CHAPTER 3

OBJECTS AND DEFINITIONS

3.1 This chapter examines the objects of the Act and how the Act defines some key terms. In looking at these issues, the committee also received evidence concerning the interpretation of the Act by the courts and how that judicial interpretation has affected the operation of the Act.

Objects of the Act

Interpretation of the Act

3.2 Some submissions argued that the courts have narrowly construed the Act and other anti-discrimination legislation. For example, the Women's Electoral Lobby expressed concern that:

> ...a persistently narrow interpretation of the SDA, particularly on the part of the High Court, is undermining the efficacy of the Act. It is notable that, in the 12 years since Wik, not a single discrimination case has succeeded before the High Court. With the exception of Justice Kirby, High Court judges have ignored the beneficent purpose of the Act and the contents of CEDAW, which has frustrated the aims of the legislation.[1]

3.3 To ensure the Act is interpreted consistently with its purpose, the Women's Electoral Lobby recommended that section 3 be amended to provide guidance on how the courts should interpret the Act. Specifically, this amendment would require that the Act be interpreted so as to further the objects of the Act set out in section 3.[2]

3.4 The Sex Discrimination Commissioner advocated inserting an express requirement in the Act that it be interpreted, not just in accordance with CEDAW but also with the ICCPR, ICESCR and the relevant ILO conventions, particularly ILO Convention 156, which relates to discrimination on the basis of family responsibilities.[3] HREOC submitted that:

> The SDA currently does not provide any guidance as to how its provisions are to be interpreted with respect to Australia's international legal obligations.[4]

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1 *Submission 8*, p. 6. See also Professor Margaret Thornton, *Committee Hansard*, 11 September 2008, p. 39; Collaborative submission from leading women's organisations and women's equality specialists, *Submission 60*, p. 13.

2 *Submission 8*, p. 7. See also Professor Margaret Thornton, *Submission 22*, p. 4; Australian Women's Health Network, *Submission 3*, pp 8-9.

3 *Committee Hansard*, 9 September 2008, p. 7.

4 *Submission 69*, p. 48.

3.5 HREOC acknowledged that, at common law, there are rules of statutory construction which require that domestic legislation should be interpreted consistently with Australia's obligations under international law and that these rules have particular application where a domestic statute gives effect to Australia's obligations under a particular international convention.[5] Despite this, HREOC considered that:

> ...an explicit direction within the SDA to codify this common law principle would help to clarify this point for courts and litigants and help to ensure that the SDA is applied consistently with CEDAW and relevant international obligations under the ICCPR, ICESCR and ILO Conventions in all cases. It would also help to elevate this presumption of statutory construction above the melee of competing presumptions.[6]

Drafting of the objects

3.6 Subsections 3(b), (ba) and (c) of the Act provide that the objects of the Act include elimination of discrimination on various grounds 'so far as is possible'. Several submissions argued that the objects of the Act should not be stated so equivocally and, in particular, should not be qualified by the phrase 'so far as is possible'.[7] For example, the Women's Electoral Lobby argued that:

> It is not a statutory convention within Australian law to proscribe wrongful behaviour and then qualify it with the words 'so far as is possible'. We would not tolerate an injunction "to drive on the left-hand side of the road 'so far as possible'". Most significantly, no such qualification is used in CEDAW, which 'condemns discrimination against women in all its forms' (Art 2). [8]

3.7 Similarly, the collaborative submission from leading women's organisations and women's equality specialists (the Collaborative submission) noted that:

> The Objects clause of the SDA undermines the entire SDA because almost every subsection is equivocal. Section 3(a) states that it will give effect only to 'certain provisions' of CEDAW. The repeated use of the qualifier, 'so far as is possible', appearing in the first line of the Preamble, and repeated in ss3 (b), (ba) and (c), confirms the impression that the SDA is ambivalent about its aims.[9]

3.8 In its submission, HREOC also noted that this qualification is not consistent with CEDAW:

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5 *Submission 69,* pp 48-49.

6 *Submission 69,* p. 49.

7 Women's Electoral Lobby, *Submission 8,* pp 6-7; Professor Margaret Thornton, *Submission 22*, pp 2 and 6; Community and Public Sector Union – State Public Services Federation, *Submission 24*, pp 2 and 3; Australian Women's Health Network, *Submission 30*, p. 6; Dr Sara Charlesworth, *Submission 39*, p. 4.

8 *Submission 8,* p. 6. See also Ms Caroline Lambert, YWCA Australia, *Committee Hansard,* 11 September 2008, p. 58.

9 *Submission 60,* p. 14.

> The term 'so far as is possible' limits the object of the SDA in a way that is not provided under CEDAW. CEDAW provides that state parties are under a general obligation to eliminate discrimination against women. The term 'so far as is possible' reflects that the substantive provisions of the SDA do not go as far as this obligation under CEDAW.[10]

3.9 In summary, HREOC argued that the use of the term 'so far as is possible' results "in a qualified commitment to international obligations, which is inappropriate in respect of an Act of such importance as the SDA" and recommended its removal.[11]

3.10 The Women's Electoral Lobby suggested replacing the phrase 'to eliminate as far as is possible' with 'to prohibit', on the basis that 'to prohibit' is stronger than the phrase 'to eliminate' and is also more commonly used in legal parlance.[12]

Definitions in the Act

Definition of Discrimination

3.11 Many submissions were critical of the existing definition of discrimination under sections 5 to 8 of the Act and, in particular, the use of the distinction between direct and indirect discrimination. For example, Dr Belinda Smith considered that:

> [A] significant limitation of the SDA is the distinction between direct and indirect discrimination. This distinction, largely replicated across all Australian antidiscrimination laws, is artificial, chimerical, difficult to understand and thus difficult to comply with and enforce.[13]

3.12 National Association of Community Legal Centres and the Combined Community Legal Centres Group (NSW) (NACLC) also submitted that:

> The distinction between 'direct' and 'indirect' discrimination is technically complex and difficult to apply. To determine whether a person has been subject to 'direct discrimination', that person needs to work out whether they have received less favourable treatment; to determine if they have been the subject to 'indirect discrimination', that person needs to work out whether the treatment they have received has had a less favourable impact on them. This places the entire burden on the complainant to deal with such a contrived distinction, and [they] risk failing in their complaint if they are unable to argue it.[14]

3.13 The Law Council of Australia and the New South Wales Bar Association (Law Council) suggested that the best approach to simplifying the definitions of

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10 *Submission 69*, p. 47.

11 HREOC, *Submission 69*, pp 47-48. See also *Committee Hansard*, 9 September 2008, p. 7.

12 *Submission 8*, pp 3 and 6. See also Professor Margaret Thornton, *Submission 22*, p. 2.

13 *Submission 12*, p. 4.

14 *Submission 52*, pp 6-7.

discrimination under the Act would be to remove the distinction between indirect and direct discrimination altogether:

> [T]he definition of both direct discrimination and indirect discrimination under the Act ought to be repealed and replaced with the definition of discrimination against women contained in article 1 of CEDAW. We say this will also address some of the complexities that currently exist in the Sex Discrimination Act.[15]

3.14 In a similar vein, Professor Margaret Thornton recommended that a broader definition of discrimination that adverts to substantive discrimination in a way that more accurately reflects the definition contained in Article 1 of CEDAW is required.[16]

Direct discrimination

3.15 Several submissions argued that direct discrimination is defined too narrowly under the Act because it requires the complainant to show he or she has been treated less favourably, in circumstances that are not materially different, to the way a person of the opposite sex would have been treated. This hypothetical person of the opposite sex is known as 'a comparator'.[17] The Australian Council of Trade Unions (ACTU) notes that:

> The current definition of direct discrimination requiring unfair comparison with a male comparator is problematic where there is no evidence available of a male in the same or similar circumstances. The requirement for a direct male comparison particularly precludes pay inequity claims where male and female workers perform different types of work, or between different workplaces or on the basis of occupational segregation.[18]

3.16 An officer of HREOC submitted that, while a comparator may be useful in some circumstances for determining whether discrimination has occurred, it should not be an element of the definition of discrimination:

> Engaging in a hypothetical comparative exercise as to how someone else may or may not have been treated in same or similar circumstances is often a very useful analytical tool for answering that question of causation. But in our view, including it as a separate element in the definition as a substantive positive duty of an applicant to establish as a question of fact can involve a very artificial distraction from that central inquiry.[19]

3.17 He provided an example of the difficulties associated with the requirement for a comparator:

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15 *Committee Hansard*, 10 September 2008, p. 49.

16 *Submission 22*, p. 3.

17 Women's Electoral Lobby, *Submission 8,* p. 6; Independent Education Union of Australia, *Submission 49*, p. 3.

18 *Submission 55*, p. 7.

19 *Committee Hansard*, 9 September 2008, p. 9.

> To give an example, the Sex Discrimination Act clarifies that breastfeeding is a characteristic appertaining to women, but if there is a claim of discrimination on the basis of breastfeeding, the comparison is with a man, in the same or similar circumstances. [That] just is not really a fair comparison. Men do not breastfeed and they do not do anything that is even remotely similar to breastfeeding. Yet a claim cannot succeed unless the applicant can positively establish that there is a comparator so that this comparative exercise can be undertaken.[20]

3.18 Similarly, Associate Professor Simon Rice stated that it is "both conceptually and practically difficult for a person to have to prove direct discrimination on the basis of a comparator."[21]

3.19 It was further argued that the interpretation of this comparative element of the definition of direct discrimination by the courts has made it extremely difficult for complaints to make out a case of direct discrimination. For example, Dr Smith argued that the narrow interpretation of similar direct discrimination provisions under the *Disability Discrimination Act 1992* by the High Court, in *Purvis v New South Wales*[22] *(Purvis)*, has 'decimated' the scope of direct discrimination under the Act.[23] The Collaborative submission similarly suggested that the *Purvis* case "raises the burden of proof in direct discrimination complaints to insuperable heights."[24]

3.20 In the *Purvis* case, the High Court considered whether the expulsion of a boy who had suffered a brain injury which caused behavioural problems was direct disability discrimination. The majority of the court held that in determining whether discrimination had occurred the complainant's treatment should be compared with how a student without a disability, who had exhibited similar violent behaviour, would have been treated.[25] Job Watch noted that:

> The minority of McHugh and Kirby JJ held that this behaviour was a manifestation of the disability and therefore should be excluded from the construction of the Comparator. However, the majority of the Court thought that it was the outburst that led to his expulsion and it would seem artificial to remove this aspect from the objective circumstances. The High Court found that the school did not directly discriminate against the student because the school would have also expelled a violent student who did not have an intellectual disability so the student was not treated differently than the Comparator would have been treated.[26]

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20 *Committee Hansard*, 9 September 2008, p. 9.

21 *Submission 53*, p. 4.

22 [2003] HCA 62.

23 *Committee Hansard*, 9 September 2008, p. 61.

24 *Submission 60*, p. 21.

25 [2003] HCA 62 at 222-232. For a summary of the case see Job Watch, *Submission 62*, pp 25-26.

26 *Submission 62*, pp 25-26.

3.21 Dr Smith submitted that the impact of the decision in *Purvis* is that the direct discrimination provisions will not prevent discrimination on criteria which are closely linked to sex but are not expressly sex:

> In essence the case makes clear that direct discrimination provisions do not prevent employers (education providers, etc) from using criteria that very closely connect or overlap with traits that are supposedly protected by the SDA. For example, while an employer may be prohibited from applying a blanket exclusion of women, direct discrimination provisions allow the employer to choose the candidate who can work 24/7, can do overtime on short notice, will not take extended leave, will not take their entitlement to carer's leave or any other criteria that may have a gendered element but is not expressly 'sex'. ...The indirect discrimination provisions are still available to challenge such criteria, but with all the uncertainty and litigation difficulties that indirect discrimination provisions entail. [27]

3.22 Job Watch also argued that the decision establishes a test for direct discrimination which:

> ...makes it too easy for a respondent to evade liability for direct discrimination by claiming that their discriminatory behaviour was because of a consequence of the complainant's sex or marital status etc and not the sex or marital status itself.[28]

3.23 Job Watch supported amending the Act to alter the way the comparator is constructed by the courts.[29] However, HREOC and Professor Rice suggested that the 'comparator' test for discrimination be replaced altogether by a 'detriment' test similar to that used in paragraph 8(1)(a) of the *Discrimination Act 1991 (ACT)*.[30] In essence, this would mean a person discriminates against another person if the person treats or proposes to treat the other person unfavourably because of an attribute such as his or her sex or relationship status.

Indirect discrimination

3.24 As discussed in chapter 2, indirect discrimination occurs where a condition, requirement or practice is imposed that is likely to have the effect of disadvantaging people of one sex, people of a particular marital status or women who are pregnant or potentially pregnant. It is therefore concerned with practices which on the face of it treat everyone equally but which disadvantage particular groups because of the characteristics of those groups. HREOC explained in its submission:

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27 *Submission 12*, p. 5. See also Professor Margaret Thornton, *Submission 22*, pp 2-3; HREOC, *Submission 69*, p.57.

28 *Submission 62*, p. 26. See also Dr Belinda Smith, 'From Wardley to Purvis: How far has Australian anti-discrimination law come in 30 years?', *Australian Journal of Labour Law*, Vol 21, 2008, pp 3-29 at pp 24-26.

29 *Submission 62*, p. 25.

30 *Submission 53*, p. 4; *Committee Hansard*, 9 September 2008, pp 9-10. See also Law Council, *Submission 59*, p. 15.

> Indirect discrimination targets facially neutral barriers which appear to treat everyone equally, but which disproportionately impact on particular groups (ie women) due to structural, historical, attitudinal, biological and social inequalities and barriers.[31]

3.25 The Collaborative submission explained how indirect discrimination is thus linked to the notion of substantive equality as opposed to formal equality:

> In many areas of life, men and women are differently situated, so requiring same treatment will not ensure equality. For example women cannot always be treated like men in the workforce as they have specific needs as a result of their childbearing function. Substantive equality looks to situations where it is necessary to treat someone differently because they are differently situated, in order to ensure equality. ...
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> Indirect discrimination, by challenging apparently neutral practices that disadvantage women, or married people, or pregnant people, could provide a path towards substantive equality.[32]

3.26 Some submissions pointed to a need to clarify what constitutes 'indirect discrimination' because this type of discrimination is poorly understood.[33] The Anti-Discrimination Commission Queensland explained that:

> Indirect discrimination ...is a complex notion and not readily identified in terms of the obligations of employers, service providers and the like. At the ADCQ, it is common to hear 'but how can that be discrimination if the policy (or requirement) applies to everyone?'. Little headway can be made in achieving equality where discrimination remains misunderstood, including by those who are victims of it.[34]

3.27 In addition, the Collaborative submission argued that the provisions prohibiting indirect discrimination have not actually operated to promote substantive equality because of the barriers to proving an indirect discrimination claim. In particular, complainants face difficulties, firstly in identifying a condition, requirement or practice, and secondly in relation to the reasonableness test under section 7B.[35]

3.28 HREOC agreed that recent court cases have taken a narrow approach to identifying a condition, requirement or practice and pointed particularly to the cases of

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31 *Submission 69*, p. 72.

32 *Submission 60*, p. 13.

33 See for example Diversity Council Australia Inc, *Submission 47*, p. 5; Anti-Discrimination Commission Queensland, *Submission 63*, pp 6-7.

34 *Submission 63*, pp 6-7. See also Dr Belinda Smith, *Committee Hansard*, 9 September 2008, p. 68; Victorian Automobile Chamber of Commerce, *Submission 32*, pp 5 and 8.

35 *Submission 60*, p. 13.

Kelly v TPG Internet Pty Ltd[36] (*Kelly*) and the High Court decision in *New South Wales v Amery*[37] (*Amery*).[38] HREOC explained that in *Kelly*:

> [T]he applicant alleged indirect discrimination because of her employer's failure to grant her request for part-time work following her return from maternity leave. Raphael FM rejected this aspect of the claim on the basis that there was no relevant requirement, condition or practice. His Honour reasoned that the refusal of part-time work was merely the refusal of an employment-related benefit, which his Honour distinguished from a requirement, condition or practice of employment.[39]

3.29 The *Amery* case concerned a challenge to different pay scales applicable to long term casual and permanent teachers, on the basis that the lower pay scales available to casual teachers indirectly discriminated against women. This challenge relied not upon subsection 5(2) of the Act but on a similar indirect discrimination provision in the *Anti-Discrimination Act 1977(NSW).* HREOC noted:

> A majority of the High Court held that the applicants had failed to establish a relevant requirement or condition of the position (the NSW legislation does not include 'practices'). The majority distinguished casual and permanent teachers as being separate positions and, accordingly, the pay scales applicable to one position could not be regarded as a condition, requirement or practice in relation to the other position.[40]

3.30 HREOC submitted that:

> One approach to remedying this situation would be to require that an applicant simply establish that the relevant circumstances (including any terms, conditions or practices imposed by the respondent) disadvantaged women (or other relevant groups). ...This would remove the need for technical disputes over whether the respondent has imposed a relevant requirement, condition or practice.[41]

3.31 However, it should be noted that the Law Council considered that the decision in *Amery* is of little relevance to the Act because of the different language used by paragraph 24(1)(b) of the *Anti-Discrimination Act 1977(NSW)* and subsection 5(2) of the Act.[42]

3.32 Section 7B provides that a condition, requirement or practice is not discriminatory if it is 'reasonable in the circumstances'. HREOC suggested that the test under section 7B should be more stringent:

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36 [2003] FMCA 584.

37 [2006] HCA 14.

38 *Submission 69,* pp 73-74. See also Collaborative submission, *Submission 60,* p. 13.

39 *Submission 69,* p. 73.

40 *Submission 69,* p. 74.

41 *Submission 69,* p. 75.

42 *Submission 59,* p. 16.

> What cases often turn on in indirect discrimination cases is whether the relevant requirement, condition or practice is reasonable. Reasonableness is the relevant threshold.
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> ...We question whether or not reasonableness is an appropriate standard in this area. The SDA draws on Australia's human rights obligations and, as such, effectively that is a form of protection of human rights. International jurisprudence on limitations of human rights establishes that for a limitation to be justified, it needs to be something more than just reasonable. It needs to be pursuant to a legitimate object and it needs to be proportionate to the achievement of that object.[43]

3.33 The Collaborative submission expressed similar reservations and argued that reasonableness is:

> ...far too open textured a test, as it suggests no objective requirement. It is much lower than comparable tests in the USA (where proportionality and business necessity must be established) and the UK (where the test is 'justified').[44]

3.34 HREOC recommended that the reasonableness test be reviewed with a view to replacing it with a standard that more explicitly requires an assessment of the legitimacy of the object being sought, and the proportionality of the means being adopted to achieve that object.[45]

Definition of other terms

3.35 A number of submissions argued that the definitions of 'marital status' in section 4 and 'family responsibilities' in section 4A discriminate against same sex couples.[46] Essentially, this is because, while both definitions use the term 'de facto spouse', the definition of 'de facto spouse' in section 4 is limited to a partner of the opposite sex.

3.36 The committee notes that the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* amends the definition of 'family responsibilities' in section 4A to provide coverage to same-sex couples in relation to discrimination on the grounds of family responsibilities. However, the Act did not amend the definitions of 'marital status' and 'de facto spouse' in section 4 to

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43 *Committee Hansard*, 9 September 2008, pp 11-12.

44 *Submission 60,* p. 13. See also HREOC, *Submission 69*, pp 77-78.

45 *Submission 69*, pp 78-79. See also UNIFEM, *Submission 19*, supplementary submission, p. 4.

46 Dr Belinda Smith, *Submission 12,* p. 8; Office of the Anti-Discrimination Commissioner (Tas) *Submission 13*, p. 3; Carers Australia *Submission 33*, p.6; NACLC *Submission 52,* p. 6; HREOC, *Submission 69*, p. 90.

provide same-sex couples with protection against discrimination on the basis of their relationship status.[47] An officer from HREOC explained that:

> The marital status provision at the moment applies to people who are in a de facto relationship, but only if you are in an opposite sex relationship. Our recommendation is simply to extend that protection to people, regardless of whether or not it is a same-sex relationship or an opposite sex relationship.[48]

3.37 Finally, the Anti-Discrimination Commissioner of Tasmania suggested the definition of 'club' in section 4 is too narrow because it is limited to clubs supplying alcohol for consumption on the premises. The Commissioner pointed out that this definition posed a technical barrier to bringing complaints against clubs which do not supply liquor.[49]

47 Explanatory Memorandum Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008, pp 37-38. See also Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 23 September 2008, pp 56-57.

48 HREOC, *Committee Hansard*, 9 September 2008, p. 14.

49 *Submission 13*, p. 2.