

# SEX DISCRIMINATION AMENDMENT BILL 1995

## Referral of the Bill

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

## The Committee's Inquiry

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

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

## Introduction

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

1.5 The Bill will amend the Act to:

---

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

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

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

- (a) insert a Preamble incorporating both a general prohibition on discrimination on the grounds covered by the Act and an equality before the law provision;
- (b) alter the Act's definition of indirect discrimination to simplify the test for indirect discrimination and include a reasonableness defence for certain sorts of indirect discrimination;
- (c) repeal and replace section 7 to include potential pregnancy as an unlawful ground of discrimination;
- (d) repeal section 33, the 'special measures' provision, and replace it with a new provision which indicates that such measures are not discrimination for the purposes of the Act and are designed to achieve 'equality' [of outcomes];<sup>4</sup>
- (e) remove the reference to 'combat related duties' in section 43;  
and
- (f) make minor technical and consequential amendments.

## Background

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

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

---

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

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

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

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

### **Convention on the Elimination of All Forms of Discrimination Against Women**

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

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

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

---

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

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

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

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

- (a) with which a substantially higher proportion of persons of the opposite sex are able to comply;
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.

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

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

---

6 Subsection 3(d) of the Act.

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

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

### ***Griggs v Duke Power Company***

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

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

---

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

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

9 (1971) 401 US 424.

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

## The Proposed Amendments

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

### Preamble

1.19 The proposed new preamble reads as follows:

- 
- 10 E. Ellis, 'The Sex Discrimination Law of the European Union', (December 1994) vol. 25, no. 4, *The Law Librarian* 186-191 at p. 187.
- 11 E. Ellis, 'The Definition of Discrimination in European Community Sex Equality Law', (December 1994) vol. 19, no. 6, *European Law Review* 563-580 at p. 572.
- 12 Ms Marian Sawyer, Associate Professor in Politics, University of Canberra, *Submission* No.1 at page 1; Mr John Basten QC, *Submission* No. 4 at page 1; Mr Alan Rose, President, Australian Law Reform Commission, *Submission* No. 6 at p. 2; Mr Michael L. Abbott QC, President, South Australian Bar Association, *Submission* No. 7, at p. 1; Mr Milen White, Assistant General Manager, Human Resources and Corporate Administration Branch, Aboriginal and Torres Strait Islander Commission, *Submission* No. 8 at page 1; Ms Mary McNish, NSW Council for Civil Liberties, *Submission* No. 10 at page 2; Ms. Kathleen Townsend, Office of the Status of Women, *Submission* No. 12 at page 1; Mr Ian Dearden, Queensland Council for Civil Liberties, *Submission* No. 13 (QCCL's position was one of 'not opposing' the Bill); Ms Barbara Horsfield, National Executive Officer, Girl Guides Association of Australia; *Submission* No. 14.
- 13 Ms Rosemary Hunter, Senior Lecturer in Law, University of Melbourne *Submission* No. 5; Ms Ingrid McKenzie, National Co-ordinator, Women's Electoral Lobby Australia Incorporated, *Submission* No. 15; *Hansard*, Senate Legal and Constitutional Legislation Committee, ('SLCLC'), 14 August 1995 at p.137 per Ms Jayeann Carney, Spokeswoman, Women's Electoral Lobby; and Ms Jenny Morgan, Associate Professor, Law School, University of Melbourne, *Submission* No. 18.
- 14 Mr Scott Carter, Queensland Law Society Inc., *Submission* No. 2; Mr Reg Hamilton, Australian Chamber of Commerce and Industry, *Submission* No. 3; Ms Rohan Squirechuk, Council for Equal Opportunity in Employment, *Submission* No. 11.

Recognising the need to prohibit, so far as is possible, discrimination against people on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs:

Affirming that every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law, without discrimination on the grounds of sex, marital status, pregnancy or potential pregnancy:

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

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

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

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

1.23 The alterations to the preamble proposed by the Bill, therefore, will be likely to have only symbolic effect.<sup>17</sup>

---

15 (1905) 3 CLR 444 at 451.

16 (1981) 148 CLR 1 at 23.

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

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

a) the SDA should contain a general prohibition of discrimination in accordance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) article 1.

b) the reference to human rights and fundamental freedoms in the general prohibition of discrimination should relate to the rights and freedoms articulated in CEDAW, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The international conventions provide an expanded reference point for the rights and freedoms to be protected by a general prohibition.

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

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

---

18 Recommendations 4.1-6.1

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

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



## Definition of indirect discrimination

### *The proposed amendments*

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

For the purpose of this Act, a person (in this subsection referred to as the 'discriminator') discriminates against another person (in this subsection referred to as the 'aggrieved person') on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

(a) with which *a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply; (italics added)*

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

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

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

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

(3) This section has effect subject to sections 7B and 7D.

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

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

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

---

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

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

*Background to indirect discrimination - Australian Iron and Steel v Banovic*

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

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

---

22 (1989) 169 CLR 165.

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

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

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

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

*Support for proposed new definition of indirect discrimination*

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

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

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

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

---

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

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

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

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

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

### *Criticism of the proposed new definition of indirect discrimination*

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

### *The Base Group*

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

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

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

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

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

concept of the 'base group' was explained in *Australian Iron and Steel Pty. Ltd. v Banovic*.<sup>42</sup>

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

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

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

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

---

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

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

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

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

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

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

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

under the Bill, identification of the base group has been specifically left to the circumstances of the case.<sup>48</sup>

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

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

### *Conclusion and Recommendation*

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

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

#### *The existing onus and the proposed amendment*

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

1.56 Clause 10 will insert the proposed section 7B:

---

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

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