Sex Discrimination Legislation in Australia
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Sex Discrimination Legislation in Australia

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Background: National Committee on Discrimination in Employment and Occupation

Following the ratification by the Australian Government in June 1973 of the International Labour Organisation Convention No.111 - the Convention on Discrimination (Employment and Occupation) 1958 - a National Committee on Discrimination in Employment and Occupation and six State Committees were established. A Committee for the Northern Territory was established later in 1979. The Convention binds the Australian Government to seek to eliminate discrimination on seven grounds - race, colour, sex, religion, political opinion, national extraction and social origin - in the areas of employment and occupation. Employers' and workers' organisations, vocational guidance and training, placement services, administrative instructions or practices, employment advertisements and superannuation were included in the Committees' areas of concern.

The Committees investigated both complaints received on grounds specified in the Convention and complaints on grounds not specified, such as age and disability. To 1984, the Committees received more complaints of discrimination on the ground of sex than on any other ground. In 1982-83, 64.6 per cent of complaints on grounds specified in the Convention were complaints on the ground of sex. Of these complaints, approximately 60 per cent were from females and 40 per cent were from males.1

The Committees worked through consensus and conciliation, and a system of tripartite representation: each State Committee had representatives of the Commonwealth and State Governments, employers' organisations and trade unions. The Committees did not have statutory powers. However the National Committee could ask the Attorney-General to table in Parliament a report of a complaint which it was unable to resolve, including the naming of the discriminating party.2 In practice, however, cases were usually resolved before that stage was reached.

The passage of the Commonwealth Sex Discrimination Act 1984, and its implementation from 1 August 1984, led to arrangements for referral of complaints, where possible, on the grounds of sex, marital status and pregnancy to the newly set up Human Rights Commission or to the State Commissioners for Equal Opportunity (or President of the Anti-Discrimination Board in the case of New South Wales). The State Committees still provided avenues for complaints on these grounds for State government employees in States which did not have sex discrimination legislation. Moves to co-locate the National and
State Committees with the Human Rights Commission and with the State Commissioners for Equal Opportunity, and the NSW Anti-Discrimination Board, were then made with the intention of providing a 'one-stop shop' approach to the handling of discrimination complaints.

With the passage of the *Human Rights and Equal Opportunity Commission Act 1986*, the functions of the National and State Committees on Discrimination in Employment and Occupation passed to the Human Rights and Equal Opportunity Commission. The reconstituted Commission is now empowered to handle matters relating to complaints on the grounds of the seven areas of discrimination of ILO Convention 111. Nine other grounds of discrimination were included in the concerns of the National and State Committees. Under the Act, such additional grounds of discrimination could be added to the Commission's areas of responsibility by regulation, and this occurred for example in 1989 under the Human Rights and Equal Opportunity Regulations (Statutory Rules 1989 No.407).

Provision is made under the Act for the establishment of at least one advisory committee to advise the Commission in relation to the performance of its functions and to report on action which needs to be taken by Australia in order to comply with ILO Convention 111.

**Commonwealth legislation**

Australia signed the United Nations Convention on the Elimination of All Forms of Discrimination Against Women on 17 July 1980. Consultations took place between the Commonwealth and the States before ratification by Australia on 28 July 1983. Article 2(b) of the Convention provides that States parties should:

> ... adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.

On 26 November 1981, Senator Ryan introduced a Sex Discrimination Bill as a Private Member's Bill. This Bill was not proceeded with, but on 12 October 1982 a joint statement was issued from the Acting Attorney-General, Mr Neil Brown, and the Minister for Home Affairs and the Environment, Mr Tom McVeigh, announcing the planned introduction of a Sex Discrimination (Commonwealth Employees) Bill. This Bill would extend protection against discrimination on the ground of sex or marital status to Commonwealth employees throughout Australia, and would complement existing State legislation. However, this Bill was not introduced into Parliament before the change of government in March 1983.
On 2 June 1983 Senator Ryan introduced the Sex Discrimination Bill 1983 into the Senate, and this passed through both Houses (after redrafting and some amendments) by May 1984.

**Sex Discrimination Act 1984**

**Objects**

The *Sex Discrimination Act 1984* came into force on 1 August 1984. Its objectives, extended in 1992, are:

(a) to give effect to certain provisions of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women; and

(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or 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; and

(ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and

(c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

**Grounds and areas of unlawful discrimination**

The Act prohibits both direct and indirect discrimination on the ground of sex, marital status or pregnancy. Discrimination on the ground of sex or marital status is defined as having occurred:

- if the aggrieved person is treated less favourably by reason of that person's sex or marital status, or a characteristic appertaining to or generally imputed to persons of that sex or marital status, or

- if the aggrieved person is required to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex or different marital status 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.

Discrimination on the ground of pregnancy is defined 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; or,

...if the aggrieved person is required to comply with a requirement or 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.

However, a man cannot claim to have been discriminated against by reason only of not being granted the same rights or privileges accorded to a woman in connection with pregnancy or childbirth.

The areas in which discrimination on the ground of sex, marital status or pregnancy are unlawful under the Act include employment, education, the provision of goods and services, the availability of facilities or accommodation, and the disposal of land or the terms and conditions applying to that disposal. The employment provisions apply also to applications for employment, commission agents, contract workers, partnerships, licensing or qualifying bodies, employment agencies, trade unions and registered organisations under the Conciliation and Arbitration Act (now the Industrial Relations Act). Commonwealth programs and Commonwealth public servants exercising powers under Commonwealth Acts are covered by the provisions.

The Act also made sexual harassment unlawful in the areas of employment and education. Sexual harassment was defined in 1984 as an unwelcome sexual advance, or an unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature directed to a person, where that person has reason to believe that rejecting or refusing the advance or request or taking objection to the conduct would disadvantage that person in any way in connection with employment or work, or possible employment or work, or in connection with the person's studies or application for admission to an educational institution as a student. Other forms of sexual harassment were not dealt with in the 1984 Act, but when introducing the Bill in 1983 the Government announced plans to give the matter consideration and to seek the views of women's organisations.

Extensions to the sexual harassment provisions were made by the Sex Discrimination and other Legislation Amendment Act 1992.
Effect on other legislation

In 1986 the Sex Discrimination (Consequential Amendments) Act was passed to amend certain Commonwealth Acts which contained provisions inconsistent with the *Sex Discrimination Act 1984* in that discrimination was made on the basis of sex or marital status.

Section 40 of the Sex Discrimination Act had provided a two-year exemption for acts in direct compliance with any other Commonwealth, State or Territory law in force at the commencement of the Act, and s 40(3) allowed for regulations to be made in relation to exemptions for specified legislation. Commonwealth legislation was reviewed to identify discriminatory provisions based on sex or marital status and a number of Acts and ACT Ordinances were amended. In the 1984 Act the Compensation (Commonwealth Government Employees) Act 1971 and the Repatriation Act 1920 were exempted from the provisions of the Act, but the Commonwealth Employees' Rehabilitation and Compensation Act 1988 and the Statute Law (Miscellaneous Provisions) Act 1988, respectively, removed these exemptions. Exemptions from the provisions of the Sex Discrimination Act then remained in force for the Social Security Act 1947, the Seamen's War Pensions and Allowances Act 1940 and the Papua New Guinea (Members of the Forces Benefits) Act 1957, and other Acts exempted by regulation.

The *Sex Discrimination Amendment Act 1991* removed paragraphs 40(1)(a) and 40(1)(b) which exempted acts done in compliance with Acts, State Acts or laws of a Territory, or regulations, rules, by-laws or directions made under an Act, State Act or law of a Territory. Subsections 40(2), (3) and (4) which listed Commonwealth Acts specifically exempted, and made provision for government regulations to exempt other specified legislation, were replaced by exemptions (s.40(2)) for the following Acts:

(a) the *Gift Duty Assessment Act 1941*;
(b) the operation of:
   (i) the definition of 'pensioner' in subsection 4(1); or
   (ii) the definition of 'concessional beneficiary' in subsection 84(1); of the *National Health Act 1953*;
(c) the *Income Tax Assessment Act 1936*;
(d) the *Income Tax (International Agreements) Act 1953*;
(e) the *Papua New Guinea (Members of the Forces Benefits) Act 1957*;
(f) the *Sales Tax (Exemptions and Classifications) Act 1935*;
(g) the *Seamen's War Pensions and Allowances Act 1940*;
(h) the *Social Security Act 1947*;
(i) the *Taxation (Unpaid Company Tax) Assessment Act 1982*;
(j) the *Social Services Act 1980 of Norfolk Island.*
Under the new subsection (3), anything done by a person in direct compliance with any regulations, rules, by-laws, determinations or directions made under the \textit{Gift Duty Assessment Act 1941}, the \textit{Income Tax Assessment Act 1936} or the \textit{Sales Tax (Exemptions and Classifications) Act 1935} is also exempt from the provisions of the Act, as is, under subsection (4) for the period of 3 years from 25 June 1991, anything done by a person for the purpose of the administration of:

(a) a scheme established under the \textit{Student Assistance Act 1973}, or
(b) a current special educational assistance scheme within the meaning of that Act.

The operation of subsections (2) and (3) must be reviewed by the Minister before 1 June 1996 and the review must include a recommendation as to whether they should be repealed (s.40A(1) and (2)).

The effect of these amendments was to remove the regulation-based exemptions for most State and Territory legislation, to give exemptions which were to continue a statutory basis, to set a time-limit for the continuation of the student assistance exemption, and to require review of the remaining exemptions.

These provisions of the \textit{Sex Discrimination Amendment Act 1991}, which received assent on 25 June 1991, came into effect on 1 August 1991. Other provisions relating to insurance and superannuation came into effect on 25 June 1993.

\textbf{Superannuation and insurance amendments}

In 1989 the Government had introduced a Sex Discrimination Amendment Bill designed to remove the provision exempting superannuation from the requirements of the \textit{Sex Discrimination Act 1984} (s.41) and to replace this with more limited exemptions. The Bill was passed by the House of Representatives on 31 May 1989 but debate was adjourned in the Senate after the Second Reading speech on 7 June 1989, and the Bill subsequently lapsed. It was re-introduced into the House of Representatives by the Attorney-General, the Hon Michael Duffy on 12 September 1990 in substantially the same form. One proposed section from the earlier Bill, to permit the remaining superannuation exemptions to be repealed by regulation, had been opposed by the Opposition and was not included in this Bill. The \textit{Sex Discrimination Amendment Act 1991} repealed section 41 of the Principal Act and substituted new sections 41, and 41A and 41B dealing with insurance and superannuation. These sections and other replacement sections dealing with insurance and superannuation (sections 5, 6 and 9 of the Amendment Act) were to commence two years after the date of assent (i.e. 25 June 1993). However, a
temporary administrative exemption has now been granted by HREOC for superannuation schemes until 1 July 1994. The superannuation amendments removed the blanket exemption for superannuation. Under section 41A, new superannuation funds may continue to discriminate in limited circumstances.

New superannuation fund conditions restrict discrimination on the grounds of sex or marital status to the following circumstances:

- where the discrimination is based on actuarial or statistical data and is reasonable having regard to that data;
- a dependent benefit (i.e. a benefit payable on the policy holder's death to another) need not be provided to those who do not have a spouse, de-facto spouse or child;
- the vesting, preservation and portability provisions may result in discrimination so long as it is indirect discrimination.

Under section 41B, existing superannuation funds may continue to discriminate more generally provided they offer their members an option to transfer to a new fund which is non-discriminatory in that it is within the limited exemptions for new funds.

In relation to an insurance policy, a person may discriminate on the grounds of sex only where the discrimination:

- is based on actuarial or statistical data;
- is reasonable having regard to that data; and
- the discrimination is contained in the terms of the policy.

Insurance policy is defined to be a life, accident or illness policy.

The insurance provision was not materially altered by the Sex Discrimination Amendment Act 1991. However the insurance provision was amended by the Law and Justice Legislation Amendment Bill (No. 3) 1992. Those amendments removed the phrase 'and any other relevant factors' from the exemption, requiring sex-differentiated premiums to be based on actuarial or statistical data only. The amendments also required insurers to make available on request the actuarial or statistical data on which sex-differentiated premiums are based in order to benefit from the statutory exemption, but extended the powers of the Human Rights and Equal Opportunity Commission to grant administrative exemptions from the requirement to supply such data.
Reviews of the Act

Following reviews of the Sex Discrimination Act 1984 and the Affirmative Action (Equal Employment Opportunity for Women) Act 1986 by the Human Rights and Equal Opportunity Commission and by the Affirmative Action Agency respectively, and of both Acts and other matters relating to equal opportunity and the status of women by the House of Representatives Standing Committee on Legal and Constitutional Affairs, a number of recommendations were made to Government and to the Attorney-General's Department for amendments to strengthen the Acts.


The Prime Minister announced a two-stage approach for the Government's response to these recommendations. The first stage involved immediate implementation of certain recommendations, while in the second stage other recommendations would be considered further before a final response was given. For the Sex Discrimination Act, this first stage was implemented by amendments effected by the Sex Discrimination and Other Legislation Amendment Act 1992 which was passed in December 1992. These amendments were to:

- Extend the provisions of the Sex Discrimination Act to federal industrial awards and variations to federal awards made after the date of the legislation
- Strengthen the sex harassment provisions by including harassment of staff by students and sexual harassment in the provision of goods and services (s.28(3) and 29(2))
- Allow complaints of victimisation to be dealt with by the Sex Discrimination Commissioner by conciliation (s.94)
- Improve the provisions enabling representative complaints
- Provide that determinations made by HREOC under the Sex Discrimination Act will be registrable in the Federal Court. If there is no challenge to the determination, it will become enforceable as if it were an order of the Court
• Prohibit dismissal on the grounds of family responsibilities (this provision is contained in the *Human Rights and Equal Opportunity Legislation Amendment Act (No. 2) 1992*).

Further consultation and investigation was promised on other recommendations of the Lavarch Committee concerning the Sex Discrimination Act, such as

• whether family responsibilities would be added as a prohibited ground of discrimination and the definition of 'family' which would then be included in the Act

• whether potential pregnancy should be explicitly added as a prohibited ground of discrimination

• whether the definition of 'marital status' should be extended to prevent discrimination of the basis of the identity of the spouse

• the possible strengthening of s.33 which allows measures to promote equality

• whether to add a general prohibition of discrimination

• whether to add a provision for equality before the law

• whether the reasonableness exemption for pregnancy discrimination should be repealed

• altering the definition of 'indirect discrimination' and 'reasonable' to provide a defence of 'reasonable in order to pursue the least discriminatory option'

• a review of the 'combat' and 'combat related' exemptions (s.43)

• amendment of s.38 to add the requirement of 'reasonableness' to the exemption allowing discrimination in the employment of staff in religious schools.

1992 amendments

The Sex Discrimination and Other Legislation Amendment Bill was introduced into the House of Representatives on 3 November 1992 and passed through both Houses without amendment, being assented to on 16 December 1992.

The *Sex Discrimination and other Legislation Amendment Act 1992* amends the *Industrial Relations Act 1988* and the *Sex Discrimination Act 1984* to provide for appeal to the Full Bench of the Industrial
Relations Commission to vary, or not vary, an award referred to it as discriminatory. 'Discriminatory award' is defined by subsection 113(5) of the Industrial Relations Act to mean an award that has been referred to it as discriminatory, and requires a person to do an act that would be unlawful under Part II of the *Sex Discrimination Act 1984* (as amended). The definition also states:

...the fact that an act is done in direct compliance with the award does not of itself mean that the act is reasonable.  

The Act replaced sections 69 and 70 of the Sex Discrimination Act dealing with representative complaints, and made other changes to conditions covering class action where more than one person has a complaint against the same person and where there is a substantial common issue of law or fact.

The 1992 Amendment Act makes sexual harassment unlawful in areas of employment, partnerships etc.; members of bodies with power to grant etc occupational qualifications etc.; registered organisations; employment agencies; the provision of goods, services and facilities; provision of accommodation; land dealings; clubs; and the carrying out of duties, functions or responsibilities of Commonwealth laws and programs. The provisions covering sexual harassment in educational institutions have been extended to cover harassment by an adult student (of 16 years or more) of an educational institution of a member of staff or of an adult student of the institution (ss.28 B-L).

The definition of sexual harassment was changed to omit the condition of belief of disadvantage, now reading:

...a person sexually harasses another person (the 'person harassed') if:
(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated. (s.28A.(1))

The *Sex Discrimination Act 1984* was also amended by the *Human Rights and Equal Opportunity Legislation Amendment Act (No. 2) 1992* which set an additional objective for the Act. Section 3 of the Sex Discrimination Act is amended to include a new object (s.3(ba)) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities.

New section 4A provides a definition of 'family responsibilities'. 'Family responsibilities' is defined to mean the responsibilities of an
employee to care for or support a dependent child, or any other immediate family member who is in need of care and support.

New section 7A provides that an employer will be taken to have discriminated against an employee on the ground of the employee's family responsibilities if:

- the employer treats the employee less favourably than an employee without family responsibilities, in circumstances that are the same or not materially different; and
- the less favourable treatment is because of the family responsibilities of the employee, or a characteristic applying generally to persons with family responsibilities, or a characteristic generally imputed to persons with family responsibilities.

New subsection 14(4) makes it unlawful for an employer to dismiss an employee on the ground of family responsibilities. A more general prohibition of discrimination based on family responsibilities will be considered by Government.

Inquiries and complaints: the machinery

The 1984 Act established the position of a Sex Discrimination Commissioner, and set additional functions for the Human Rights Commission (now the Human Rights and Equal Opportunity Commission). These functions include inquiring into and making determinations on matters referred by the Minister or Commissioner, granting exemptions, promoting understanding and acceptance of, and compliance with, the Act, examining enactments or proposed enactments to ensure consistency with the Act, and reporting to and advising the Minister on matters relating to discrimination on the grounds of sex, marital status or pregnancy, or discrimination involving sexual harassment.

The Commissioner is required to inquire on behalf of the Commission into alleged infringements and must endeavour to effect a settlement by conciliation. The Commissioner may decide not to inquire into an act if:

- he or she is satisfied that the act is not unlawful;
- he or she is of the opinion that the aggrieved person or persons does not or do not desire the inquiry to continue;
- more than 12 months have elapsed since the act; or
- he or she is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance. (s.52(2)).
If the Commissioner decides not to inquire, or continue to inquire, into a complaint, the complainant is to be informed in writing of that decision and the reasons for it, and of the complainant's right to serve notice in writing within 21 days requiring the Commissioner to refer the complaint to the Commission. The Commissioner may obtain information from such persons and make such inquiries as thought fit, may require the furnishing of relevant information and documents and may require attendance at a compulsory conference.

The provisions dealing with review of decisions not to inquire or continue to inquire into a complaint were amended by the Law and Justice Legislation Amendment Act (No. 3) 1992. The amendments replace the right to a HREOC inquiry with a review by the President of the HREOC in cases where the Commissioner to whom a complaint of sex discrimination is made decides not to inquire into the complaint or not to continue to inquire into the complaint because the Commissioner finds

- that the complaint is about an act done more than 12 months ago, or
- that the complaint is frivolous, vexatious, misconceived or lacking in substance, or
- that those aggrieved by the act do not wish the Commissioner's inquiry to be made or continued.

Referral to the HREOC is still available where the decision not to inquire is based on a finding by the Commissioner that the act complained of is not unlawful under the Sex Discrimination Act.

Inquiries may be referred to the Commission by the Commissioner or by the Minister. The Commission may hold a single inquiry when the subject matter of two or more complaints is substantially the same, or may determine that a complaint should be dealt with as a representative complaint. Under the 1984 Act, the Commission had no legal power to enforce a determination. If a complaint was unresolved through conciliation, the Commission or complainant might institute proceedings in the Federal Court to give effect to a determination of the Commission. The Sex Discrimination and other Legislation Amendment Act 1992 provides that a determination of the Human Rights and Equal Opportunity Commission must be registered with the Federal Court, and the determination shall have effect as an order of the Federal Court (new sections 82A and 82B). Failure to provide information or actuarial or statistical data, failure to attend a conference as directed and obstruction of the Commission are offences under the Act and maximum penalties of $1000 for individuals or $5000 for organisations or groups may be incurred. Maximum penalties of $2500 or imprisonment for three months for an individual, and $10,000 for a body corporate, are set for offences of false or
misleading information or victimisation. Advertising in such a way as to indicate an intention to do an act that is unlawful under the provisions of the Sex Discrimination Act is also an offence with maximum penalties of $1000 for an individual or $5000 for a body corporate.

Legislation passed through both Houses of Parliament by the end of 1986 replacing the Human Rights Commission with the Human Rights and Equal Opportunity Commission. The Commission was re-located from Canberra to Sydney and is now responsible for administration of the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Human Rights and Equal Opportunity Commission Act 1986*, the *Privacy Act 1988*, the *Disability Discrimination Act 1992* and for functions exercised by reference to ILO Convention 111 and four other international instruments. It may also be given functions under future human rights legislation. The Commission is made up of a President, the Human Rights Commissioner, the Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Privacy Commissioner, the Disability Discrimination Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner. The *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986* amended the *Sex Discrimination Act 1984* to substitute the new Commission for the former Human Rights Commission, and to provide that the Sex Discrimination Commissioner is not subject to the direction of the Commission in the performance of functions under the Sex Discrimination Act. Other amendments included an increase in the penalty for misuse or wrongful disclosure of information by Commission staff to $5000 or imprisonment for one year or both.

Functions of the Human Rights and Equal Opportunity Commission also include undertaking research and educational programs, examining enactments, reporting on what laws should be made on matters relating to discrimination on the ground of sex, marital status or pregnancy, or involving sexual harassment, and preparing guidelines for the avoidance of discrimination on these grounds.

The Sex Discrimination Act provides that State anti-discrimination legislation should operate concurrently with Commonwealth legislation. This provision mirrors an amendment to the Commonwealth *Racial Discrimination Act 1975*, made after the decision of the High Court in *Viskauskas v Niland* which held that provisions of the NSW Anti-Discrimination Act dealing with racial discrimination were inconsistent with the Commonwealth Act and were, to the extent of the inconsistency, rendered inoperative. Under the Sex Discrimination Act, if a person has taken action under such a State or Territory law, then that person is not entitled to institute a proceeding on the same matter under the Commonwealth legislation.
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(However, if an action taken under Federal legislation does not succeed, a complainant may still have recourse to State legislation.) A person may be prosecuted or convicted under either the State or Commonwealth legislation, but not both, for the same action or omission. The strengthening of Commonwealth/State co-operative arrangements for the investigation, attempted conciliation and determination of complaints was envisaged, so furthering the development of the 'one-stop shopping' concept.

The Human Rights and Equal Opportunity Commission has regional offices in Queensland, Tasmania, the Northern Territory and the ACT. State offices of the Commissioners for Equal Opportunity in South Australia and Western Australia, and the Equal Opportunity Board in Victoria act on behalf of the Human Rights and Equal Opportunity Commission and receive some Commonwealth funding for this purpose. In 1985 amendments to the NSW Anti-Discrimination Act provided that certain functions under Commonwealth Acts relating to human rights in New South Wales (including the Sex Discrimination Act 1984) may be delegated to the NSW Anti-Discrimination Board. However, co-operative arrangements with the NSW Anti-Discrimination Board were terminated in 1992 and the Central Office now has carriage of complaints under Federal legislation originating in NSW. Following the enactment of the Queensland Anti-Discrimination Act 1991 in December 1991, agreement was reached that the federal Human Rights and Equal Opportunity Commission would perform the functions of the Queensland Anti-Discrimination Commission for a five-year period. Joint offices of HREOC and the Queensland Anti-Discrimination Commission were established in Brisbane, Rockhampton and Cairns. Similarly, the ACT Human Rights Office opened in Canberra in December 1991 as a joint federal and ACT government arrangement. The Office handles complaints lodged under the ACT Discrimination Act 1991 as well as those lodged under the federal Acts administered by HREOC.

The reversal in Queensland of the reciprocal arrangements applying in other States, where State offices in general administer both the Commonwealth and State legislation, is an interesting development. Human Rights and Equal Opportunity offices were already operating in Queensland. If anti-discrimination legislation were to be enacted in Tasmania, this State too may come to a similar arrangement.

In 1991-92 800 complaints were lodged under the Sex Discrimination Act compared with 440 complaints in the 1987-88 year. Women complainants continued to outnumber men by 729 to 63 with six complaints from group organisations. The predominant area of complaint related to employment (89.3 per cent). Of the complaints, 366 or 45.8 per cent involved sexual harassment in employment. The majority of cases were considered to be successfully conciliated with a
mutually agreed settlement or with the complaint not proceeded with or withdrawn (In 1991-92 of the 82 complaints under the Sex Discrimination Act handled by the central office, 37 were conciliated, 29 discontinued, 6 declined, 2 referred elsewhere (1 'other') and only 7 cases needed to be referred for hearing - described as 'the most expensive and traumatic way of reaching a settlement'.


Senator Ryan's 1981 Sex Discrimination Bill included provision for affirmative action in public and private employment. This Part was omitted from the Sex Discrimination Act 1984. Instead, the Government decided on a course of public discussion and consultation before introducing affirmative action legislation. A Green Paper, Affirmative Action for Women: A Policy Discussion Paper, was presented to Parliament by the Prime Minister, Mr Hawke, on 5 June 1984. This outlined the reasons or need for affirmative action and the proposed elements of affirmative action programs, as well as the Government's plans for a voluntary pilot program. The Government also established a Working Party with members representing the Government and Opposition, Business, Trade Unions, Women's Organisations (from the National Women's Consultative Council) and Higher Education Institutions.

The Pilot Program commenced in July 1984 and at the end of May 1985 a Progress Report was issued. The Report of the Working Party on Affirmative Action Legislation was presented to Parliament by the Prime Minister, Mr Hawke, on 28 November 1985 at which time he made a Ministerial Statement announcing a National Agenda for Women, and the Government's acceptance of the recommendations for affirmative action legislation and supportive measures.

On 19 February 1986 the Prime Minister, Mr Hawke, presented the Affirmative Action (Equal Employment Opportunity for Women) Bill 1986. The supportive measures recommended by the Working Party in the areas of education, child care and legislative restrictions to women's employment were also announced in the Prime Minister's Second Reading Speech.

The Affirmative Action (Equal Employment Opportunity for Women) Act 1986 came into effect on 1 October 1986. It requires higher education institutions and relevant employers to develop and implement affirmative action programs. An affirmative action program is defined as a program designed to ensure that:

(a) appropriate action is taken to eliminate discrimination by the relevant employer against women in relation to employment matters; and
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(b) measures are taken by the relevant employer to promote equal opportunity for women in relation to employment matters; (s.3(1)).

'Discrimination' means discrimination as defined in sections 5, 6 or 7 of the Sex Discrimination Act 1984 (Cth).

A 'relevant employer' means a higher education institution which is an employer, or a person, body or association which employs 100 or more employees in Australia. The term does not include the Commonwealth, a State, a Territory, an authority or a voluntary body.

A 'higher education institution' is defined as a university, college of advanced education or other institution of tertiary education (other than a technical and further education institution within the meaning of the Commonwealth Tertiary Education Commission Act 1977. This was later amended to read within the meaning of the Employment, Education and Training Act 1988). The Affirmative Action (Equal Employment Opportunity for Women) Amendment Act 1989 extended the coverage of the Act to amalgamated educational institutions established after 31 December 1988 where before amalgamation at least one of the institutions was a higher education institution and therefore a relevant employer in terms of the Act.

Higher education institutions were required to commence the development and implementation of affirmative action programs for women in October 1986. Companies employing more than 1000 people were required to commence their programs by 1 February 1987, companies with over 500 and under 1000 employees were required to commence their programs by 1 February 1988 and companies with over 100 and under 500 employees by 1 February 1989. Staff employed by subsidiary companies were taken into account when calculating numbers of employees.

Affirmative action programs are to include eight steps which involve:

- the issuing by management of a policy statement notifying employees of the commencement of an affirmative action program;
- conferring responsibility for the program on a person with sufficient authority and status within the management to enable proper development and implementation of the program;
- consulting with trade unions which have members in that work place;
- consulting with employees, especially women;
- collecting and recording statistical and other relevant information on the program;
• reviewing policies and practices of the employer to identify any discriminatory policy or practice or to identify any patterns of lack of opportunity relating to women;

• setting objectives and making forward estimates; and

• monitoring and evaluating the implementation of the program to assess the achievement of the objectives and forward estimates. (s.8(1)).

For the purposes of this provision:

• 'forward estimate' is defined as a quantitative measure or aim which may be expressed in numerical terms, designed to achieve equality of opportunity for women in employment matters, being a measure or aim that can reasonably be implemented by the relevant employer within a specified time; and

• 'objective' means a qualitative measure or aim, expressed as a general principle, designed to achieve equality of opportunity for women in employment matters, being a measure or aim that can reasonably be implemented by the relevant employer within a specified time. (s.8(2)).

An affirmative action program may contain any other provision which the relevant employer thinks fit which is not inconsistent with the eight steps or the purpose of the Act. The Act specifically states, however, that nothing in it shall be taken to require a relevant employer to take any action incompatible with the principle that employment matters should be dealt with on the basis of merit.

The Act provided for the establishment of the office of a Director of Affirmative Action whose functions include advising and assisting employers in the development and implementation of programs, and the issuing of guidelines for this purpose; the monitoring and evaluation of reports and programs; research, educational programs and promotion of affirmative action through public discussion and community information; reviewing the effectiveness of the Act; and reporting to the Minister. The Director must submit a report to the Minister for Industrial Relations within six months after each 31 May on the operations of the Director during that year to 31 May. The Director may also submit other reports on matters relating to the operations, powers or functions of the Director. Reports are to be tabled in Parliament within 15 sitting days of receipt.

Employers are required to prepare a public report and a confidential report on the development and implementation of the program. Public reports are to provide statistics and related information, including the number of employees of either sex and their types of job or job classifications, and an outline of the processes to develop and
implement the affirmative action program. Public reports are to be made available by the Director to a member of the public on request.

Confidential reports are required to provide detailed analyses of the processes undertaken by the employer to develop and implement the program. Where this detailed analysis has been provided in the employer's public report, a separate confidential report need not be lodged.

The Director may request permission from employers to make information from the confidential report available to the public or available for use in a report of the Director. The Director, or persons employed by the Director, may not reveal information from confidential reports without consent, and the maximum penalties for so doing are $2500 or imprisonment for three months, or both. This is the heaviest penalty provided for in the Act and applies only to misuse of information by the Director or staff. It is for the protection of employers implementing affirmative action programs.

The Director may grant extensions of time to employers for the lodging of private and confidential reports, where such a request has been made and where the Director considers there are reasonable grounds for extending the period. If, in the opinion of the Director, the information provided in a report fails to comply with the provisions of the Act, the Director may by notice in writing request a relevant employer to provide further information within such time as specified in the notice. Failure to submit a public or confidential report to the Director as required, or failure to provide further information as required may result in the Director naming the employer, in the Director's Report, as having failed to provide the report or further information. This is the main sanction against employers in the Act.

The Affirmative Action Agency was established in October 1986, and in October 1992 presented its sixth annual report. In 1988-89 the final phase of implementation had occurred, covering private sector organisations with 100-499 employees, and the Agency was able to report then that all higher education institutions and 97 per cent of private sector organisations had reported as required by the Act. In 1992 the sanction of naming companies who had failed to report was applied in the case of eleven companies, some of which have since complied.


Following a review of the effectiveness and operation of the Affirmative Action (Equal Employment Opportunity for Women) Act
1986 conducted by the Affirmative Action Agency, and of both this Act and the Sex Discrimination Act 1984 and other matters relating to equal opportunity and the status of women by the House of Representatives Standing Committee on Legal and Constitutional Affairs, recommendations were made to Government and to the Attorney-General's Department for amendments to strengthen the Act.

On 19 September 1992 the Prime Minister announced the Government's response to those recommendations of the Report of the Inquiry into Equal Opportunity and Equal Status by the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Lavarch Report) which dealt with the Sex Discrimination Act and the Affirmative Action Act: legislation would be introduced to:

- give the Director of the Affirmative Action Agency (AAA) power to vary reporting requirements, thus enabling a reduction of reporting obligations of organisations consistently recording good progress (new section 13A of the Amendment Act provides that the AAA may, if satisfied that an employer has established an affirmative action program and has complied with other requirements of the Act for at least three years, waive the Principal Act's public reporting requirements)

- extend the operation of the Act to cover voluntary bodies employing 100 or more employees.

The Government also announced its intention to extend the coverage of the Act to union officials as employees and to trainees employed through Group Training Schemes. Section 3 of the Principal Act is amended to extend the coverage of the Principal Act to elected trade union officials (new subsection (5)), voluntary bodies (employing 100 or more people) and trainees of group training schemes (new subsection (6)).

The Coalition had announced that it would abolish the Affirmative Action Agency and incorporate its equal employment opportunity functions into the Department of Industrial Relations. With the aim of protecting the AAA as a separate body, the Affirmative Action Agency (Equal Employment Opportunity for Women) Amendment Act 1992 establishes the Agency as a statutory authority (s.6 which establishes a new Part III).

The Lavarch Report also recommended the introduction of contract compliance so that tenderers for Commonwealth contracts must be able to demonstrate compliance with the Affirmative Action (Equal Employment Opportunity) Act. The Government's Response announced acceptance of this recommendation. From 1 January 1993,
employers who fail to comply with the requirements of the Affirmative Action (Equal Employment Opportunity for Women) Act will not be eligible for consideration for government contracts for goods and services and specified industry assistance. This is to encompass purchasing by all government departments.\textsuperscript{12}

**Public Service Reform Act 1984**

The Public Service Reform Act 1984 (Cth) inserted a new section (s.22B) into the Public Service Act 1922 to provide for the commencement, development and implementation of equal employment opportunity programs throughout the Australian Public Service. This section of the Act came into operation on 1 October 1984 and Commonwealth government departments, statutory authorities with staff employed under the Public Service Act 1922, and statutory authorities for which the Public Service Board had statutory responsibility in relation to terms and conditions of employment of staff, were required to establish Equal Employment Opportunity (EEO) programs to conform with provisions of the Act. In accordance with the Act, an EEO program must include:

(a) examination of practices in relation to employment matters in the Department to identify:

   (i) any practices that unjustifiably discriminate against women or persons in designated groups; and

   (ii) any patterns (whether ascertained statistically or otherwise) of inequality of opportunity in respect of women or persons in designated groups;

(b) eliminating any practices, and eliminating or ameliorating any patterns, so identified;

(c) informing officers and employees in the Department, and relevant staff organisations, of the contents of the program and of the results of any review of the program;

(d) collecting and recording information, including statistical information, relevant to the operation of the program;

(e) assessing the effectiveness of the program by comparing information collected in relation to the results of the program with the indicators against which the effectiveness of the program is to be assessed; and

(f) giving effect to any guidelines on EEO programs issued by the Public Service Board. (s.22B(2)).

Programs are to relate to such 'employment matters' as the selection, promotion, transfer, training and development, and conditions of service of women members of staff and those in designated groups.
'Designated groups' at this stage are Aboriginal people, people with disabilities and people whose first language is not English.

In addition, the *Merit Protection (Australian Government Employees) Act 1984* provides for a Merit Protection Review Agency to investigate complaints of discrimination.

The first programs prepared in compliance with the Public Service Act's EEO provisions were completed during 1985-86. Sixty-five departments and authorities were then required to develop programs and forward copies to the Board. The Annual Report 1986-87 showed that only 45 of these had approved programs; the remaining twenty, employing approximately 55,000 staff, had not satisfactorily completed revisions of their programs. By 30 June 1989 all Australian Public Service departments had lodged EEO programs. At that date programs for eight agencies were still outstanding, including that of the Human Rights and Equal Opportunity Commission (although this and four of the other programs had been received by 30 September 1989).

In May 1987 the Treasurer announced plans for the restructuring of the Public Service Board. The *Administrative Arrangements Act 1987* assented to on 18 September, abolished the Board and created the Office of the Public Service Commissioner. This Act amended the *Public Service Act 1922* by removing the definition of the Board and inserting the definition of Commissioner (i.e. the Public Service Commissioner), and by providing that references to the Board were references to the Commissioner. Some of the Board's former functions were devolved or transferred to other Departments including the Department of Industrial Relations and the Department of Finance. The Public Service Commissioner retained responsibility for the guiding and monitoring of EEO programs, although the aim was to devolve more responsibility to Department Heads. The Department of Finance is now responsible for the production of the statistical data necessary for the monitoring of EEO programs.

**Equal Employment Opportunity (Commonwealth Authorities) Act 1987**

Despite the passing of the *Public Service Reform Act 1984*, and of regulations in June 1986 (Statutory Rules No.130-135, 1986) which brought other Commonwealth departments and authorities within the scope of section 22B of the Public Service Act, a number of Commonwealth authorities including some major statutory authorities which had no statutory relationship with the Public Service Board were still not covered by legislation requiring EEO programs. On 19
March 1987 the Equal Employment Opportunity (Commonwealth Authorities) Bill 1987 was introduced in the House of Representatives. It was read a third time in this House on 26 March 1987 and in the Senate on 5 May 1987. It received assent on 18 May 1987.

The Act widened the requirement for EEO programs to those Commonwealth authorities, including statutory authorities, employing 40 or more employees in Australia, not covered by the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* or the *Public Service Act 1922*.

The Act follows sub-section 22B(2) of the Public Service Act in providing for the contents of the EEO program. Minimum requirements for a program include informing employees of the program and results of monitoring and evaluation; appointing an officer of sufficient authority and status to be responsible for development and implementation of the program; consulting relevant trade unions and employees, particularly women and persons in designated groups; collecting and recording relevant statistics and information on employment by the authority, including numbers and types of jobs or classification, of male and female employees and persons in designated groups; identifying discriminatory policies and practices or patterns of lack of equality of opportunity in employment; setting objectives for the program and quantitative and other indicators against which the effectiveness of the program is to be assessed; and monitoring and evaluating the implementation of the program. No action is to be incompatible with the principle that employment matters should be dealt with on the basis of merit.

Major authorities covered by this legislation included Telecom (approximately 91,000 employees in 1987), the Australian Postal Commission (approximately 37,300 employees in 1987), and the Commonwealth Banking Corporation (approximately 36,100 employees in 1987). Four primary industry authorities were exempted from the legislation (the Australian Dairy Corporation, the Australian Meat and Livestock Corporation, the Australian Wheat Board and the Australian Wool Corporation) as it was planned to amend their establishing legislation to provide for EEO programs. This occurred in the case of three of these Authorities through the *Wheat Marketing Amendment (No 2) Act 1987* (s.45AA and 45 AB), the *Wool Marketing Act 1987* (s.41 and s.42) and the *Australian Meat and Livestock Industry Legislation Amendment Act 1987* (s.33 and s.33A). The Australian Dairy Corporation, with a small number of employees has also set in place an EEO program.

Under the Act, authorities have the option of reporting to their Ministers, or to the Public Service Commission. All have chosen to report to their own Minister and each now issues its own EEO report.
The Department of Industrial Relations has overall responsibility for administering both the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* and the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986*.

**South Australia: Sex Discrimination Act, 1975; Equal Opportunity Act, 1984**

South Australia was the first Australian State to introduce sex discrimination legislation.

In 1973 a Sex Discrimination Bill was introduced into the South Australian Parliament as a Private Member's Bill by Dr David Tonkin. A Select Committee report on the proposed Bill led to the reintroduction in June 1975 of sex discrimination legislation. The Bill was regarded as a positive step towards achieving the aims of International Women’s Year (1975). Its purpose was 'to render unlawful certain kinds of discrimination on the grounds of sex or marital status; to provide effective remedies against such discrimination and promote equality of opportunity between men and women generally; and to deal with other related matters'. The legislation also had an educative purpose. The Government hoped that it would create a climate in which public opinion would be 'mobilised against this form of discrimination'. The 1975 Bill extended the terms of the original Bill in provision for machinery for conciliation or the imposition of penalties. Many of the provisions were modelled on the United Kingdom's Sex Discrimination Act of 1975.

The South Australian Sex Discrimination Act was assented to on 4 December 1975 and took full effect from 12 August 1976. The Act prohibited both direct and indirect discrimination on the ground of sex or marital status. Indirect discrimination was defined as discrimination based on a characteristic or presumed characteristic appertaining generally to persons of a group (or marital status). Discrimination was defined as less favourable treatment than that in identical or similar circumstances to the treatment which would be accorded to a person of the opposite sex or different marital status.

The Act made discrimination on the basis of sex or marital status unlawful in employment, education, the provision of goods and services (including banking, credit and insurance), access to public places, accommodation and advertising. Discrimination in employment included work done by commission agents and contract workers, in relation to a partnership, and in the membership and rules of a trade union or employers' organisation. Similarly an employment agency or a qualifying body (i.e. an authority or body empowered to confer an
authorisation or qualification that is needed for, or facilitates, the practice of a profession or trade) might not discriminate on these grounds.

The Act established a Commissioner for Equal Opportunity and a Sex Discrimination Board. The Commissioner was appointed subject to the *Public Service Act, 1967*. Duties of the Commissioner were to investigate and conciliate complaints of unlawful discrimination, to initiate investigations and review all South Australian legislation to identify any discrimination. The Commissioner had to present an annual report and in it make any recommendations for the elimination or modification of discriminatory legislative provisions.

The Sex Discrimination Board was chaired by a judge or lawyer of at least seven years standing, and had two other members. These appointments were not subject to the *Public Service Act 1967*, but the appointment of Registrar to the Board was a public service position. The main functions of the Board were to hear and determine complaints, initiate inquiries and to grant exemptions from the Act. After hearing evidence the Board could dismiss the complaint or, if satisfied that there had been contravention of a provision of the Act, it could make an order requiring that the contravention cease and that future contravention be eliminated. It could order the payment of compensation to the complainant. Penalties not exceeding $2000 could be imposed for non-compliance with an order of the Board.

On 23 August 1984 the South Australian Attorney-General introduced a new Equal Opportunity Bill in the Legislative Council. The Bill resulted from the report of a working party on anti-discrimination legislation which recommended in December 1983 that there should be one Act, one agency to administer the legislation and one tribunal to deal with disputed complaints in all areas. The *Equal Opportunity Act, 1984* passed through the Parliament on 7 December 1984, after the resolving of a deadlock between the Houses over the definition of sexual harassment. It was assented to on 20 December 1984 and most provisions came into force on 1 March 1986.

The Equal Opportunity Act repealed the *Sex Discrimination Act, 1975* the *Racial Discrimination Act, 1976* and the *Handicapped Persons Equal Opportunity Act, 1981*. Objectives of the Act include:

- promoting equality of opportunity between the citizens of South Australia;
- preventing certain kinds of discrimination based on sex, sexuality, marital-status, pregnancy, race or physical impairment; and
- facilitating the participation of citizens in the economic and social life of the community.
Part III of the Act concerns the prohibition of discrimination on the ground of sex, sexuality, marital status or pregnancy in the areas of employment (including agents and contract workers), partnerships (the ground of sexuality is exempted), associations with both male and female members, qualifying bodies, and education or in relation to land, goods, services, accommodation, or superannuation. The provision relating to superannuation (Division VI of Part III) has not yet been proclaimed.

Part VI of the Act concerns 'other unlawful acts' and includes the prohibition of sexual harassment in the areas of employment (including commission agents and contract workers), education, the provision of goods and services, and accommodation. Section 87 includes the provision that employers, education authorities and the providers of goods and services have a duty to ensure that none of their employees subject other employees subject other employees, students, customers etc. to sexual harassment. Sexual harassment is defined as behaviour which causes a person to feel offended, humiliated or intimidated in circumstances in which it is reasonable for that person to feel offended, humiliated or intimidated, when the behaviour involves the subjecting of another person to an unsolicited and intentional act of physical intimacy, demanding or requesting (directly or by implication) sexual favours from the other person or making a remark (on more than one occasion) pertaining to the other person, being a remark that has sexual connotations.

The Act establishes a Commissioner for Equal Opportunity and an Equal Opportunity Tribunal. The Commissioner is appointed for five years and may be reappointed. Duties of the Commissioner are to foster and encourage informed and unprejudiced attitudes in the community with a view to eliminating discrimination on the ground of sex, sexuality, marital status, pregnancy, race or physical impairment; to institute, promote or assist in research, collection of data and the dissemination of information relating to such discrimination; to make recommendations to the Minister and to furnish advice; and to make annual reports to the Minister on the operation of the Act. Other duties of the Commissioner and officers who assist the Commissioner are to investigate complaints (which have been lodged in writing) and to attempt to resolve these by conciliation. The Commissioner may decline to take action or proceed if of the opinion that a complaint is frivolous, vexatious, misconceived or lacking in substance. To assist in the investigation of a complaint, the Commissioner may require books, papers or documents from the person alleged to have contravened the Act, and failure to comply carries a maximum penalty of up to $2000. Section 28a of the Acts Interpretation Act provides that from 1 August 1990 division-type fines and penalties will apply in South Australia so that these may be amended or increased by one Act. The Statute Law Revision Act 1990 amended sections of the Equal Opportunity Act
dealing with fines and penalties so that, for example, 'a penalty not exceeding $2000' is replaced by 'Penalty: Division 7 fine'.

The Equal Opportunity Tribunal consists of a Presiding Officer who is a judge or magistrate, not more than two Deputy Presiding Officers who are either judges, magistrates or legal practitioners of not less than seven years standing, and a panel of not more than 12 persons nominated by the Minister to be available for selection to sit at hearings. Members of the Tribunal are appointed for three years and are eligible for reappointment.

After hearing evidence and representations concerning a complaint, the Tribunal may order the payment of damages by the respondent to the complainant, may order the respondent to refrain from further contravention of the Act or may order the respondent to perform any acts to redress the loss or damage suffered by the complainant, or may dismiss the complaint. Appeals may be made to the Supreme Court against decisions of the Tribunal.

In 1989 the Act was amended by the Equal Opportunity Act Amendment Act, 1989 to extend prohibition of discrimination to the ground of intellectual impairment, and to alter the language of the Act to render it gender neutral. Other amendments relating to discrimination on the ground of age in the main came into force on 1 June 1991.


**New South Wales: Anti-Discrimination Act 1977**

In 1976 an Anti-Discrimination Bill listing nine grounds of unlawful discrimination was introduced by the NSW Government. These grounds were race, sex, marital status, age, religious conviction or political conviction, physical handicap or condition, mental disability, and homosexuality. The Bill was substantially amended by the Legislative Council which deleted all grounds except those of race, sex and marital status and made other amendments. The grounds deleted, and that of membership or non-membership of a trade union, were matters set for research by the Anti-Discrimination Board, established under the Act.

The Anti-Discrimination Act 1977 was assented to on 28 April 1977 and took full effect from 1 June 1977. Its stated purpose is 'to render
unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons.

Discrimination on the ground of sex or marital status is defined as less favourable treatment than given, or would be given, in the same or similar circumstances to a person of the opposite sex or different marital status. As in the South Australian Act both direct and indirect discrimination are unlawful on the ground of sex or marital status in certain areas.

The Act prohibits discrimination on the ground of sex or marital status in employment and in applying for employment. It also prohibits discrimination against commission agents and contract workers, discrimination by trade unions, qualifying bodies and employment agencies, discrimination in according access to places where liquor is sold, and discrimination in the provision of goods, services and accommodation. Discrimination on the ground of marital status is not proscribed in the matter of access to places where liquor is sold or in the provision of goods.

The Act was amended in 1980 to extend its provisions to public employment. The Anti-Discrimination (Amendment) Act 1980 was assented to on 28 April 1980. Its purpose was to eliminate discrimination in public employment on the ground of race, sex and marital status, and to promote equal opportunity for women and members of racial minorities in State public employment (including the teaching service, police force and State authorities).

In 1981 the Act was again amended to make discrimination on the ground of physical impairment also unlawful in certain circumstances, and for certain other purposes. The Anti-Discrimination (Amendment) Act 1981 extends the provisions of the Act to public education (except for single sex schools), discrimination by registered clubs, and discrimination in partnerships.

Amendments in 1982 to the Act transferred to the President of the Anti-Discrimination Board the functions formerly allocated to the Counsellor for Equal Opportunity, and made discrimination on the ground of intellectual impairment or homosexuality unlawful in certain circumstances. In 1989 vilification on the ground of race also became unlawful.

The Anti-Discrimination (Amendment) Act 1984 provided that inquiries by the Equal Opportunity Tribunal may be held in private if the Tribunal (by its own motion or an application of a party to the inquiry) considers this appropriate.
The 1977 Act had established a Counsellor for Equal Opportunity and an Anti-Discrimination Board. The 1981 amendments established an Equal Opportunity Tribunal. Duties of the Counsellor, which became the duties of the President of the Anti-Discrimination Board, are to investigate complaints of unlawful discrimination and to endeavour to resolve these by conciliation. If the President is satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance 'he' may decline to entertain the complaint but must advise the complainant of the reason for this and of the complainant's rights. Where the President fails to resolve a complaint he may refer it to the Equal Opportunity Tribunal.

The Anti-Discrimination (Amendment) Act 1981 established the Equal Opportunity Tribunal to be composed of a number of part-time members, at least one of whom is to be a judge or person qualified for appointment as a judge. When sitting, the Tribunal is made up of three members, the senior member being the judicial member, and two non-judicial members. The Tribunal's main function is to investigate complaints referred to it by the President of the Anti-Discrimination Board or the Minister. The Tribunal may hold a single inquiry into several complaints arising out of the same or substantially the same circumstances, and may join a person as a party to an inquiry. It may dismiss complaints if judged to be frivolous, vexatious, misconceived or lacking in substance. If the Tribunal finds a complaint substantiated it may order the payment of damages not exceeding $40 000 to the complainant, may order the respondent to cease the unlawful conduct or order the respondent to make redress for loss or damage suffered by the complainant. The Act provides for a right of appeal against a decision or order of the Tribunal.

The Anti-Discrimination Board consists of the President and two part-time members who may be appointed (under the 1982 Amendments) for a period not exceeding seven years in the case of a full-time member (the President) and three years in the case of a part-time member, and are eligible for reappointment. General functions of the Board are to:

(a) carry out investigations, research and inquiries relating to discrimination, in particular on the grounds of age, religious or political conviction, mental disability, and membership or non-membership of a trade union;

(b) acquire and disseminate knowledge on all matters relating to the elimination of discrimination and the achievement of equal rights;

(c) arrange and co-ordinate consultations, discussions, seminars and conferences;

(d) review, from time to time, the laws of the State;
consult with governmental, business, industrial and community groups and organisations in order to ascertain means of improving services and conditions affecting minority groups and other groups which are the subject of discrimination and inequality;

(f) hold public inquiries; and

(g) develop human rights programs and policies. (s.119).

The Anti-Discrimination (Amendment) Act 1985 provided for a closer working relationship between State and Commonwealth authorities in the 'promotion of the observance of human rights'. Arrangements might be made between the State and Commonwealth Ministers to delegate certain functions under the Sex Discrimination Act 1984 (Cth) and other anti-discrimination or human rights Acts to the President of the Anti-Discrimination Board, to the Board or to an officer of the Board. This arrangement ended in June 1992.15

Equal employment opportunity in the State public service is provided for in the Anti-Discrimination (Amendment) Act 1980. Public service departments and authorities are required to prepare and implement equal opportunity management plans to achieve the objects of equal opportunity. (The 1984 amendments provided that these plans include provision for physically handicapped persons.) The position of Director of Equal Opportunity in Public Employment was established (1980). Functions of the Director include advising and assisting authorities in relation to their management plans, evaluating the effectiveness of these plans and reporting and making recommendations to the Minister on the operation of the plans and on the objective of equal opportunity. The Miscellaneous Acts (Public Sector Executives Employment) Amendment Act 1989 made changes to the conditions of employment of the Director in line with the provisions of the Public Sector Management (Executives) Amendment Act 1989.


In 1975, International Women's Year, the Victorian Government established a Committee on the Status of Women which reported to the Premier in August 1976. The Committee's recommendations included the introduction of legislation to combat sex discrimination. The Equal Opportunity Act was passed by Parliament on 24 May 1977 and became fully operative by 3 April 1978. Its stated purpose was 'to render unlawful certain kinds of discrimination on the ground of sex or marital status, to promote equality of opportunity between men and women, to make consequential amendments to certain Acts and for other purposes'.

Discrimination on the ground of sex or marital status is defined again as less favourable treatment than that accorded to a person of the other sex or different marital status. The Act covered such discrimination in employment and the offer of employment, discrimination against commission agents and contract workers, discrimination in partnerships and in professional and other organisations, discrimination by qualifying bodies, employment agencies and educational authorities, and discrimination in the provision of goods, services, or accommodation. The Act established a Commissioner for Equal Opportunity and an Equal Opportunity Board and provided for the investigation and resolution of complaints.

The Act was repealed and replaced by the *Equal Opportunity Act 1984* which was assented to on 22 May 1984 and came into operation on 1 August 1984. The new Act also repealed and incorporated the provisions of the *Equal Opportunity (Discrimination Against Disabled Persons) Act 1982*.

The *Equal Opportunity Act 1984* widened the grounds of unlawful discrimination to discrimination on the grounds of status and private life. For the purposes of the Act 'status' is defined as the sex, the marital status, the race, or the impairment of that person or the status or condition of being a parent, childless or a de facto spouse. 'Private life' is defined as

(a) the holding or not holding of any lawful religious or political belief or view by the person; or

(b) engaging or refusing to engage in any lawful religious or political activities by the person.

The Act outlaws sexual harassment in the areas of employment, education and in the provision of goods and services and accommodation.

An objective of the Act is 'to facilitate the administration of the Act by strengthening the investigation, conciliation and enforcement provisions'.

Amendments made by the *Equal Opportunity (Amendment) Act 1985* included provision for the appointment of part-time members of the Board, for preliminary conferences, for the removal of gender specific language in the Act and for the transfer to the Commissioner of some functions formerly allocated to the Board.

The Act (as amended) makes provision for a Commissioner for Equal Opportunity and an Equal Opportunity Board. The Commissioner is appointed under the *Public Service Act 1974*. The Equal Opportunity Board consists of a President (the 1985 amendment replacing the
former 'chairman') and not less than two other members, appointed by
the Governor in Council and not, by reason of this office, subject to the
provisions of the Public Service Act 1974. The Registrar of the Board
and other staff are public servants.

It is the Commissioner's function to investigate complaints or matters
referred by the Board, and to attempt to resolve these by negotiation.
The Commissioner may dismiss complaints considered to be frivolous,
vexatious, misconceived or lacking in substance. Where this attempt
at negotiation is unsuccessful, the Commissioner may refer the matter
to the Board. The Equal Opportunity (Amendment) Act 1987
empowered the Commissioner for Equal Opportunity also to initiate
investigations in certain cases. The 1985 amendments included
provision for the making of an interim order by the President of the
Board to prevent a party from acting in a manner prejudicial to
negotiations or to the conciliation procedure. Provision is also now
made for the holding of preliminary conferences.

If the Board is satisfied that a person has contravened a provision of
the Act it may make an order requiring that the person refrain from
contravention of the Act, or requiring redress. Failure to obey an
order is an offence and a penalty not exceeding 20 penalty units
($2000), and five penalty units ($500) for each day of continuing
non-observance, may be imposed. The penalty for giving false or
misleading information is also a maximum of 20 penalty units.

If the Board, after hearing a complaint, considers that it is frivolous,
vexatious or totally lacking in substance or that the respondent has
behaved unreasonably, it may order the person who made the
complaint to pay the costs incurred by the other person.

Hearings of the Board are to be held in public but the Board may
direct that a hearing or part of a hearing be held in private and may
order that evidence, documents or information must not be published
except as specified by the Board.

Provision is made that for questions of law arising in proceedings
before the Board, the Board may seek the opinion of the Supreme
Court. Any party to proceedings before the Board may appeal to the
Supreme Court against an order of the Board on a question of law
only.

Educational and other duties of the Commissioner include the
dissemination of information to promote equality of opportunity
between men and women and the elimination of discrimination on the
ground of sex or marital status, the review of legislation to identify
discriminatory provisions, relevant research and reports to the
Minister.
In January 1989, the Law Reform Commission of Victoria was asked by the Attorney-General to conduct a major review of the operation of the Act and to advise on whether changes should be made to the scope of the Act and its administration. In May 1989 the Commission published a Discussion Paper on its review and invited comments on a number of proposals for reform of the Act. Among the proposals were those to extend the Act to prohibit discrimination on the ground of sexuality or on imputed grounds (i.e. of a presumed characteristic). At present a complainant of discrimination on the ground of sex or marital status has to have the characteristic which is the ground for discrimination, whereas the discrimination may have occurred because of a mistaken presumption. Another proposal was to extend the Act to prohibit unconsciously motivated discrimination. A clearer distinction between administrative and judicial functions was also advocated, with the Equal Opportunity Board becoming a specialist judicial body named the 'Equal Opportunity Tribunal'. In March 1990 the Law Reform Commission took the unusual step of issuing a second discussion paper which developed its proposals in more detail following further research and comment received on the first discussion paper. The second paper presents a draft Equal Opportunity Bill in plain English. The Draft Bill incorporates the Commission's proposed changes to the Act, including the prohibition of discrimination on the new grounds of age, sexuality, irrelevant criminal record, social origin, pregnancy, personal association and presumed characteristics. Comment was invited from the public on the second discussion paper, and the proposals were to be considered by the Attorney-General's Department. No amendments to the Act have yet resulted.

In December 1992 the Attorney-General, Jan Wade, referred to the Scrutiny of Acts and Regulations Committee an inquiry into the effectiveness and efficiency of the Equal Opportunity Act 1984 in eliminating discrimination and in providing redress for victims. Among the matters set for review by the Committee are:

- the agencies of the Commissioner for Equal Opportunity and the Equal Opportunity Board and their functions, powers and procedures
- whether it is preferable to have a specialist tribunal or to transfer the jurisdiction of the Board to a division of the County Court
- the costs of compliance with the Equal Opportunity Act
- the definition of 'discrimination' in the light of the Supreme Court decision in the \textit{Arumugam} case
- whether additional grounds of discrimination should be prohibited
• whether there should be amendments to the areas of activity in which discrimination is prohibited, or to the exemptions.

The Committee is required to consider the resource implications of its recommendations, and should report by 30 June 1993.

The Public Service (Amendment) Act 1984 provides for equal employment opportunity programs in State government employment in Victoria.

**Western Australia: Equal Opportunity Act 1984**

On 20 September 1984 the Western Australian Equal Opportunity Bill was introduced into the Legislative Assembly. The Bill was sent back to the Legislative Assembly from the Council on 6 November 1984 with some minor amendments which were agreed to by the Assembly. The Act was assented to on 7 December 1984 and was proclaimed and entered into force on 8 July 1985.

Under the Equal Opportunity Act, discrimination - direct or indirect - is unlawful on the ground of sex, marital status, pregnancy, race and religious or political conviction in the areas of employment, education, the provision of goods, services and facilities, accommodation and the activities of clubs. (The ground of impairment was added by the Equal Opportunity Amendment Act 1988 and that of age by the Equal Opportunity Amendment Act 1992.) Sexual or racial harassment is unlawful in employment and education. It is also unlawful to discriminate in advertisements and to victimise a complainant.

During the 1989 election campaign, an undertaking was made by the Labor Government to amend the Act to protect people from discrimination based on their family commitments and responsibilities. A paper addressing this ground was prepared by the Office of the Commissioner for Equal Opportunity. The Equal Opportunity Amendment Act 1992 added the ground of 'family responsibility or family status'. A new Part IIA was inserted into the Act to prohibit both direct and indirect discrimination on the ground of family responsibility or family status in the areas of employment (including applicants and employees, commission agents, contract workers, partnerships, professional or trade organisations, qualifying bodies, and employment agencies); education; and application forms or the provision of personal information different from that required from a person with different family responsibility or status. Exemptions to Part IIA include measures intended to meet special needs.
The Principal Act established a Commissioner for Equal Opportunity and an Equal Opportunity Tribunal. The main responsibilities of the Commissioner for Equal Opportunity are the investigation and conciliation of complaints, community education and the review of legislation to identify discriminatory provisions. The Commissioner may direct parties to attend a compulsory conference. The Tribunal consists of a part-time President who must be a legal practitioner of at least seven years standing, and two other members. The Equal Opportunity Amendment Act 1988 provided for more flexibility in the composition of the Tribunal by providing for the appointment of two deputy presidents enabled to perform the functions of the President, and by provision for an enlarged pool of deputy members.

The Tribunal holds inquiries into complaints referred by the Commissioner or the Minister and attempts to resolve these by conciliation or by order where possible. Where a complaint is substantiated, the Tribunal may order a respondent to pay the complainant damages not exceeding $40,000. The Tribunal may dismiss a complaint if satisfied that it is frivolous, vexatious, misconceived or lacking in substance or should be dismissed for any other reason. Provision is made for appeal to the Supreme Court on a question of law in a decision or order of the Tribunal.

Equal employment opportunity in State Government employment is an important objective of the Act. A Director of Equal Opportunity in Public Employment has been appointed and each State Government authority is required to prepare and implement equal employment opportunity management plans. The provisions of equal employment opportunity in public employment are based on the New South Wales legislation.

Queensland: Anti-Discrimination Act 1991


The Act achieved a number of firsts with its Preamble on the need for the 'promotion of equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct'; with its inclusion of breast feeding in the prohibited grounds of discrimination; and with its use of examples throughout the Act. The
Act prohibits discrimination on the basis of the attributes of sex; marital status; pregnancy; parental status; breastfeeding; age; race; impairment; religion; political belief or activity; trade union activity; lawful sexual activity; and association with, or relation to, a person identified on the basis of any of these attributes. Both direct and indirect discrimination is prohibited (s.8). Discrimination on the basis of breastfeeding is prohibited only in the areas of the provision of goods and services.

Areas of activity in which discrimination is prohibited are

- work and work-related areas, including pre-work areas, partnership and pre-partnership areas, industrial, professional, trade or business organisation in membership or pre-membership areas; qualifying bodies and pre-qualifying areas; and employment agency areas
- education including the prospective student area
- goods and services area
- superannuation
- insurance
- disposition of land
- accommodation
- club membership and affairs
- administration of State laws and programs
- local government.

Employment exemptions cover genuine occupational requirements, residential domestic services, residential child care services, work with children, educational or health-related institutions with religious purposes, the provision of single sex accommodation, or where workers are to be a married couple. A two-year exemption applies for 'compulsory retirement of people of a particular sex or a particular category or type of position', and provision is made for youth wages for workers under 21 years of age.

The Act establishes an Anti-Discrimination Commission, consisting of an Anti-Discrimination Commissioner and staff, and an Anti-Discrimination Tribunal.
The Commission's functions are:

(a) to inquire into complaints and, where possible, to effect conciliation;
(b) to carry out investigations relating to contraventions of the Act;
(c) to examine Acts and, when requested by the Minister, proposed Acts, to determine whether they are, or would be, inconsistent with the purposes of the Act, and to report to the Minister the results of the examination;
(d) to undertake research and educational programs to promote the purposes of the Act, and to coordinate programs undertaken by other people or authorities on behalf of the state;
(e) to consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act;
(f) when requested by the Minister, to research and develop additional grounds of discrimination and to make recommendations for the inclusion of such grounds in the Act;
(g) such functions as are conferred on the Commission under another Act;
(h) such functions as are conferred on the Commission under an arrangement with the Commonwealth ...;
(i) to promote an understanding and acceptance, and the public discussion, of human rights in Queensland;
(j) if the Commission considers it appropriate to do so - to intervene in a proceeding that involves human rights issues with the leave of the court hearing the proceeding and subject to any conditions imposed by the court;
(k) such other functions as the Minister determines;
(l) to take any action incidental or conducive to the discharge of the above functions. (s.235).

The Tribunal's functions are:

(a) to hear and determine complaints that the Act has been contravened;
(b) to grant exemptions from the Act;
(c) to provide opinions about the application of the Act;
(d) any other functions conferred on the Tribunal under the Act;
(e) any other functions conferred on the Tribunal under another Act;
(f) to take any action incidental or conducive to the discharge of the above functions. (s.248).
Provision for appeal to the Supreme Court against a Tribunal decision on a question of law is made.

**ACT: Discrimination Act 1991**

The *Discrimination Act 1991* was passed by the Legislative Assembly of the ACT on 20 November 1991. The Act commenced on the date of its notification in the ACT *Gazette* S 143, 13 December 1991.

The objects of the Act are:

(a) to eliminate, so far as possible, discrimination to which this Act applies in the areas of work, education, access to premises, the provision of goods, services, facilities and accommodation and the activities of clubs;

(b) to eliminate, so far as possible, sexual harassment in those areas;

(c) to promote recognition and acceptance within the community of the equality of men and women; and

(d) to promote recognition and acceptance within the community of the principle of equality of opportunity for all persons.

The Act applies to discrimination on the ground of any of the following attributes: sex, sexuality, transsexuality, marital status, status as a parent or carer, pregnancy, race, religious or political conviction, impairment or association (whether as a relative or otherwise) with a person identified by reference to one of these attributes.

Discrimination is defined as unfavourable treatment of a person because the person has one of these attributes, or the imposition of a condition or requirement that has or is likely to have the effect of disadvantaging a person with one of these attributes. However, if the condition or requirement is 'reasonable in the circumstances' (s.8(2)) it is not held to be unlawful discrimination. Matters to be taken into account in deciding whether a condition or requirement is 'reasonable in the circumstances' are:

(a) the nature and extent of the resultant disadvantage;

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement. (s.8(3)).

The ACT *Discrimination Act 1991* makes discrimination on the listed grounds unlawful in the areas of employment; education; access to premises; goods, services and facilities; accommodation; clubs; and in
requests etc for information' (ss.10·23). Employment areas cover applicants and employees, commission agents, contract workers, partnerships, professional or trade organisations, qualifying bodies, and employment agencies.

Part IV covers a wide range of 'exceptions to unlawful discrimination'. Some of these mirror the exemptions of the Commonwealth Sex Discrimination Act 1984. They include those for genuine occupational qualifications (s.34(1) and (2)) employment of a couple, residential care of children, services for members of one sex, accommodation provided for employees or students, educational institutions conducted for religious purposes, religious and voluntary bodies, and measures intended to achieve equality (s.27). The ACT Act exempts from its provisions educational institutions for members of one sex and clubs for members of one sex.

The exemptions for sport are the same as those of the Commonwealth Sex Discrimination Act 1984 except that the ACT also exempts sporting activities by children who have not yet attained 12 years of age.

In contrast to the Commonwealth's 1991 amendments, the ACT provides a blanket exemption for superannuation and provident funds and schemes (s.29). For insurance, it is not unlawful to discriminate against another person with respect to the terms on which an annuity or a policy of insurance is offered to, or may be obtained by, the other person, if the discrimination is reasonable in the circumstances, having regard to any actuarial or statistical data on which it is reasonable for the first-mentioned person to rely. (s.28)

Part V of the Act relates to sexual harassment which is defined:

For the purposes of this Part, a person subjects another person to sexual harassment if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in other unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated. (s.58(1)).

Sexual harassment is unlawful in employment (and relates to harassment by an employer or potential employer or partner, fellow employee, commission agent or contract worker); education (harassment by staff of a student or potential student and harassment by a student of another student or member of staff); access to premises; provision of goods, services and facilities; accommodation; and clubs.

The Act provides for the appointment of a Discrimination Commissioner whose main function is the investigation of complaints
and the endeavour to resolve each complaint by conciliation. The Commissioner may make a single investigation of several complaints or deal with a complaint as a representative complaint. The Commissioner may require attendance at compulsory conferences or may hold a public hearing. The Commissioner may require information or documents believed relevant to the investigation and may prohibit publication of evidence. After completing an investigation the Commissioner may

- dismiss any complaint not substantiated
- direct a respondent not to repeat or continue unlawful conduct
- direct the respondent to perform any reasonable act or acts, or
direct the respondent to pay a specified amount by way of compensation, to redress any loss or damage suffered by a person as a result of the unlawful conduct
- decide to take no further action.

If the Commissioner dismisses a complaint which on reasonable grounds is deemed vexatious or frivolous or not made in good faith, the complainant may be directed to pay to the respondent a specified amount to cover expenses incurred by the respondent in relation to the investigation of the complaint.

Application may be made to the Administrative Appeals Tribunal for review of a direction or other decision of the Commissioner.

Section 97 provides that acts that are unlawful under Parts III (Unlawful Discrimination), V (Sexual Harassment), and VII (other unlawful Acts - victimisation and unlawful advertising) do not constitute an offence. Section 98 provides that, except as expressly provided, nothing in the Act confers on a person any right of civil action in respect of an act that is unlawful in the areas of discrimination, sexual harassment victimisation or advertising.

Provision is made for application to the Commissioner for a grant of exemptions for periods not exceeding three years (s.109) and for application to the Administrative Appeals Tribunal for the review of such decisions.

Other functions of the Discrimination Commissioner include

- promoting understanding and acceptance of, and compliance with, the Act;
- research, educational and other programs to promote the objects of the Act;
- review of Territory laws to ascertain any inconsistencies with the Act;
• advice to the Minister on any matter relevant to the operation of the Act; and
• functions conferred by arrangement with HREOC and the Commonwealth Commissioner, or arrangement or functions conferred under other Territory laws.

**Northern Territory: Anti-Discrimination Act 1992**

The *Anti-Discrimination Act 1992* was passed by the Northern Territory Legislative Assembly on 17 November 1992 and was assented to on 18 December 1992. Commencement date for the Act is 1 August 1993.

Described as an Act to:

promote equality of opportunity in the Territory by protecting persons from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct, to provide remedies for persons discriminated against, and for related purposes

its objects are:

(a) to promote recognition and acceptance within the community of the principle of the right to equality of opportunity of persons regardless of an attribute;

(b) to eliminate discrimination against persons on the ground of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association, religious belief or activity, political opinion, affiliation or activity, irrelevant medical record or irrelevant criminal record in the area of work, accommodation or education or in the provision of goods, services and facilities, in the activities of clubs or in insurance and superannuation; and

(c) to eliminate sexual harassment. (s.3).

The Act provides for an Anti-Discrimination Commissioner. Functions of the Commissioner are:

(a) to carry out investigations and hearings into complaints and endeavour to effect conciliation;

(b) to examine Acts and regulations and proposed Acts and regulations of the Territory to determine whether they are, or would be, inconsistent with the purposes of this Act, and to report the results of such examinations to the Minister;
(c) to institute, promote or assist in research, the collection of data and the dissemination of information relating to discrimination and the effects of discrimination;

(d) to consult with organisations, departments and local government and community government bodies and associations to ascertain means of improving services and conditions affecting groups that are subjected to prohibited conduct;

(e) to research and develop additional grounds of discrimination and to make recommendations for the inclusion of such grounds in this Act;

(f) to examine practices, alleged practices or proposed practices of a person, at the Commissioner's own initiative or when required by the Minister, to determine whether they are, or would be, inconsistent with the purposes of this Act, and, when required by the Minister, to report the results of the examination to the Minister;

(g) to promote in the Territory an understanding and acceptance, and public discussion, of the purposes and principles of equal opportunity;

(h) to promote an understanding and acceptance of, and compliance with, this Act;

(j) to promote the recognition and acceptance of non-discriminatory attitudes, acts and practices;

(k) to promote within the public sector the development of equal opportunity management programs;

(m) to prepare and publish guidelines and codes of practice to assist persons to comply with this Act;

(n) to provide advice and assistance to persons relating to this Act as the Commissioner thinks fit;

(p) to advise the minister generally on the operation of this Act;

(q) if the Commissioner considers it appropriate to do so, to intervene in a proceeding that involves issues of equality of opportunity or discrimination with the leave of the court hearing the proceeding and subject to any conditions imposed by the court;

(r) such functions as are conferred on the Commissioner by or under this or any other Act;

(s) such other functions as the Minister determines. (s.13).

The Anti-Discrimination Commissioner will be responsible for the administration of the Territory Act and complaints made under it, with the Human Rights and Equal Opportunity Commission Office in Darwin continuing to be responsible for complaints made under Commonwealth Acts.
The Northern Territory Public Sector Employment and Management Act has a requirement of anti-discrimination. To date there has been a Director for Equal Employment Opportunity in the Northern Territory Public Sector, but this position will cease to exist on 1 August 1993. Each NT department will then be required to implement an EEO management plan and to report annually on this to individual Ministers. The Human Resource Management Division of the office of the Commissioner for Public Employment will have co-ordinating responsibilities.

Tasmania

Tasmania now is the only Australian State or Territory which has not enacted sex discrimination legislation. The Sex Discrimination Act 1984 (Cth) is administered by the Human Rights and Equal Opportunity Commission office in Hobart, and complaints of sex discrimination or sexual harassment in Tasmania are made under the federal legislation. Commonwealth programs and programs in receipt of specific purpose payments by the Commonwealth to Tasmania come under section 26 of the Sex Discrimination Act 1984 (Cth).[20]

(1) It is unlawful for a person who performs any function or who exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of that other person's sex, marital status or pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

(2) This section binds the Crown in the right of a State.

State employees, including teachers, police, State public servants and local government employees in Tasmania are not covered by the Commonwealth legislation.

In 1978 the Tasmanian Minister for Education, Recreation and the Arts, Mr Holgate, introduced an anti-discrimination Bill

for the prevention of unjustifiable discrimination on the grounds of sex, marital status, ethnic origin, or physical handicap; and for the making of inquiry into discrimination on the grounds of religious or political belief.

This Bill lapsed after a Select Committee of the Legislative Council concluded that the legislation was unnecessary.

As in Queensland, the change of government in Tasmania in 1989 prompted new plans for anti-discrimination legislation on a number of grounds including sex, marital status, pregnancy, parenthood and
Sexual orientation. The areas to be covered (with standard exemptions) were employment or occupation; education; access to places and facilities; land, housing and other accommodation; provision of goods, services and facilities; and clubs. The legislation planned was generally in line with the Commonwealth legislation and was to have been introduced in the Autumn Sitting of 1991. It was to have been enforceable to the same extent as provisions of the Commonwealth legislation except that it would have extended also to the ground of parenthood, sexual orientation and impairment. Non-enforceable conciliatory grounds to match those covered by the Human Rights and Equal Opportunity Commission were to be provided. An Office of the Status of Women was set up to advise the Premier and to provide consultative and information services.

An amendment to the Tasmanian State Service Act provided some measures for equal opportunity in the State public service. Further legislation to cover State agencies and local government was envisaged. However with the change of government in February 1992, this planned legislation lapsed.

On 2 March 1993 an Anti-Discrimination Bill was introduced into the Legislative Assembly as a Private Member's Bill. Prohibited grounds of discrimination are listed as race; social status; gender; sexual orientation; marital status; pregnancy; parental status; impairment; trade union activity; and association with a person who has, or is believed to have, any of the above attributes. Discrimination on any of these grounds may be the subject of an order of the Tribunal which would be enforceable upon filing the documents in the Supreme Court. Other prohibited forms of discrimination based on attributes of mental or psychiatric disability; religious belief or activity; political opinion, affiliation or activity; age; criminal record; or association with a person who has, or is believed to have, any of the above attributes may be the subject of a declaration of the Tribunal on the cause of the discrimination, together with recommendations it considers appropriate. Prohibited conduct is listed as sexual harassment; victimisation; racial vilification; failure to accommodate a special need; promoting prohibited conduct; or aiding a contravention of the [proposed] Act. Sexual harassment; vilification on the ground of race, gender, sexual orientation or impairment; failure to accommodate a special need; and discriminatory advertising may be the subject of an order of the Tribunal and enforceable upon filing the documents in the Supreme Court.

The Private Member's Bill is unlikely to succeed. Another option may be legislation on more limited grounds which provides coverage in terms of the Commonwealth's Sex Discrimination Act, and perhaps other Acts, to State and local government employees. The Bill is
interesting in that if passed it would be the first of the Acts to replace the ground of 'sex' with that of 'gender'.

**Effectiveness of the legislation**

**Operation of the Acts**

Reviews of the legislation, assessments of its effectiveness in different areas and recommendations for future amendments or action are undertaken continuously by the Human Rights and Equal Opportunity Commission, and by the State Commissioners and Anti-Discrimination Board. As case law has developed, aspects of the legislation have been seen as deficient in some areas in terms of achievement of the stated objectives. Most recently in the sex discrimination area HREOC has reported on its inquiry into sex discrimination in overaward payments and has conducted a review of permanent exemptions contained within the Sex Discrimination Act. In December 1992 the Affirmative Action Agency issued its final report of the effectiveness review of the Affirmative Action (Equal Employment Opportunity for Women) Act 1986, entitled *Quality and Commitment: The Next Steps*. Many of the recommendations from these reviews have already resulted in amendments to the Acts.

The Human Rights and Equal Opportunity Commission in the *Annual Report 1988-89* commented on difficulties encountered in administering its legislation. Unlike its state counterparts, HREOC could not enforce its decisions without recourse to the Federal Court. On the question of enforcement, the President of HREOC, Sir Ronald Wilson, commented in 1990:

>The Commission may make determinations as to whether unlawful conduct has occurred, and as to what if any remedies should be given. The process has many of the indicia of judicial power. However, the determinations of the Commission are stated not to be binding or conclusive between the parties.

>In this the Commission contrasts with the NSW Equal Opportunity Tribunal and its equivalents under other State anti-discrimination legislation, which exercise judicial power in the full sense. Unlike the State bodies, the Commission is constrained by the Boilermakers case...

>Enforcement proceedings in the Federal Court are provided for. The Federal Court has held however that these are not strictly proceedings for enforcement of the Commission's order. The Federal Court is required to satisfy itself that unlawful conduct has occurred, and determine for itself what order is appropriate, rather than relying on the determinations of the Commission or on evidence given to the Commission.21

>From February 1993, under the *Sex Discrimination and other Legislation Amendment Act 1992*, a determination of the Human
Rights and Equal Opportunity Commission must be registered with the Federal Court, and the determination shall have effect as an order of the Federal Court (new sections 82A and 82B).

The question of possible conflict in the conciliation and judicial roles is relevant for the Federal and State anti-discrimination bodies. This question has arisen when conciliation attempts have failed and the Commissioner or Commission then plays a part in presenting the case before the Tribunal or Supreme Court in the case of an appeal, or before the Federal Court. In considering the question of the need to separate the investigation and adjudication functions, the Law Reform Commission of Victoria proposed, for Victoria, a clearer distinction between administrative and judicial functions, and that the Equal Opportunity Board should be renamed the Equal Opportunity Tribunal to better describe its functions. This question is now one of the matters for the inquiry by the Scrutiny of Acts and Regulations Committee in Victoria.

The inquiry by this parliamentary committee will also consider the implications of a case in Victoria (Department of Health v Arumugam) which raised fundamental questions on anti-discrimination legislation when the Victorian Supreme Court in 1988 overturned a decision of the Equal Opportunity Board of Victoria. The Board had found that the then Victorian Health Department (later Commission) had discriminated against a doctor because of his race. However, Mr Justice Fullagar ruled in the Supreme Court that to be unlawful, the discrimination had to be a conscious act. The High Court refused leave to appeal against this decision because it said the case involved no general principle. Legal commentators such as Professor Tony Blackshield pointed out that it could be very difficult to prove that racist and sexist acts were conscious acts. The Law Reform Commission of Victoria has proposed that the Equal Opportunity Act should be extended to prohibit unconsciously motivated discrimination. Its Draft Equal Opportunity Bill includes the provision that for unlawful discrimination to take place, it is not necessary that 'the person be aware that the characteristic is a basis for his or her treatment of the other person'. However, if this is a necessary amendment to make the Victorian Equal Opportunity Act effective then other State and Federal legislation may need similar amendments.

Another cause for concern in this case was the awarding of legal costs of the Supreme Court case ($100,000) against the individual who was in that position simply because he had been a successful complainant to the Equal Opportunity Board. This was seen as a deterrent to individuals who could not match the financial resources of a government department or large organisation.
Exemptions and changes to exemptions

The Commonwealth and State sex discrimination and equal opportunity Acts provide for many exceptions to, and exemptions from, their provisions. Inevitably some of these exceptions reduce the overall effectiveness of the legislation in combating discrimination. Others can be regarded as common-sense precautions against unreasonable expectations.

Employment exemptions

In the area of employment, the Commonwealth Sex Discrimination Act 1984 provides a list of general exemptions where it is a genuine occupational qualification to be a person of a particular sex. These apply if:

(a) the duties of the position can be performed only by a person having particular physical attributes (other than attributes of strength or stamina) that are not possessed by persons of one sex;

(b) the duties of the position involve performing in a dramatic performance or other entertainment in a role that, for reasons of authenticity, aesthetics or tradition, is required to be performed by a person of a particular sex;

(c) the duties of the position need to be performed by a person of a particular sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex;

(d) the duties of the position include the conduct of searches of the clothing and bodies of persons of one sex;

(e) the occupant of the position is required to enter a lavatory ordinarily used by members of one sex while the lavatory is in use by members of that sex;

(f) the occupant of the position is required to live on premises provided by the employer or principal and -

(i) the premises are not equipped with separate sleeping accommodation and sanitary facilities for members of each sex;

(ii) the premises are already occupied by a person, or persons of one sex; and

(iii) it is not reasonable to expect the employer or principal to provide separate sleeping accommodation and sanitary facilities for members of each sex;

(g) the occupant of the position is required to enter areas ordinarily used only by persons of one sex while those persons are in a state of undress; or

(h) the position is declared, by regulations made for the purpose, to be a position in relation to which it is a genuine occupational qualification to be a person of a particular sex. (s.30(2)).
These general exemptions for employment appear also in most of the State Acts.

Residential child care services are exempted from the provisions of the Queensland Anti-Discrimination Act 1991 (ss.27 and 28) and the ACT Discrimination Act 1991. Work with children is also exempted from the provisions of the Queensland Act.

**Awards of courts or tribunals**

The *Sex Discrimination Act 1984* (Cth) and the State Acts exempted from their provisions any action in compliance with an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment. Federal industrial awards were exempted under the 1984 Act (s.40(1)(e)). Under the Victorian Act an action in compliance with a provision of an instrument made or approved by or under any other Act was not unlawful.

Legislative and award restrictions to women's employment were of major concern. The Australian Council of Trade Union's (ACTU) 1981 survey, *Federal Award Provisions which Differentiate on the Basis of Sex*, identified approximately 300 Federal awards in force at 1 January 1980, which contained provisions the effects of which could be discriminatory to women. In 1986 a commitment was given by the then Prime Minister, Mr Hawke, that there would be no further extension to the exemptions after 31 July 1987 'unless there is a clear and substantial justification on health and safety grounds', and by the ACTU and Confederation of Australian Industry (CAI) to aim to complete the process of removing restrictive provisions from Federal awards by the end of 1988.26

The Prime Minister announced in 1986 that the Government had decided to amend the *Conciliation and Arbitration Act 1904* to require the Conciliation and Arbitration Commission when making future awards or orders to have regard to the anti-discrimination provisions of the Sex Discrimination Act. The *Industrial Relations Act 1988*, which replaced the Conciliation and Arbitration Act, provides that

In the performance of its functions the Commission [i.e. the Industrial Relations Commission] shall take account of the principles embodied in the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984* relating to discrimination in relation to employment. (s.93).

The Industrial Relations Commission is not empowered to make a public sector employment award or order inconsistent with the Act (under section 109 of the Sex Discrimination Act, and section 121 of the Industrial Relations Act).
The *Sex Discrimination and other Legislation Amendment Act 1992* does not remove or replace the exemption at s.40(1)(e). Instead, through new section 50A and through an amendment provided in this Bill to the Industrial Relations Act (new section 111A) a complaint of discrimination in a federal industrial award may be made to the Sex Discrimination Commissioner who may then refer the award to the Australian Industrial Relations Commission (AIRC). Upon finding that an award is discriminatory, the AIRC must take action to remove the discrimination by setting aside the award or terms of the award, or varying the award, unless it considers that this would not be in the public interest. Before taking such action the AIRC must give parties to the agreement an opportunity to amend the agreement so as to remove the discrimination. Under new section 111A of the Industrial Relations Act, the Sex Discrimination Commissioner would be a party to the proceeding on such a review of an award.

**Temporary exemptions**

All Acts provide for the granting of temporary exemptions. The Commonwealth Act provides for the granting of exemptions by the Human Rights and Equal Opportunity Commission for a period of up to five years, with the possibility of a further exemption for a period of up to five years. These are notified in the Commonwealth Gazette and have been granted, inter alia, for single sex primary school sport, for women only audiences before Aboriginal women dancers and, most recently, for the superannuation industry.

Health and safety concerns in some industries have prompted some long term 'temporary' exemptions. Much of the recent research and negotiation has concerned lead industries and smelters and some temporary exemptions have been granted to these industries to apply to women employees of child-bearing age. Unions have tried to address the problem by pushing for a reduction in lead levels arguing that they are dangerous to all employees, not just to women. In 1988 the Equal Opportunity Board of Victoria did not grant an application from the Australian Lead Development Association for an exemption which would have allowed excluding the employment of women who are pregnant or capable of becoming pregnant from employment involving exposure to lead levels potentially harmful to an unborn child. In February 1992 HREOC intervened in a case involving Mt Isa Mines and Worksafe. A draft national code and proposed standard prepared by Worksafe sought not to discriminate between male and female workers but required a progressive lowering of lead levels for all workers in the lead industry. Criteria for exclusion from a lead-risk job included, in the proposed standard, personal medical condition, pregnancy and breastfeeding.
The New South Wales and Western Australian Acts also provide for the granting of temporary exemptions and further exemptions of up to five years. The Victorian, South Australian and Northern Territory Acts provide for exemptions and further exemptions of up to three years. The State exemptions are granted by the Equal Opportunity Board of Victoria, the Equal Opportunity Tribunals of South Australia and Western Australia, the Anti-Discrimination Tribunal in Queensland, the Discrimination Commissioner in the ACT, the Anti-Discrimination Commissioner in the Northern Territory, or by the Minister on the recommendation of the Anti-Discrimination Board in New South Wales.

Education

The Commonwealth and State Acts all have exemptions from their provisions for single sex schools, colleges and educational institutions. The Commonwealth Act also specifically provides for education or training courses for students of one sex, or mainly for students of one sex. Discrimination on the grounds of sex, marital status, pregnancy or sexual preference is not unlawful in educational institutions conducted in accordance with religious beliefs or doctrines if the discrimination is 'in good faith' and in order to avoid injury to the religious susceptibilities of the particular faith or creed (s.38(1)). The New South Wales Act exempts all private educational authorities from its provisions. The ACT Act exempts the provision of educational institutions for members of one sex.

A recommendation of the House of Representatives Standing Committee on Legal and Constitutional Affairs in *Half Way to Equal, Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (Lavarch Report), 1992, was that section 38 of the *Sex Discrimination Act 1984*, which exempts educational institutions established for religious purposes from the provisions of the Act, be amended to add the requirement of 'reasonableness'. Such a requirement would mean that a religious body could be called on to show that discrimination in employment of staff was reasonable having regard to the objectives of the organisation. The Government has promised to consult widely on this issue, and to reconsider its response to the recommendation in twelve months' time, i.e. by the end of 1993.

Religious bodies and charities

All of the Commonwealth and State Acts provide exemptions to apply to discrimination on the ground of sex or marital status in the ordination or appointment of priests, ministers of religion or members of any religious order; their training and education; the selection or appointment of persons to perform duties or functions in connection with religious observance or practice; and to any other act or practice
that conforms to the beliefs of that religion. Thus the debate about the ordination of women priests was outside the scope of the Federal and State sex discrimination legislation, although the principle of the unlawful nature of such discrimination was often argued. Indeed the Victorian Act specifically states that the Act does not apply to the ordination or appointment of priests, ministers of religion or members of a religious order (s.38(a)).

The conferring of charitable benefits is exempted from the sex discrimination provisions of the Commonwealth and State Acts. Voluntary bodies are exempted from the provisions of the Commonwealth Act, the Western Australian Act and the NSW Act in connection with the admission of members and the providing of benefits, facilities and services to members. However the Affirmative Action (Equal Employment Opportunity) for Women Act 1986 was amended in 1992 to provide that voluntary bodies employing 100 or more people should be included within the scope of the Act.

Clubs

Some of the wide exemptions for clubs, contained in early State legislation, have been removed by the later Acts or amendments. Provisions of the NSW, South Australian and Western Australian Acts are now substantially the same as those of the Commonwealth Act. In July 1985 the NSW Anti-Discrimination Board issued Guidelines for Registered Clubs in an attempt to reduce the number of complaints in this area.

The Sex Discrimination Act 1984 (Cth) makes it unlawful for a club, or a committee of management or representative of a club, to discriminate against a member or an applicant for membership of the club on the ground of a person's sex, marital status or pregnancy. However, it is not unlawful to discriminate against a person on the ground of sex if membership of the club is available only to persons of the opposite sex, or if it is not practicable for a benefit to be used or enjoyed simultaneously or to the same extent by both men and women. In determining whether this latter exemption applies, the matters to be taken into account include the purposes for which the club was established, its membership, the nature of benefits it provides, the opportunities for use and enjoyment of benefits by men and women, and other relevant circumstances. The practice of according 'associate' or auxiliary memberships to women members in a club may now be challenged.

The Victorian Act contains a different definition of 'club' from the other Acts. In the 1984 Victorian Equal Opportunity Act a club is a social, recreational sporting or community service club or a community service organisation which
(a) is in occupation of any Crown land; or

(b) is directly or indirectly in receipt of financial assistance from the State Government or a municipality. (s.31(1)).

In the Commonwealth Act

'club' means an association (whether incorporated or unincorporated) of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that

(a) provides and maintains its facilities, in whole or in part, from the funds of the association; and

(b) sells or supplies liquor for consumption on its premises; (s.4(1)).

The Victorian Act exempts from the anti-discrimination provisions, clubs established solely for persons of a certain status or private life, clubs which exist or operate principally to prevent or reduce disadvantage to members or to preserve a minority culture. In its Second Discussion Paper on the Equal Opportunity Act Review, the Law Reform Commission of Victoria has proposed that the current approach be retained.

Sport

All Acts provide exemptions for competitive sporting activities in which the strength, stamina or physique of competitors is relevant. In the Commonwealth, Victorian, Western Australian, Queensland, ACT and Northern Territory Acts this exemption does not apply to coaching, administration, umpiring or refereeing, or to 'any prescribed sporting activity'. Sporting activities by children under the age of 12 years are also not exempted from the provisions of the Commonwealth, Western Australian, Queensland and Northern Territory Acts. The Law Reform Commission of Victoria has included this measure for children under 12 also in its Draft Equal Opportunity Bill.

A former federal Sex Discrimination Commissioner, Ms Quentin Bryce, has commented that although discrimination against women in sport is extensive and widely recognised, few women bring complaints under the Sex Discrimination Act to the Human Rights and Equal Opportunity Commission in this area.

Superannuation and insurance

The Commonwealth's Sex Discrimination Act 1984 exempted superannuation schemes and provident funds from its provisions (s.41(1)) but provided that:
Sub-section (1) may be repealed by a regulation, and such a regulation shall come into operation
(a) on a date specified in the regulation, being a date not earlier than 12 months after the making of the regulation; or
(b) at the expiration of the period of 2 years immediately after the commencement of this Act,
whichever is later.

A review of the exemption relating to superannuation was conducted by the Human Rights Commission which made recommendations in 1986 including that of the repeal of section 41(1). In 1989 the Human Rights and Equal Opportunity Commission reviewed the general exemption in relation to insurance. Its report, *Insurance and the Sex Discrimination Act 1984*, recommended retaining the exemption for differentiated insurance rates based on valid and reasonable data, but deleting the exemption based on 'any other relevant factors' (s.41(4)). The report also recommended that insurance companies should have a duty to disclose and be accountable for the statistical data used to justify different premiums, and that the Insurance and Superannuation Commission should provide an appeal mechanism for cases where data or its interpretation is disputed.

The *Sex Discrimination Amendment Act 1991* replaced the blanket exemptions for superannuation, with more limited exemptions. A more limited exemption for insurance was enacted in 1992.

In many of the State Acts, wider exemptions for both superannuation and insurance now apply than under the Sex Discrimination Act (Cth). The NSW Anti-Discrimination Act exempts superannuation and provident funds and schemes from the provisions of the Act (s.36), as do the Victorian Equal Opportunity Act (s.36) and the ACT Discrimination Act (s.29). Sections 41-44 of the South Australian Equal Opportunity Act, which relate to superannuation, have not yet been proclaimed. The *Equal Opportunity Act 1984* of Western Australia exempted superannuation schemes under subsection 34(1) but provided that this subsection may be repealed by regulation. However, pending action under the Commonwealth Act, no regulation has been made.

The Queensland Anti-Discrimination Act, in relation to exemptions in both the superannuation (discrimination on the ground of sex or marital status) and insurance (discrimination on the ground of sex) areas, provides that:

It is not unlawful to discriminate [on the basis of sex or marital status for superannuation, or on the basis of sex for insurance] with respect to a matter that is otherwise prohibited under Subdivision A if the discrimination is
permitted under the *Sex Discrimination Act 1984* of the Commonwealth. (s.59 and s.73 respectively).

Insurance provisions in all Acts exempt discrimination based on actuarial or statistical data. The State Acts of NSW, Victoria, Queensland, Western Australia and Northern Territory also include an exemption where the discrimination is reasonable having regard to the data and 'any other relevant factors'. This phrase, 'any other relevant factors', was deleted in 1992 from the Commonwealth Sex Discrimination Act to tighten the provision in that Act, and it does not appear in the insurance provisions of the South Australian or ACT Acts. The ACT Act, however, exempts the imposition of conditions or requirements which may disadvantage persons on the ground of any attribute such as sex, sexuality, marital status or pregnancy if the condition or requirement is 'reasonable in the circumstances' (s.8(2)).

Differences in the Acts have yet to be tested by case law but it would be expected that where there are inconsistencies, the Commonwealth Act would prevail. In the case of intra-State insurance schemes, however, State legislation (in most cases providing wider exemptions) could be expected to apply.

**Combat duties**

The Commonwealth *Sex Discrimination Act 1984* provided that discrimination against a woman on the ground of sex was not unlawful in connection with employment, engagement or appointment in the Defence Force in a position involving the performance of combat duty, or combat-related duties. (s.43). No similar exemption or reference appears in the State Acts as this is an area of Federal jurisdiction. In ratifying the United Nations Convention on the Elimination of All Forms of Discrimination Against Women in 1983, Australia made a reservation reflecting the Defence Force practice of excluding women from combat and combat-related positions.

Regulations under the Sex Discrimination Act defined 'combat' and 'combat-related' duties to include direct participation in acts of violence against an adversary in time of war as well as duties in support of or in close proximity to, a person performing combat duties. Also included in the definition of these duties were positions which must be filled by those who have had experience in, or training for, warlike operations and the reserve which must be maintained for casualty replacement, relief from arduous duty and the career development of combat personnel.31

However, the Government undertook to open more positions in the Defence Force to women, consistent with maintaining combat preparedness, and in August 1984 the then Minister for Defence, Mr
Scholes, the Minister Assisting the Prime Minister on the Status of Women, Senator Ryan, and the then Attorney-General, Senator Gareth Evans, announced the opening of 17,000 positions within the Defence Force to women on the basis of merit in competition with men.32

On 30 May 1990 the then Minister for Defence Science and Personnel, Mr Gordon Bilney, announced the decision that women in the three Services could serve in combat-related positions, thus opening up many more jobs and career opportunities to women. However he announced that, although it will not be used, the exemption relating to combat-related duties in the Sex Discrimination Act will remain. The Chiefs of Staff Committee would review implementation of the new arrangements annually, and the policy would again be reviewed in June 1993. At the time of this announcement, women made up 11.3 per cent of the Australian Defence Force. Women in the Navy would still be excluded from service on submarines, in the Army from positions in armour, artillery, infantry and combat engineers and in the Air Force from operating combat aircraft with offensive capabilities and from being airfield defence guards.33


...that section 43 be amended to include a specified time period not exceeding two years to allow the removal of prohibitive and discriminatory provisions from Defence Force legislative requirements and administrative procedures.

On 18 December 1992, following recommendations from the Chief of the Defence Force, Mr Bilney announced the opening of several combat positions to women. In the RAAF, women could fly every type of RAAF aircraft including combat aircraft, and the only category of employment not open to them would be airfield defence guards. In the Navy, they will be able to serve on all ships including submarines, being excluded only from the hazardous occupation of mine clearance diver. In the Army, over 80 per cent of positions will be available to women, but exemptions for the combat arms (infantry, armour, artillery, and combat engineers) would remain in place. Mr Bilney expected the question of amendments to the Sex Discrimination Act as a result of these changes to be addressed 'early in the new year'.34

**Grounds and changes to grounds**

**Pregnancy**

Article 11, paragraph 2 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women states:
In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; and

(d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.

In ratifying the Convention, Australia entered a reservation on Article 11(2)(b) concerning paid maternity leave.

Pregnancy is a ground for unlawful discrimination under the Commonwealth, South Australian, Western Australian, Queensland, Australian Capital Territory and Northern Territory Acts. The ground of pregnancy is included in the South Australian Equal Opportunity Act, 1984, but the Act provides an exemption if the discrimination is based on the fact that the woman is not, or would not be, able to perform the work adequately without danger to herself or the unborn child, or respond adequately to situations of emergency that should reasonably be anticipated in connection with the employment, where no other reasonably appropriate position in the same employment could be offered to her without encountering these problems.

In terms of the NSW Anti-Discrimination Act, discrimination on the ground of pregnancy or possible pregnancy is a form of direct or indirect sex discrimination. However, under the NSW Act it is not unlawful to discriminate in employment against a woman if at the date of application or interview for a position the woman is pregnant. A woman who was pregnant at the time of interview or application for employment may be lawfully dismissed unless she did not know and could not reasonably be expected to have known that she was pregnant.

Pregnancy is not specified as a ground for unlawful discrimination in the Victorian Equal Opportunity Act 1984. Discrimination on this ground is considered implicit sex discrimination within the definition of a characteristic pertaining to persons of a certain status. The position regarding discrimination if a woman is pregnant at the time of interview or application for a job is unclear. The Victorian
Commissioner for Equal Opportunity, in the 1988-89 Annual Report, recommended a specific reference in the Act to pregnancy as a ground. This has been included in the Victorian Law Reform Commission's Draft Equal Opportunity Bill.

All State Acts, as well as the Commonwealth Act, provide that the rights and privileges granted to women in connection with pregnancy or childbirth are not to be regarded as discrimination against other employees.

**Family status and family responsibilities**

The Commonwealth, Victoria, West Australia, Queensland, the ACT and the Northern Territory all now have provisions in their anti-discrimination or equal opportunity Acts to prohibit discrimination on the ground of family status or responsibilities. The Victorian *Equal Opportunity Act 1984* made certain kinds of discrimination against a person based on that person's status unlawful. The definition of 'status' included the status or condition of being a parent or being childless. The *ACT Discrimination Act 1991* includes 'status as a parent or carer', and the Queensland and Northern Territory Anti-Discrimination Acts include both 'parental status' or 'parenthood' and 'breastfeeding' as grounds of prohibited discrimination. The Western Australian *Equal Opportunity Amendment Act 1992* added the ground of 'family responsibility or family status'.

The Commonwealth *Sex Discrimination Act 1984* was amended by the *Human Rights and Equal Opportunity Legislation Amendment Act (No. 2) 1992* which set a new object (s.3(ba)) to the Act:

> to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities.

New section 4A, provides a definition of 'family responsibilities'. 'Family responsibilities' is defined to mean the responsibilities of an employee to care for or support a dependent child, or any other immediate family member who is in need of care and support.

New section 7A, provides that an employer will be taken to have discriminated against an employee on the ground of the employee's family responsibilities if:

- the employer treats the employee less favourably than an employee without family responsibilities, in circumstances that are the same or not materially different; and
- the less favourable treatment is because of the family responsibilities of the employee, or a characteristic applying generally to persons with family responsibilities, or a characteristic generally imputed to persons with family responsibilities.
New subsection 14(4), makes it unlawful for an employer to dismiss an employee on the ground of family responsibilities.

These inclusions or amendments to the Acts are in line with Australia's obligations under International Labour Organisation Convention 156.

Sexual harassment

The 1984 Commonwealth Act outlawed sexual harassment in the areas of employment and education. The Western Australian Act also prohibits sexual harassment relating to the provision or control of accommodation, and the Victorian and South Australian Acts make sexual harassment illegal in the areas of employment, education and the provision of goods, services and accommodation. Some differences existed in the definitions of sexual harassment but the common factors to 1992 were the unwelcome nature of the action and the implicit disadvantage in refusing or objecting to the advance or harassment. The 1992 amendments to the Commonwealth Act replaced the condition of belief of disadvantage in the definition of sexual harassment with:

... in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated. (s.28A.(1)).

The Commissioner for Equal Opportunity in Victoria recommended the strengthening of the sexual harassment provisions to cover

- harassment by a fellow worker or subordinate;
- a single act of harassment;
- specific reference to sexual harassment in education; and
- sexual harassment by a fellow student.\(^{35}\)

The Victorian Law Reform Commission has also proposed replacing the wording 'sexual advances' and 'persistent sexual suggestions and innuendo' (s.20(1) of the Victorian Equal Opportunity Act) with wording more in line with the Commonwealth definition of 'unwelcome sexual advance' 'unwelcome request for sexual favours' or 'unwelcome conduct of a sexual nature', which could apply to a single act of harassment.

The New South Wales Anti-Discrimination Act does not deal specifically with sexual harassment, although discrimination on the grounds of both sex and homosexuality are proscribed. The Equal Opportunity Tribunal in NSW has held that sexual harassment could constitute discrimination on the ground of sex, and sexual harassment cases are dealt with under this ground.
In the *ACT Discrimination Act 1991* the definition of sexual harassment is:

... a person subjects another person to sexual harassment if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in other unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated. (s.58(1)).

In its far-reaching Inquiry into Equal Opportunity and Equal Status, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended amendments to the *Sex Discrimination Act* which would:

- remove the need for a complainant to demonstrate disadvantage by replacing the definition of sex harassment in ss.28(3) and 29(2) with definitions similar to those contained in s.58 of the *ACT Discrimination Act* 1991;
- amend s.29(1) to include harassment of staff by students as an offence; and
- make unlawful sexual harassment in the provision of goods and services, and accommodation.

In responding to the report of this inquiry, *Half Way to Equal* (the Lavarch Report) the Prime Minister announced on 19 September 1992 that the Government would introduce legislation to strengthen the sexual harassment provisions of the *Sex Discrimination Act*. This was achieved with the *Sex Discrimination and other Legislation Amendment Act 1992* which extended the areas in which sexual harassment is unlawful and changed the definition of sexual harassment to omit the condition of belief of disadvantage.36

**Developments in other provisions**

**Requirements of complaints**

The requirement of a written complaint, and the prospect of conducting a single action, were seen as barriers to disadvantaged sections of the community such as Aboriginal, migrant and country women. A single complainant is unlikely to be able to match the resources of a large organisation or government department in an adversarial situation.

The Commonwealth *Sex Discrimination and other Legislation Amendment Act 1992* replaced sections 69 and 70 dealing with representative complaints, and made other changes to conditions covering class action where more than one person has a complaint
against the same person and where there is a substantial common issue of law or fact.

Advertising

Advertisements which indicate an intention to discriminate on the ground of sex or marital status are proscribed by all Acts. Specific maximum penalties for placing or publishing such advertisements are set by the respective Acts of the Commonwealth ($1000, or $5000 for a body corporate), South Australia ($1000), New South Wales ($1000), Queensland (35 penalty units - at $60 per penalty unit - for an individual or 170 penalty units in the case of a corporation), Northern Territory ($1000 for an individual or $5000 for a corporation) and Victoria (two penalty units - $200). In the 1988-89 Annual Report of the Victorian Commissioner for Equal Opportunity, the Commissioner recommended that financial penalties for discriminatory advertising should be increased to match those applied under the Commonwealth laws. The Draft Equal Opportunity Bill prepared by the Law Reform Commission of Victoria recommended increasing the maximum penalty to 20 penalty units.

Vicarious liability

Under the Commonwealth, Victorian, South Australian, Western Australian and Queensland Acts, a person (or employer) is liable for unlawful acts done by employees or agents unless it is established that the person took all reasonable steps to prevent the unlawful acts. The NSW Act makes principals or employers liable for acts of their agents or employees unless they 'did not, either before or after the doing of the act, authorise [the doing of the act], either expressly or by implication'.

In the case of sexual harassment different approaches are taken to vicarious liability. The Victorian Act provides that an employer or supervisor is liable if an employee sexually harasses another in the course of employment if the employer or supervisor knowingly permitted the harassment. In the matter of other forms of discrimination by an employee or agent, the employer may be liable unless he or she took reasonable precautions to ensure that it did not occur. The South Australian Act states that a person is not vicariously liable for an act of sexual harassment committed by an agent or employee, 'unless he instructed, authorised or connived at that act'.
Achievements and goals

Some measures of the success of the Commonwealth and State sex discrimination legislation may be

- that the majority of complaints are settled by conciliation
- that only a very small number of complaints proceed to a Federal Court or Supreme Court hearing
- that all higher education institutions and all but a very few (eleven) private industry companies had reported as required by the Affirmative Action (Equal Employment Opportunity for Women) Act
- that all Australian Government public service departments have equal employment opportunity programs
- that guidelines to employers and community education programs have been prepared on aspects of discrimination, such as pregnancy and sexual harassment.

Even the growth each year in the number of complaints of discrimination may be regarded as a measure of the growing understanding in the community that such discrimination is illegal and that there are avenues for combating it and providing redress or compensation.

On the other hand, it is clear that the aim of equal employment opportunity has not been attained and that progress is, at best, slow.

For adult employees, in February 1993, women's full-time ordinary time average weekly earnings were 84 per cent of men's, and for full-time average total earnings the female/male proportion was 80 per cent. For all employees average weekly total earnings the female/male proportion was 67 per cent. In the December quarter of 1975 the female/male proportion for all employees average weekly total earnings was 65 per cent so this has changed little in the past 17 years.

Reasons identified for the disparity in wage levels, prompting affirmative action and equal employment opportunity legislation, included the lower awards for traditionally female occupations, the high degree of occupational and industry segregation of women workers, and the predominance of women in part-time employment.

Australia has the highest incidence of occupational segregation of the OECD countries, and one of the highest incidences of industrial segregation. Women are concentrated in the lowest-paid levels in
industry. Only 23 per cent of Australia's 618,000 senior managers are women.

One aim of affirmative action and equal employment opportunity programs is to encourage more women into non-traditional areas of employment. Opportunities in traineeships and the trade-training system are important as only about 12 per cent of apprenticeships are held by women. However, the introduction in July 1990 of the Training Guarantee Levy Scheme caused further fears of loss of momentum in the push for equal employment opportunities. No provision was included in the Training Guarantee Acts that the training be provided on a fair and equitable basis.

Concern has also been expressed that equal employment opportunity principles may be overlooked in the award restructuring and enterprise bargaining processes. It has been pointed out that such processes present 'a golden opportunity to address the issues of relativity, skills recognition, work flexibility and training in one of the most sex segregated work forces in the industrialised world'. A Department of Industrial Relations report in December 1990 on Women in Restructured Awards pointed out that women were entering award restructuring from a weaker position than male employees, but that there were many positive initiatives. Two units within the Department of Industrial Relations, a Work and Family Unit and an Equal Pay Unit, advise on these areas and on Australia's progress in terms of its responsibilities under ILO Convention 156 on Workers with Family Responsibilities, ratified in March 1990.

For the Australian Government's own employees, equal employment opportunity programs were set in place following the enactment of the Public Service Reform Act in 1984. In the Australian Public Service, the representation of women in the Senior Executive Service (SES) and senior Administrative Service Officer (ASO) positions has increased since 1986. In December 1992, 13.37 per cent of SES officers were women, compared with 3.9 per cent in 1984 when the SES was formed. However, women still tend to be at lower levels than men with the same educational qualifications and length of service. Studies have shown that if women and men with the same qualifications and length of service had reached the same levels, in June 1989 there would have been about 60 per cent more women in ASO8 positions, and almost twice as many in the SES.

In regional offices women (and other designated groups) appear to be particularly under-represented at senior levels. The 1987-88 Annual Report of the Public Service Commissioner noted that arrangements made for the devolution of the Board's EEO functions in the regions were still inadequate, and that there had been a drop in the average level of EEO activity in the regions. This Report stated:
Many of the former Board functions cannot be performed efficiently - or in practice, cannot be performed at all - by individual regional offices of departments working alone. The specialist expertise involved cannot be duplicated in all departments, and programs for small minorities need to be coordinated on an interagency level to be viable.40

According to the 1991-92 Annual Report of the Human Rights and Equal Opportunity Commission, the Commonwealth was the respondent in a total of 95 of the 800 cases. In its 1988-89 report, the Commission speculated that the increase in complaints against the Commonwealth appeared 'due in part to cutbacks in resources for EEO programs in Commonwealth agencies'. Apparently, a number of complaints which would formerly have been handled internally by EEO officers have been referred to the Commission instead.

Legislation is only one of a number of strategies in place to work towards equal opportunity for women. Education programs and the wider National Agenda for Women are at least equally important. Legislation alone cannot produce the changes required, but it does play an important part in changing community attitudes and expectations.
## Appendix 1

### Comparative Table of Sex Discrimination Acts(a)

**Abbreviations:**

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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>SDA</td>
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<tr>
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<td>Anti-Discrimination Act 1977 (New South Wales)</td>
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* no provision

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Note: The *Royal Commissions Act* 1923 (NSW) and the *Royal Commissions Act* 1968 (WA) have relevant provisions concerning evidence and offence.

Appendix 2

Major Commonwealth and State legislation in the areas of sex discrimination and equal opportunity for women.

Commonwealth

Sex Discrimination Act 1984
Human Rights and Equal Opportunity Commission Act 1986
Public Service Reform Act 1984
Equal Employment Opportunity (Commonwealth Authorities) Act 1987

New South Wales

Anti-Discrimination Act 1977

Victoria

Equal Opportunity Act 1984
Public Service Act 1974

South Australia

Equal Opportunity Act, 1984
Government Management and Employment Act, 1985

Western Australia

Equal Opportunity Act 1984

Queensland

Anti-Discrimination Act 1991

Australian Capital Territory

Discrimination Act 1991

Northern Territory

Anti-Discrimination Act 1992
Notes


3. The Conciliation and Arbitration Act was replaced by the *Industrial Relations Act 1988*. The *Sex Discrimination Act 1984* was therefore amended by the *Industrial Relations (Consequential Provisions) Act 1988* to cover organisations 'within the meaning of the *Industrial Relations Act 1988*'. A similar amendment was made to the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986*.


7. This is discussed further in the section on Exemptions, Awards of courts or tribunals on pp 47-48 of this paper.


10. Amended by the *Employment, Education and Training Act 1988*.


16. The definition of impairment in the *Equal Opportunity Act 1984* was widened by the *Health (General Amendment) Act 1988* to include 'the presence in the body of organisms causing disease' and 'an impairment which is imputed to a person'. To the exemptions covering discrimination on the ground of impairment was added 'where the discrimination is reasonably necessary to protect public health'.


18. See later discussion on effectiveness of the legislation, p. 45.


20. The extent to which Commonwealth and Commonwealth-State programs are bound by the *Sex Discrimination Act 1984* (Cth) is discussed in a PRS paper by Bernard Pulle, Law and Government Group, entitled *Commonwealth Programs in Tasmania*.


30. See discussion on pp.6-7 above.

31. 'Combat duties' and 'combat-related' duties were defined in *Sex Discrimination Regulations*. Statutory Rules 1984 No. 181.


36. As discussed on p.10 above.


