them for the traditional female occupations which were already low in pay and status and were also diminishing in numbers.

The *Leves* case was a dramatic exception to the rule that complaints of direct discrimination are unlikely to have far-reaching effects upon discriminatory practices. In spite of disclaimers by the relevant Minister, the case has already resulted in a number of material changes in the New South Wales education system. And although these are unlikely to have much impact in the short-term, the long-term significance is enormous. The expectations of many future school children will, one hopes, be materially affected as a result of this case. It can, however, only have relevance to public education. Private schools will not be directly affected by this decision, as the statutory scheme makes the relevant proscriptions inapplicable to them. They are, in any event, specifically exempted from some anti-discrimination legislation.[17]

Before leaving the subject of education, I should mention one other area in which the New South Wales equal opportunity laws have been instrumental in changing policy in public schools, that of corporal punishment. Until recently, the caning of girls was forbidden in New South Wales public schools. However, boys over twelve could be caned in certain circumstances if stipulated procedures were followed. This led to a number of complaints by boys that they were being treated less favourably than girls; complaints which, on their face, would appear to have been well-founded. However, while the cases were still pending, the policy was changed and caning was formally forbidden in public schools in relation to both boys and girls. The cases were then discontinued, and have never come to hearing.

There have been significant changes over recent years in the intake of women into the professions. These are revealed by university statistics, showing a dramatic increase in the number and proportion of women studying, for instance, law, agriculture and veterinary science. I doubt, however, whether equal opportunity laws have had much to do with these changes. The increases commenced before the passing of these laws, and I think it more likely that they both emerged from a common cause; namely the increasing influence, since the early 1970s, of an articulate, resourceful and politically influential women's movement.

For the majority of women, however, those without the benefit of tertiary education, the changes have not been significant. Although the number and proportion of women in the workforce has increased, their relative conditions have remained substantially unaltered. This is in spite of the fact that sex-segregated job advertising is now illegal, as is open preferment for one sex over the other unless justified by a job-related reason. But it is relatively easy for an employer to conceal a discriminatory hiring policy by giving non-discriminatory reasons for it. Not that this can continue indefinitely,

17 *Eg.* Anti-Discrimination Act 1977 (NSW) s.31A(3).

particularly for larger employers. Employment statistics have been successfully used in discrimination cases in order to refute employers' denials of sex-based employment policies.[18]

Another, more significant qualification on the potential impact of equal opportunity laws is that they are, by their nature, totally ineffective to deal with the issue of child care which is probably the greatest single problem facing women entering the workforce. It is largely child care and its associated difficulties which have led to women's under-participation in the general workforce and over-participation in part-time work. The solution lies well outside the ambit of anti-discrimination laws and of this paper. Until that problem is solved, a substantial limitation will remain on the extent to which any sex discrimination laws can assist women in the workforce.

Equal opportunity laws cover not only the commencement of employment but also the conditions under which it is maintained and the circumstances in which it is terminated. This is how the issue of sexual harassment in the workplace falls within the ambit of these laws.

As recently as 1983, I presided over the first sexual harassment case ever to be heard outside North America.[19] The facts of that case are of no great interest, in spite of the intense media coverage at the time. The real significance lay in the finding that sexual harassment at work could amount to unlawful discrimination. The essence of this finding was that, if unwanted sexual approaches became an unwelcome feature of the workplace, then they could constitute 'less favourable treatment' on the ground of sex. Similar findings have since been made in New Zealand and Victoria.[20] In addition, in the rush of enactments and re-enactments of anti-discrimination laws, in 1984, each jurisdiction, except New South Wales, has passed new sex discrimination legislation which specifically proscribes sexual harassment, not only in the workplace, but also in the fields of education (but not in Victoria) and in the provision of accommodation and goods and services (but not in the Commonwealth).

I remember a degree of scepticism being expressed by certain colleagues when the issue of sexual harassment first arose in the *Loder* case. It was laughed off by some as a trivial issue, a one-off situation which was interesting only because of the occupations of the parties and the titillating details which were published in the media. Nevertheless, I am told by administrators of the anti-discrimination agencies that the decision had great impact, both on employers and employees. It did, in fact, change attitudes and actions. To quote one of them: "a shudder ran through the boardrooms of Sydney". The decision certainly opened a floodgate of enquiries from women, who realised, probably for the first time, that they had an avenue of

18 *Najdovska* v. *Australian Iron and Steel Pty Ltd* (1985) EOC 92-140 (hereinafter the *Australian Iron and Steel* case).

19 *O'Callaghan* v. *Loder* [1983] 3 NSWLR 89 (hereinafter the *Loder* case).

20 *H* v. *E* (1985) EOC 92-137; *R* v. *Equal Opportunity Board; ex parte Burns* [1985] VR 317; *Orr* v. *Liva Tool and Diemakers Pty Ltd* (1985) EOC 92-126.

complaint in relation to sexual advances in the workplace. On the other hand, these enquiries are frequently not followed up. Women fear work-related consequences, and are not surprisingly reluctant to undergo the sort of ordeals which were suffered by the complainants in the *Loder* case. Nevertheless, a large number of complaints are made each year on the ground of sexual harassment. It is an issue which is now recognised as a serious problem in certain work environments. One can accordingly hope that there is a continuing change, both in attitudes and actions.

With regard to the termination of employment. As would be anticipated, this is very much within the ambit of anti-discrimination legislation. I have already mentioned the *Australian Iron and Steel* case,[21] in which the New South Wales Equal Opportunity Tribunal found that certain retrenchment policies amounted to unlawful discrimination. In addition, there have been at least two interesting cases relating to compulsory retirement ages for men and women. These have revealed that the disparate age eligibility for the age pension, which has apparently favoured women over men, has in fact led to some women being disadvantaged in their employment. For employers have been stipulating compulsory retirement ages according to pension eligibility, and have thus been putting off women at sixty and men at sixty-five. This has been found to be unlawful under both the New South Wales and Victorian legislation.[22] As a result of these cases, employers have generally been bringing their retirement ages for both men and women forward to sixty, rather than taking them back to sixty-five. This means, of course that men are being disadvantaged in that they are denied the extra five years of employment, without recourse to the age pension. That, however, is outside the purview of the relevant legislation.

I should digress here to say that it is a common response in the discrimination area for an employer, when faced with a complaint that one group is denied a benefit which is available to others, to withdraw the benefit altogether. This, of course, leads to hostility against the complaining party and his or her group, and is probably used as a powerful disincentive to complain at all.

Women have long been complaining about the structure and administration of superannuation funds, which has led to their receiving less benefits than men. However, as a result of successful lobbying from employer groups, superannuation and provident schemes have been exempted from all sex discrimination legislation in Australia (with the partial exception of the South Australian Act).

The one field, outside employment, where equal opportunity laws have had marked impact upon women, is in the area of registered clubs. Clubs which are designed as single-sex clubs are exempt. But those which accept both sexes

21 See note 18 *supra*.

22 *Allders International Pty Ltd* v. *Anstee* (1986) 5 NSWLR 47; *Tobin* v. *Diamond Valley Community Hospital* (1985) EOC 92-139.

for membership must now do so on equal terms. It used to be a common feature of many such clubs that only men would be afforded full membership. Women became 'associate' members. Certainly their subscription was lower, but they were denied the right to vote or otherwise to participate in the administration of the club. They were frequently denied access to certain areas in the club and were generally treated as second-class members in relation to their enjoyment of club facilities.

In a series of decisions in different jurisdictions, this type of treatment has been found to infringe the Australian sex discrimination laws.[23] The general result is that both men and women are now given the choice of full or associate membership. Gone also are the days when women were denied or restricted in their access to clubs' sporting activities at weekends, by reason only of their being women. The same, of course, applies in reverse. One of the successful complaints about unequal access to club benefits came from a group of men. In *Pulis and Banfield* v. *Moe City Council*,[24] the Victorian Equal Opportunity Board upheld a complaint that male members of a recreation club were discriminated against by the allocation of Monday nights as a 'women's night', thereby restricting the men's enjoyment of the club's facilities.

The area of sport itself is exempt from sex discrimination laws. Neither sex can seek membership of sporting teams which are restricted to the other sex. Nor, if both sexes belong to the same team, can each sex demand equal treatment with the other. A further exemption from all sex discrimination laws is granted to religious organisations. Women seeking ordination in the Church must thus look elsewhere for support for their cause.

## VI. DISCRIMINATION ON THE GROUND OF MARITAL STATUS

By virtue of the Federal Sex Discrimination Act and the various State Acts, discrimination on the ground of marital status is proscribed throughout Australia. "Marital status" means the state of being single, married, separated, divorced, widowed, or living in a de facto relationship. As with other grounds of discrimination, the proscriptions operate in the fields of employment, education, accommodation, the provision of goods and services and registered clubs.

It is the status of the person which must be the reason for the less favourable treatment in order to attract this prohibition, rather than the identity of the person's partner. This was the finding of the New South Wales Court of Appeal in *Boehringer Ingelheim Pty Ltd* v. *Reddrop*.[25] In that case, the employer, a pharmaceutical company, had declined to employ the complainant as a pharmacist, although she had rated higher than any other applicant for the job. The reason for her rejection was that her husband, also

23 See, *eg. Umina Beach Bowling Club Limited* v. *Ryan* [1984] 2 NSWLR 61.
24 (1986) EOC 92-170.
25 [1984] 2 NSWLR 13.

a pharmacist, was employed by a rival pharmaceutical company. As Mahoney J.A. said:

> [t]he definition of 'marital status' in 4(1) refers to 'the status or condition of being' married. That definition does not refer to, eg, the characteristics or proclivities of the particular spouse and I do not think that this paragraph intended to remove these from the area of considerations to which an employer might legitimately refer. I do not think the paragraph would prevent an employer refusing to engage as a live-in cook a man who was cohabiting with Typhoid Mary.[26]

Complaints of discrimination on the ground of marital status have constituted a significant proportion of all complaints to anti-discrimination agencies over recent years although the number of decided cases has not been great. The two main areas of complaint have related to employment and accommodation.

As to employment, the majority of complaints here have either been from married women complaining of recruitment or dismissal practices, or from single men complaining that they are denied benefits available to married employees. The complaints of married women are twofold. Both involve stereotyped assumptions on the part of employers about the status and obligations of married women, and are accordingly closely linked with discrimination on the ground of sex. The first and more pervasive type of discrimination consists of a reluctance on the part of employers to hire young married women because of an assumption that they will be unable to combine their employment with their domestic responsibilities. The first *Wardley* case[27] provides an illustration of this. Closely linked is the assumption that, once married, a woman will be economically dependent upon her husband and will thus be less deserving of an income-producing job. Such a case came before the South Australian Industrial Court, by way of appeal from the then Sex Discrimination Board, in *Lamberti* v. *T.R.W. Carr Pty Ltd.*[28] The Board had dismissed a complaint by a married woman who had been retrenched by her employer. A number of other women had been retrenched at the same time, all of them married. The only women who remained in the respondent's employment were single. The Industrial Court found that the employer had laid off the married women without any real enquiry about their circumstances, upon the assumption that they would suffer less hardship than the single employees. This constituted direct discrimination on the ground of marital status. The matter was accordingly remitted to the Board for the determination of appropriate relief.

There have been surprisingly few decided cases about the position of married women in employment vis-a-vis their single sisters. For the complaints in this area are numerous, and it would seem that some women are suffering real hardship as a result of stereotyped assumptions about their capacity to undertake fulltime employment and their financial needs.

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26 *Id.*, 21.
27 Note 13, *supra*.
28 (1984) EOC 92-114.

The other area, within employment, which has been the subject of numerous complaints, at least in New South Wales, relates to the provision of benefits for married or de facto couples. Virtually all the complainants here have been single, and most of them men. Many have complained that concessional travel is allowed for wives, but not for partners or friends of single men.

The field of accommodation has provided a constant source of complaints on the ground of marital status. These have largely been from single people, and sometimes from de facto couples. This is the only area of discrimination which is sex neutral, with roughly equal numbers of male and female complainants. Owners, and sometimes agents, have apparently assumed that married couples will be more responsible about caring for rented premises, and have favoured them accordingly. Single parents particularly have been discriminated against. This is one of the more difficult areas of discrimination from a social point of view, for it brings into conflict the right of a single person to be judged according to his or her real merits, without the intervention of stereotyped assumptions, and the right of a person to choose how best to protect and care for his or her private property. Certainly the legislation exempts small-scale accommodation which is resided in by the owner or a near relative. Even so, a number of people resent the intrusion of equal opportunity laws into what they regard as essentially domestic decisions, and in some cases one must have sympathy with them. For the moment, however, the equal opportunity laws in this area prevail and landlords must treat tenants according to their real merits rather than their perceived attributes.

## VII. DISCRIMINATION ON THE GROUND OF SEXUALITY

The South Australian Equal Opportunity Act 1984 proscribes discrimination on the ground of sexuality, which is defined in section 5 as meaning heterosexuality, homosexuality, bisexuality or transexuality. In addition, the New South Wales Anti-Discrimination Act, in 1982, added homosexuality to the grounds of discrimination prohibited by that Act. No other Australian legislation has similar provisions.

"Transexual" is defined in section 5 of the South Australian Act as "a person of the one sex who assumes characteristics of the other sex". Otherwise, the protected groups are not legislatively defined. The New South Wales Act, however, expressly applies to persons who are thought to be homosexual, whether they are so or not.

So far as I am aware, there have been no decided cases under the South Australian legislation. Nor do I know how many of the relatively few South Australian complaints on this ground have related to homosexuality or to other categories of sexuality. Accordingly, I propose only to state the existence of the South Australian legislation, and otherwise to confine myself to discussing the New South Wales position so far as homosexuality is concerned.

The recognition of homosexuals as a group requiring protection, rather than punishment, is a very recent phenomenon. Nor has homosexuality been a politically compelling cause to espouse. When the New South Wales Anti-Discrimination Act was first introduced into Parliament in 1976, it included homosexuality as one of the proscribed grounds of discrimination. This provoked considerable opposition, which threatened the future of the legislation as a whole. Ultimately, the portion relating to homosexuality, together with age, religious and political conviction, and mental and physical impairment, was rejected by the opposition-controlled Upper House.

At that time, in 1977, homosexual acts between men were still treated as serious criminal offences in New South Wales, regardless of the age of the participants or the consensual nature of the acts. Indeed, this was the position throughout the country, except in South Australia and the Australian Capital Territory. A substantial number of police officers, at least in New South Wales, apparently devoted themselves almost exclusively to detecting homosexual offences. Anyone who appeared in Magistrates' courts at about that time will remember the numerous charges relating to offences allegedly committed in public toilets, where the police had apparently adopted a practice of endeavouring to entrap people with homosexual tendencies.

Attitudes towards homosexuals and homosexuality have undoubtedly liberalised substantially since then. In 1982, homosexuality was added as a proscribed ground of discrimination to the New South Wales Anti-Discrimination Act. At about the same time a new method of categorising and dealing with all sexual offences was introduced into the New South Wales Crimes Act 1900. Part of the package involved the decriminalisation of homosexual acts between consenting adults.

Attitudinal changes, such as occurred at about that time, normally feed upon themselves. In New South Wales this appeared to be happening in relation to homosexuality until quite recently. Whereas, ten years ago, hostility towards homosexuals and homosexuality was quite openly expressed, this was becoming much less acceptable. Whereas, ten years ago, homosexuals feared dismissal or similar retribution if their sexuality became known, they were starting to become more relaxed about the consequences of revealing their homosexuality.

All this has, unfortunately, been dramatically set back by the advent of A.I.D.S. People whose vocal abhorrence of homosexuality had, temporarily, been stifled, have once again been loud in their denunciations. A.I.D.S. has been said to be God's (or nature's) punishment for deviancy; and any gains which had been made in relation to the acceptance of individual homosexuals as normal human beings have similarly been reversed. Ignorance about A.I.D.S. and its transmission has led to an irrational fear of contact with members of high-risk groups, particularly homosexuals. There have been no anti-discrimination cases involving A.I.D.S. sufferers in Australia. This is perhaps not surprising, given the current climate of hostility and fear. There have, however, been a substantial number of complaints to the Anti-

Discrimination Board. These have been accepted as coming within the physical impairment provisions of the Act.

Nor have there been any significant decided cases involving the ground of homosexuality, although in the reporting year 1985 to 1986 there were eighty-six complaints on this ground to the Anti-Discrimination Board, most of them in the area of employment, and almost all of them coming from men. This constituted a significant increase in the number of complaints over previous years; a product, it would seem, of the increased incidence of discrimination encountered by homosexuals since the emergence of A.I.D.S. as a substantial medical problem in this country.

## VIII. DISCRIMINATION ON THE GROUND OF RACE

By virtue of the Federal Racial Discrimination Act and the various State Acts, racial discrimination is prohibited throughout Australia. 'Race' in this context generally means colour, nationality, and ethnic or national origin.

It goes without saying that people of different ethnic and national backgrounds encounter different problems and prejudices in Australian society. The one group, however, which has quite unique and almost insurmountable problems is the Australian Aborigine. I must, therefore, discuss this group separately.

### A. ABORIGINES

Aborigines suffer worse hardships and deprivations than any other racial group in this country. Their problems encompass a full range of life experiences. It is not within the scope of this paper to discuss them in detail, but they must be mentioned. They include: gross health problems, with the highest infant mortality rate in the western world and almost general eye, ear and lung infections; widespread poverty, with substandard housing and living conditions; educational under-achievement; high unemployment (well over 50% in some areas); gross over-representation amongst the prison population and defendants in criminal courts, particularly in relation to minor, 'street' offences.

The treatment of Aborigines over the last two hundred years has been marked by violence, degradation and deprivation. Although we can hope that the worst of the violence is behind us, the deprivation and hardship remains. Nor has there been any real improvement over recent years, despite a growing awareness of the seriousness of the situation and the responsibility we must take for its existence.

It is only very recently that we have begun to realise the importance to Aborigines of their cultural heritage, particularly their traditional laws and their relationship with the land. In general, that realisation still remains to be translated into action. The only substantial step so far has been the transfer back to the traditional owners of a large tract of land in South Australia, pursuant to the Pitjantjatjara Land Rights Act 1981 (S.A.).

Many of the difficulties suffered by Aborigines such as health, land rights

and the problems of applying cultural law are, by their nature, outside the purview of equal opportunity laws. Indeed, it is somewhat ironic that an attempt to invalidate parts of the Pitjantjatjara Land Rights Act was based upon apparent inconsistencies between that Act and the Commonwealth Racial Discrimination Act 1975. In *Gerhardy* v. *Brown*,[29] the High Court found that there were inconsistencies between the two Acts, although there was no unanimity as to where the inconsistencies lay. However, all seven judges were in agreement that the relevant provisions of the State Act were 'special measures' designed to secure the advancement of a group which required protection. As such, the Federal Act did not apply to invalidate or restrict their operation. During the course of his judgment, Deane J. said:

> [i]t would seem that the Aboriginal people had inhabited this country for at least forty milleniums before the arrival of the first white settlers less than two hundred years ago. To the extent that one can generalise, their society was not institutionalised and drew no clear distinction between the spiritual and the temporal. The core of existence was the relationship with and the responsibility for their homelands which neither individual nor clan 'owned' in a European sense but which provided identity of both in a way which the European settlers did not trouble to comprehend and which the imposed law, based on an assertion of terrae nullius, failed completely to acknowledge, let alone protect. The almost two centuries that have elapsed since white settlement have seen the extinction of some Aboriginal clans and the dispersal, with consequent loss of identity and tradition, of others. Particularly where the clan has survived as a unit living on ancestral lands however, the relationship between the Aboriginal peoples and their land remains unobliterated. Yet, almost two centuries on, the generally accepted view remains that the common law is ignorant of any communal native title or other legal claims of the Aboriginal clans or peoples even to ancestral tribal lands on which they still live (see *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 F.L.R. 141). If that view of the law be correct, and I do not suggest that it is not, the common law of this land has still not reached the stage of retreat from injustice which the law of Illinois and Virginia had reached in 1823 when Marshall C.J. in *Johnson* v. *McIntosh* (1823) 8 Wheaton 543 at p. 574 accepted that, subject to the assertion of ultimate dominion including the power to convey title by grant by the State, the 'original inhabitants' should be recognised as having 'a legal as well as just claim' to retain the occupancy of their traditional lands. It is in this context that one must approach the question whether the provisions of sec. 19 of the State Act are, or are included in 'special measures' of the kind referred to in art.1(4) of the Convention.[30]

There are certain areas of hardship for Aborigines which might, in theory, be peripherally assisted by reference to anti-discrimination laws. Educational underachievement, poor housing and unequal treatment by law enforcement agencies might conceivably fall within this category, although it is difficult to see how any real headway could be achieved in any of these areas by these means. Certainly there has been none so far.

Lack of employment opportunities is a further area of deprivation which could, in theory, be alleviated by equal opportunity laws. However, precisely the same restrictions apply here as they do in relation to sexual discrimination. The fact is that the barriers faced by Aborigines in the area

29 (1985) 159 CLR 70.
30 *Id.*, 149.

of employment are so great and so entrenched that a complaint-based system is incapable of surmounting them. And whereas, in the field of sex discrimination substantial gains have been made, notwithstanding these restrictions, the same cannot be said in relation to Aborigines. There have been no decided cases in Australia involving discrimination against Aborigines in employment. Indeed, the only decided cases of discrimination against Aborigines have involved their being refused service in hotels. This in itself provides some commentary about the significance of equal opportunity laws to Aborigines.

Those women who have succeeded in overcoming the restrictions inherent in our complaint-based system have done so by dint of their understanding of possible remedies and their determination in pursuing them. That type of access is denied to many Aborigines. The unfortunate fact is that the more disadvantaged the group, the more difficult its access to remedies such as these. Hence, it cannot be said that Aborigines, the most disadvantaged group of all, have achieved any substantial protection through equal opportunity laws in this country. Their expectations, unfortunately, remain largely unchanged.

## B. PEOPLE OF OTHER ETHNIC AND NATIONAL ORIGIN

It is impossible to categorise the problems faced by the various ethnic or national groups other than Aborigines, for they vary greatly. There are however, certain major areas of disadvantage. These include employment, housing, education, language barriers and difficulties in cultural adaptation.

Numerous complaints of racial discrimination have been made each year to the various anti-discrimination agencies. But surprisingly few have been referred to the Tribunals, and there is a dearth of decided cases in the area. One reason for this is to be found in the substantial constitutional difficulties which have arisen since the early 1980s in relation to the New South Wales Anti-Discrimination Act (which, in this respect, is no different from other State Acts). In *Viskauskas* v. *Niland*,[31] the High Court held that the race provisions in the New South Wales Act were inconsistent with the Racial Discrimination Act 1975 (Cth) and were therefore invalid under section 109 of the Constitution. The Commonwealth Act covered the field of racial discrimination, the Court said, and left no scope for the operation of the State Act. Shortly afterwards, a new section 6A was inserted into the Racial Discrimination Act (Cth), the object of which was to validate State racial discrimination legislation, both prospectively and retrospectively. In *University of Wollongong* v. *Metwally*,[32] the majority of the High Court[33] held that this provision had no retrospective operation. It was beyond the power of Parliament, they said, to override the effect of section 109 of the

31 (1983) 153 CLR 280.
32 (1984) 158 CLR 447.
33 Gibbs C.J., Murphy, Brennan and Deane JJ., with Mason, Wilson and Dawson JJ. dissenting.

Constitution. The relevant provisions of the State Anti-Discrimination Act were accordingly not operative when the discriminatory acts complained of by Mr. Metwally were committed.

This decision had far-reaching effect. It meant that all complaints lodged under State racial discrimination legislation in relation to acts committed before 19 June 1983 (the date on which section 6A of the Racial Discrimination Act came into force) had to be rejected as being outside jurisdiction. It also led to considerable hardship to Mr. Metwally, who had received an award of over $46,000 from the Equal Opportunity Tribunal. That finding was never impeached on its merits, only on the basis of the constitutional invalidity of the New South Wales Act.

Further restrictions on State Anti-Discrimination legislation have resulted from the High Court decision in *Dao Thi Nguyet Thanh* v. *Australian Postal Commission*.[34]

The complainants in that case were women of Vietnamese origin who had been refused permanent appointment with the respondent as they had failed to meet a specified minimum body weight requirement. They claimed that they had been discriminated against on the grounds of race and sex. This was a classic example of a 'disparate impact' case, which, had it proceeded on its merits, would probably have involved a discussion as to the reasonableness of the weight requirement. However, constitutional barriers intervened. So far as the ground of race was concerned, the acts complained of had pre-dated June 1983, and were therefore outside jurisdiction by reason of the *Metwally* decision.[35] So far as the ground of sex was concerned, the High Court unanimously held that the relevant provisions of the State Anti-Discrimination Act were inconsistent with the Postal Services Act 1975 (Cth) and were, to that extent, invalid. The decision in *Wardley's* case was distinguished.

This decision has a potentially far-reaching effect. It means that the provisions of the State Equal Opportunity Acts will almost certainly have no application in relation to employees of Commonwealth authorities, or to many persons otherwise employed under Commonwealth legislation.

It appears to be the experience of the anti-discrimination agencies that people from non-English speaking backgrounds who are likely to be suffering most from discriminatory practices and policies are not generally coming forward and complaining. Female migrant blue collar workers, for example, are substantially under-represented in complaints. Indeed only about one-third of all complaints of racial discrimination come from women. There are a number of barriers for these underprivileged groups. They are concerned about the vulnerability of their jobs, language difficulties restrict their knowledge of available remedies, they are likely to be suspicious of

34 (1987) 162 CLR 317.
35 Note 32 *supra*.

Government agencies and there may well be cultural reasons why it would be inappropriate for them to complain.

SCLL Racial discrimination legislation in the United States of America has given rise to landmark decisions of considerable general impact. Perhaps that will occur here in the future. For the moment, however, it must be said that little has been achieved in this country in the protection of racial minorities by dint of equal opportunity laws.

## IX. DISCRIMINATION ON THE GROUND OF PHYSICAL IMPAIRMENT

Discrimination on the ground of physical impairment is proscribed by equal opportunity legislation in New South Wales, Victoria and South Australia. It was not contained in the original legislation in any of those States, but was added after 1981 — the International Year of the Disabled.

As with other grounds of discrimination, the proscription applies in the fields of employment, education, accommodation, the provision of goods and services, and registered clubs. Each State provides for exemptions in relation to people who, by reason of their impairment, might be unable to safely carry out the work, or use the accommodation, etc., as well as those who would require special services or facilities which could not reasonably be provided in the circumstances. The precise terms of these exemptions differ from State to State, sometimes with significant variations in operation.

It is only relatively recently that any real thought has been given to the needs of the disabled. This is in spite of the fact that, on some estimates, up to 13% of the Australian population is physically disabled.[36] Moreover, it is an increasing proportion, the product, in part, of the large number of motor vehicle injuries sustained in our community. Given these figures it is probably not surprising that, in the three States with physical impairment legislation, there has been a substantial number of complaints of discrimination on this ground. Indeed, in Victoria, these complaints are second in number only to complaints of sexual discrimination. In 1984-1985, they constituted 22% of all complaints to the Equal Opportunity Commissioner. In New South Wales the number, although large, still lags behind complaints of sexual and racial discrimination. In 1985-1986, there were 181 complaints on this ground, comprising 14% of all complaints.

Approximately two-thirds of complaints have been in the area of employment, many of them in the public sector. They have primarily related to recruitment practices and to the termination of employment. Locomotor impairments give rise to the most common disabilities amongst complainants. Many others suffer from 'invisible' disabilities, such as epilepsy or diabetes.

The traditional approach to the handicapped in our society has been to give them additional pensions, to ensure, as best we can, that they are treated

36 Australian Bureau of Statistics, *Handicapped Persons, Australia, 1981* (1982).

humanely and to put them out of our minds. Consequently, physically handicapped people who wish to participate fully in society find themselves confronted by barriers which are both systemic and entrenched. The barriers are often the product of ignorance and thoughtlessness rather than any deliberate prejudice against the handicapped. As such, they are probably more vulnerable to complaints of indirect rather than direct discrimination.

In addition, the rising cost of workers' compensation insurance has resulted in many employers adopting a deliberate policy of excluding job applicants who might be vulnerable to illness or accident. Such was almost certainly the case in *O'Neill* v. *Burton Cables*.[37] There, the Victorian Equal Opportunity Board found in favour of a man who had been rejected for employment as a purchasing officer because of a pre-existing back complaint. The Board said:

> [n]o employer is required to employ a person who cannot undertake the duties of the position they are seeking to fill. But an employer must investigate each particular case and cannot apply a general rule that would exclude a whole class of persons because some members of that class may not be suitable employees.[38]

Many of the cases in this area have involved the scope of the exemption sections. At least two have related to the type of services or facilities which can 'reasonably' be provided for the handicapped. This is essentially a factual issue, which frequently involves an analysis of the economic consequences to the respondent of supplying the relevant facilities. Such was the case in *Blair* v. *Venture Stores Retailers Pty Ltd*.[39] In that case the Victorian Equal Opportunity Board upheld the exemption in relation to a retail store which had closed down a lift, thereby depriving the complainants of wheelchair access to the upper floor shopping areas. The store produced evidence of the high cost which would have been incurred in retaining the lift. As a result, the Board found that it would be unreasonably onerous to require its retention.

A real difficulty in this respect arises from the scheme of the legislation, which requires that a discriminatory act must already have been committed before a complaint can be lodged. There is no provision for a complaint of apprehended discrimination. Accordingly, in *Woods* v. *Wollongong City Council*,[40] the New South Wales Equal Opportunity Tribunal upheld submissions that it had no jurisdiction to deal with a complaint, from a paraplegic, that she was denied wheelchair access to a large retail centre. The centre was then under construction and accordingly no access had yet been provided to any member of the public. The irony lies in the possibility that, after completion of such a construction, the respondent might seek to evade liability by reference to the high cost at that stage of providing the appropriate access.

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37 (1986) EOC 92-159.
38 *Id.*, 76,576.
39 (1984) EOC 92-103.
40 (1986) EOC 92-174.

In New South Wales, it has been held that the statutory defence is available if an employer genuinely believes that a prospective employee will be unable to perform the relevant work, provided the belief is based upon grounds upon which it is reasonable to rely. The reasonableness or otherwise of the belief itself is not relevant.[41]

As often happens with innovative legislation, there have been a number of teething problems in relation to the impairment provisions. In a recent New South Wales case I found it necessary to treat an epileptic as an intellectually, rather than a physically handicapped person. The complainant in fact was a highly intelligent young man. The problem arose, not because of his condition, but because the Anti-Discrimination Act defines intellectual impairment by reference to defects in the brain, and excludes such defects from the definition of physical impairment.[42] In the same case, I was obliged to uphold a defence based upon the combined effect of section 54 of the Anti-Discrimination Act and section 66 of the Public Service Act 1979 (NSW). Section 54 provides a defence for anything necessarily done in compliance with any other Act. Section 66 of the Public Service Act provides that no person will be eligible for permanent appointment to the New South Wales Public Service unless he or she has passed a medical examination. The complainant in that case had failed his medical examination by reason of his history of epilepsy. This was held to provide a complete defence to the respondent, who had refused to give him a permanent appointment to the Public Service. This decision will have far-reaching consequences for it means that the largest employer in New South Wales can hide behind the shield of the compulsory medical examination and thereby evade any external assessment of its recruitment policies or practices vis-a-vis the disabled. This is all the more significant when one realises that, until now, approximately half of the physical impairment complaints in New South Wales have related to recruitment practices, most of them in the public sector.

Constitutional problems also abound. By reason of the High Court decision in *Dao Thi Nguyet Thanh* v. *Australian Postal Commission*,[43] State anti-discrimination laws cannot apply to Commonwealth instrumentalities. Nor can they apply in relation to life insurance companies which conduct their business under the Life Insurance Act 1945 (Cth). This was the finding of the High Court in *Australian Mutual Provident Society* v. *Goulden*,[44] yet another anti-discrimination case involving the operation of section 109 of the Constitution.

It can thus be seen that there have been substantial problems in applying the physical impairment provisions in the three States which have them, particularly in New South Wales. In the circumstances, one could be forgiven

41 *Secretary, Department of Health* v. *Jamal* (1987) EOC 92-183.
42 *Kitt* v. *Tourism Commission* (1987) EOC 92-196. An appeal to the Supreme Court of New South Wales was dismissed: *Kitt* v. *Tourism Commission* (1987) EOC 92-209.
43 Note 34, *supra*.
44 (1986) 160 CLR 330.

for having a degree of pessimism as to whether these provisions are likely to provide any substantial protection for the physically handicapped, at least in the short term. Their long-term prognosis, however, is reasonably favourable. This, in any event, is the view of many equal opportunity administrators, who see the impairment provisions as being potentially one of the most important of all anti-discrimination measures.

## X. DISCRIMINATION ON THE GROUND OF INTELLECTUAL IMPAIRMENT

Discrimination on the ground of intellectual impairment is proscribed in New South Wales and Victoria only. To date those proscriptions have had little if any impact. There have been few complaints on this ground to the relevant agencies and no decided cases. The restrictions and problems already described in relation to the physical impairment laws apply also in this area. In many respects the problems here are greater, because the protected group is less likely to have ready access to available remedies.

In devoting such short space to this ground, I do not want to be taken as implying that the problems or needs of intellectually handicapped people are any less extensive or important than those of other protected groups, for the contrary is the case. However, there is little point in analysing their enormous difficulties here. The unfortunate fact is that equal opportunity laws have so far been generally ineffective in dealing with them. We can only hope that this situation will change in the relatively near future.

## XI. DISCRIMINATION ON THE GROUND OF POLITICAL OR RELIGIOUS CONVICTION

Both the Victorian and Western Australian Equal Opportunity Acts 1984, proscribe discrimination on the ground of religious or political conviction. The Victorian Act also covers discrimination on the ground of engaging or failing to engage in lawful religious or political activity.

Approximately 10% of all complaints to the Victorian Commissioner of Equal Opportunity have been based on these grounds, and most of them relating to politics.

I hope I will be forgiven for giving this area scant coverage. They are not grounds with which I have any personal familiarity. They are, in any event, the product of very recent legislation and have resulted in only five decided cases in Australia. All of these have involved political belief or activity and all but one have been Victorian.

All cases have, to some degree, involved the question as to what amounts to political conviction or activity. In the Western Australian case *Croatian Brotherhood Union of Western Australia (Inc.)* v. *Yugoslav Clubs and Community Associations of Western Australia (Inc.)*,[45] the majority of the

45 (1986) EOC 92-190.

Equal Opportunity Tribunal adopted the definition contained in a research report of the New South Wales Anti-Discrimination Board, which described political conviction as referring to:

- any belief or opinion concerning the nature and purpose of the State;
- the distribution and utilisation of State power;
- the interaction between the State and organisational movements, groups and individuals as they affect, or are affected by, the exercise of State power; or
- any belief or opinion concerning the distribution and utilisation of economic, social and cultural power in a society.[46]

In that case, the Tribunal found that political conviction was a factor in the dispute between the parties, but dismissed the complaint for other reasons.

The most recent, and probably the most significant case involving this ground, was the Victorian case of *Hein* v. *Jacques Ltd.*[47] In that case, the Equal Opportunity Board found in favour of an employee who had been dismissed for non-joinder of a union. It was held that the union, by virtue of its affiliation with the Australian Labor Party, was engaged in political activities. Accordingly, the complainant, in refusing to join the union, was failing to engage in political activities within the meaning of the relevant legislation.

Another Victorian case in which a complaint on this ground was substantiated was *Thorne* v. *R.*[48] The complainant, a teacher, was taken off teaching duties after she had publicly supported a paedophile support group, and advocated the lowering of the age of consent. The Equal Opportunity Board found that her views were expressed in a political context, rather than a moral or sexual one and that in expressing them, she was engaging in political activity.

There is clearly considerable scope for the utilisation of these grounds in a number of different contexts. Representations have been made for them to be added to the proscribed grounds in the New South Wales Anti-Discrimination Act.

## XII. AFFIRMATIVE ACTION

The concept and practice of affirmative action has sparked more debate and dissension than any other measures in the equal opportunity area. So diverse is the thinking about affirmative action that it is difficult even to find an acceptable definition of it. In order to do so, one must resort to vague terms, such as: "a systematic means . . . of achieving equal employment opportunity for women and other disadvantaged groups".[49]

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46 *Id.*, 76,815 *per* P. Tulloch and B. Buick.
47 (1987) EOC 92-188.
48 (1986) EOC 92-182.
49 S. Ryan and G. Evans, *Affirmative Action for Women* (1984).

Another, more meaningful definition is:

> [a]ffirmative action is a systematic approach to the identification and elimination of the institutional barriers that women and minority group members encounter in employment. An Affirmative Action Program is a planned, results-oriented management program designed to achieve Equal Employment Opportunity . . .[50]

Legislatively based affirmative action schemes are generally restricted to the field of employment. However not all affirmative action is imposed by law. The recently announced decision of Sydney University to reduce its entry requirements for students from disadvantaged schools is an example of this.

The purpose of affirmative action is to redress the effects of past discrimination. It can take a number of forms, such as the setting of long-term goals for achieving employment equity, the establishment of specific intake quotas for particular years or, as in Australia, the attempt to reach self-imposed objectives for achieving employment equity.

It is impossible to fully discuss the arguments for and against affirmative action. Many books have been written on the subject. I propose simply to state the major arguments and leave it for the reader to decide between them.

Those who promote affirmative action say that systemic discrimination requires systemic remedies. The complaints-based method of dealing with particular acts of discrimination is totally inadequate to address the real problems afflicting disadvantaged groups. It is our responsibility to remove present inequities. Our failure to attempt this would signal our acceptance of them, and we would be waiting indefinitely for their removal.

Those who oppose affirmative action point out that the methods used are themselves discriminatory. They disadvantage individuals who have never themselves done anything to deserve it, except to belong to a non-disadvantaged group. In the process, the 'merit' principle is eroded. Accordingly, affirmative action does more harm than good.

Like it or not, affirmative action is alive and relatively well in Australia. It started in New South Wales, with the introduction of Part IXA of the Anti-Discrimination Act. This created the office of the Director of Equal Opportunity in Public Employment. All departments and declared authorities under the New South Wales Public Service Act are required, under this legislation, to prepare and implement equal opportunity management plans designed towards eliminating discrimination on the grounds of race, sex and marital status. The scope of the legislation has since been extended. Universities and Colleges of Advanced Education must now participate in the programme, and the protected group has, since 1984, included the physically handicapped.

The New South Wales scheme has met with partial success. Some departments have resented the legislation, and have been slow to co-operate with the Director. Although there have been some significant changes in

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50 Equal Opportunity Bureau, Public Service Board, *Affirmative Action Programme for Women in the Australian Public Service* (1984).

employment profiles in the target groups, these have largely been in the lower to middle salary levels.

Part IX of the Western Australian Equal Opportunity Act 1984 is in substantially the same terms as Part IXA of the New South Wales Anti-Discrimination Act. The Act only came into effect in July 1985. It takes considerable time for the presentation of management plans, let alone their implementation. Accordingly, it is much too early to assess the effectiveness of this legislation at this stage.

In 1986, the Commonwealth introduced its Affirmative Action (Equal Employment Opportunity for Women) Act. This followed a pilot programme, commenced in 1984, involving twenty-eight large private sector organisations and three higher education institutions.

The 1986 legislation applies to all private sector organisations employing one hundred or more people, and to all higher education institutions. It comes into operation progressively, with higher education institutions covered immediately (from 1 October 1986). A timetable is set for other employers, with the larger ones covered first. The smaller employers (100-499 employees) will not be affected until February 1989. Programmes are required to be developed and implemented, in consultation with trade unions and employees, with the object of achieving equal employment opportunity for women. Section 3(4) of the Act provides that an employer is not required to take any action which is incompatible with the merit principle. No compulsory 'quotas' or 'targets' are established under the Federal legislation. The employer is required to specify objectives and must endeavour to achieve them, but their achievement is not compulsory. This avoids those features of the American legislation which have attracted the greatest criticism.

Each of the other States, except Tasmania and Queensland, have introduced affirmative action programmes within their respective public services. Other than to state that fact, I do not propose to discuss them.