

ANTI-DISCRIMINATION COMMISSION—TASMANIA

Annual Report—1 July 2001—30 June 2002

In some claims, the parties' constructive approach has meant that claims have gone over the 6 month limit. In one 'education and training' involving a claimant's refusal to take up a place, the parties' initial conciliation was successful. The opportunity to meet with the Secretary of the Department of Premier and Cabinet, Ms Linda Horsey, and to constructively discuss process along with development of the law, means the Commission has been able to move forward positively. I thank her, Supreme Court Registrar Mr Ian Richard has provided sound procedural advice along with good humour, and I appreciate also discussion with Mr Simon Alston of Crown Law on discrimination matters.

With budgetary approval for an Administrative Trainee and Office Administrator, to commence after July 2002, the Commission will for the first time have administrative organisational support. This will make an enormous difference to the working conditions and administrative capacity of the Commission. The support of the Secretary, Mr R. Bingham and review by Ms Jackie Ashlin were crucial. The Department of Justice and Industrial Relations has positively assisted the Commission's work, particularly but not only in relation to human resources, finance and budgetary issues. Naming all who have given advice, provided assistance and been supportive means running the risk of omitting some who ought to be mentioned. I and all at the Commission give thanks, without naming, all who in so many ways have been instrumental in ensuring that 2001-2002 has not only been productively traversed by the Commission, but celebrated.

I thank Mr Richard Bingham, Secretary of the Department of Justice and Industrial Relations, and Attorney-General Dr Peter Patmore, MHA, for their interest in the Commission's productivity, welfare and wellbeing, and appreciation of the Commission's work. The recognition of the need for an independent Anti-Discrimination Commissioner, replete with expertise, diligence and consideration of the public's right to fairness and integrity in the investigation and conciliation process and all anti-discrimination work, is central to the Commission's contribution to the community and public administration in the state. All at the Commission welcome that recognition.

Anti-Discrimination Commission

The Commission was established on the 10th December 1999 as an independent statutory authority, with corporate administration provided under the Department of Justice and Industrial Relations.

Anti-Discrimination Commissioner

Dr Jocelyne A. Scott was appointed as Anti-Discrimination Commissioner by the Minister for Justice and Industrial Relations, the Hon. Dr Peter Patmore MHA on 2 September 1999 for a five year term. Dr Scott is entering her fourth year of her term.

Functions of the Commissioner

The Commissioner's functions are:

- to advise and make recommendations to the Minister on matters relating to discrimination and prohibited conduct;
- to promote the recognition and approval of acceptable attitudes, acts and practices relating to discrimination and prohibited conduct;
- to consult and inquire into discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;
- to disseminate information about discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;
- to undertake research and educational programs to promote attitudes, acts and practices against discrimination and prohibited conduct;
- to prepare and publish guidelines for the avoidance of attitudes, acts and practices relating to discrimination and prohibited conduct;
- to examine any legislation and report to the Minister as to whether it is discriminatory or not;
- to investigate and seek to conciliate claims: ss. 5, 6, 7, 69

The Legislation

The *Anti-Discrimination Act 1998* (Tasmania) was given royal assent on 10 December 1998, being proclaimed on 10 December 1999.

The Act makes unlawful discrimination on attributes or identities including:

- race/ethnicity;
- parental status;
- religious belief or affiliation;
- age;
- family status;
- religious activity;
- sexual orientation;
- family responsibilities;
- irrelevant criminal record;
- lawful sexual activity;
- disability;
- irrelevant medical record;
- sex/gender;
- industrial activity;
- association with a person who has, or is believed to have, any of these attributes or identities; s. 16
- marital status;
- political belief or affiliation;
- breastfeeding;
- political activity;
- religious belief or affiliation;
- religious activity;
- irrelevant criminal record;
- irrelevant medical record;
- association with a person who has, or is believed to have, any of these attributes or identities; s. 16

The Act also covers the following prohibited conduct:

- any conduct which offends, humiliates, intimidates, insults or ridicules another person re sex/gender, marital status, pregnancy, breastfeeding, parental status, family responsibilities;
- sexual harassment;
- victimisation (in relation to claims, etc.);
- inciting hatred (by a public act)—on race, disability, sexual orientation, lawful sexual activity, religious belief/affiliation/activity;
- publishing, displaying or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct;
- knowingly causing, inducing or aiding others to contravene the Act: ss. 17, 19, 20, 21

Areas covered by the Act:

- employment (paid and unpaid);
- education and training;
- provision of facilities, goods and services;
- accommodation (business and residential);
- membership and activities of clubs;
- administration of any law of the State and any State program re sex/gender, family responsibilities and associated attributes/identities;
- awards, enterprise agreements and industrial agreements re sex/gender, family responsibilities and related attributes/identities; s. 22

Exceptions and Exemptions under the Act are contained in Part 5 of the Act.

Location Of Commission Office

The Commission is located at Level 5, Executive Building, 15 Murray Street, Hobart, Tasmania 7000. Postal address: GPO Box 197, Hobart, Tasmania 7001. Telephone: (03) 6224 4905; or 1800 632 716. Fax: (03) 6233 5333. International: + 61 3 6224 4905. Fax: + 61 3 6233 5333.

Staffing

The Commissioner is assisted by equivalent to four full-time investigators and Conciliation Officers. All officers dealing in investigation and conciliation are legally trained. A Training Officer provides training consultancies. An Administration, Community Liaison and Education Officer undertakes administration of claims, co-ordinating conciliations, co-conciliating and conducting community education, liaison, production and dissemination of information, and an Administrative Assistant. All other administration and assistance to the Commissioner are performed by the last two Officers. A Cadet under the Indigenous Cadet Program does legal investigation in University vacations.(Appendix I)

Anti-Discrimination Tribunal

The Anti-Discrimination Tribunal was established by the *Anti-Discrimination Act 1998* and its main purpose is to conduct Inquiries concerning discrimination claims under attributes/identities and conduct prohibited by the Act. It is chaired by Mrs Helen Wood, Magistrate and former Chairperson of the Sex Discrimination Tribunal, it has eight members including the chairperson, seven legally qualified one and non-legal member. Members are Ms Melanie Bartlett, Mr Steven Bishop, Ms Margaret Odowski, Ms Viki Rutter, Ms Merrin MacKay, Ms Antonia Kohl, and Ms Catherine Rheinberger.

Claims Referred for Tribunal Inquiry

Parties receive a letter advising them of a date for a Directions Conference, where parties wishing to be legally represented or accompanied by a person at the Inquest seek permission, and the Tribunal makes directions to ensure the Inquiry is conducted fairly and expeditiously. Often a timetable is set requiring parties to prepare and exchange orders. Once directions are complied with, claims are listed for Inquiry.

Preparatory Orders

If the claim is substantiated on Inquiry, the Tribunal may make an enforceable order, including: the discrimination or prohibited conduct must not be repeated or continued; the respondent must redress any loss, injury or humiliation; the respondent must pay compensation; the claimant must be re-employed; the respondent must apologise to the claimant; any other orders. If not substantiated, the claim is dismissed. (For Tribunal Decisions on Review - Rejection and Dismissal by Commissioner see Appendix -13)

The Tribunal is located at the Magistrates Court, Hobart. Address: Office of the Anti-Discrimination Tribunal, 23-27 Liverpool Street, Hobart, Tasmania 7000. Telephone (03) 6233 2020. Email: sally.bridge@justice.tas.gov.au. Contact Person: Ms Sally Bridge, Registrar, Office of the Anti-Discrimination Tribunal. Website: <http://www.courts.tas.gov.au/magistrate/general>

Anti-Discrimination Commission Claims Handling

Who may Lodge a Claim?

- a person against whom the alleged discrimination or prohibited conduct was directed;
- a person against whom the alleged discrimination or prohibited conduct was directed on behalf of a class of persons against whom alleged discrimination or prohibited conduct was directed, if the Commissioner is satisfied a majority of members are likely to consent;
- a trade union that represents -
 - (i) a member against whom the alleged discrimination or prohibited conduct was directed;
 - (ii) a class of members against whom the alleged discrimination or prohibited conduct was directed, if the Commissioner is satisfied a majority are likely to consent;
- an individual against whom the alleged discrimination or prohibited conduct was directed, if the Commissioner is satisfied a majority of members are likely to consent;
- a member of a person referred to in this section;
- a person on behalf of the person against whom the alleged discrimination or prohibited conduct was directed; s. 60

How to Lodge a Claim.

A claim is to be made in writing, signed by the claimant, and identify the person, class of persons or organization against whom the alleged discrimination or prohibited conduct was directed and against whom the claim is made. It must set out details of the alleged discrimination or prohibited conduct, and be lodged with the Commissioner in person, by post or by any other means the Commissioner allows. The Commissioner may require procedural advice and assistance to any person requiring it to make a claim. s. 62

Time Limits.

A claim must be made within 12 months after alleged discrimination or prohibited conduct occurred, however, the Commissioner may accept a claim made after the 12 months have expired if satisfied it is reasonable to do so: s. 63 If a claim would have come under the *Sex Discrimination Act 1994* or discrimination or prohibited conduct were 'continuing' at 10 December 1999, it can be accepted for investigation under the Act: s. 108

Procedure.

- The Commissioner is to decide whether to accept or reject a claim for investigation within 42 days; s. 64(2)
- A person whose claim is rejected may apply to the Tribunal for review, by written application within 28 days of receiving the rejection: s. 65(2), (3)
- If the Commissioner accepts a claim for investigation, within 10 days the Commissioner is to notify the respondent, provide reasons for accepting it, and give the respondent a summary of the claim or, with the claimant's consent, a copy of the claim: s. 67
- After investigation, the Commissioner determines that the claim is dismissed, referred to conciliation, or referred to Inquiry: s. 71 (1)
- Claims must be referred to the Tribunal within 6 months of notification to the respondent or any further period agreed by the claimant, regardless of whether the investigation is completed: s. 71 (1)
- A referral report on a claim is to be provided by the Commissioner within 48 days of referring a claim to the Tribunal: s. 79

Claims lodged.

2001-2002: 239 claims (Averaging 20 claims per month). 1999-2000: 192 claims. 2000-2001: 287 claims. Total since proclamation : 718 (Appendix - 2)*

Breakdown of Claims—Outcome.

- rejected, review sought: 50
- rejected, review sought: 20
- withdrawn, reasons: 9
- dismissed: 57
- dismissed, review sought: 8
- conciliated agreement: 56
- Tribunal referral after investigation: 6
- Tribunal referral after conciliation: 4
- Tribunal referral after conciliation: 21
- Total claims investigated: 223 (Appendix - 3)

Breakdown of Claims—General.

- single attribute/identity: 132 (55%)
- more than one attribute/identity: 98 (41%)
- * other prohibited conduct: 9 (4%)
- sexual harassment: 4 (1.7%)
- offensive conduct re sex/gender, etc: 0 (0%)
- victimization re claims: 5 (2.1%) (Appendix - 4, 5)

Breakdown of Claims—Claimants.

- Total claims - Individual: 235 (98.3%), Two people: 3 (1.3%),
- On behalf of others, or self and others:1 (0.4%) (Appendix - 7)

Exemptions

The Commissioner may grant an exemption from the Act, unconditionally or on conditions, for up to 3 years; may revoke an exemption, vary conditions or impose conditions during the period of the exemption; and renew an exemption: s. 57 Applications are public and deal with by the Commissioner. In May the Tribunal dismissed a challenge to the grant of an exemption to Metro to enable it to balance its busdriver-workforce on sex/gender lines.

2001-2002: 31 Exemption Applications

Withdrawn: 2; Rejected: 2; No breach of Act: 1; Granted: 17 (2-3 years)

Enquiries

The Commission handles three types of enquiries, 'telephone', 'written' and 'personal' or 'walk-in'/appointments. This financial year about 7200 telephone enquiries, averaging 600 calls per month, 100 'written' enquiries or appointments, 128 'written' enquiries, plus some 110 written responses to more complex telephone enquiries were dealt with. (Appendix - 9)

The Commission provided advice to Local Government, State Government and non-Government Agencies on matters ranging from as disability and irrelevant criminal record: s. 96

Training

As official training provider of the Anti-Discrimination Commission, Anti-Discrimination Australia (Tasmania) delivered 48 training sessions (41 general, 7 manager and supervisor), 3 policy advisers, 7 pre-claim conciliations, and 8 one-to-one training sessions. Income generated for this financial year: \$23, 592. Consultancies were provided to both public and private sectors. Anti-Discrimination Australia has also coordinated the Youth Employment Component of the Tasmania Together Partnership Agreement between the State Government and the Hobart City Council. (Appendix - 10)

Community Education

The Community Education Unit provided free Information Sessions to Community Colleges, Skills Centre, International Students, Adult Migrants-English for Refugees and newly arrived Migrants, Disability Support Workers, Social Science Studies at TAFE, Youth Action Network Glenorchy, Community Project in conjunction with Tas DEC Global Learning Centre, and other various community organizations. A 1-day seminar for Lawyers, Human Resource Practitioners, Managers, etc on Commission claims handling procedures was conducted in Hobart with over 100 participants.

Community Liaison and Involvement

Consultations with Heads of Government Agencies, Departments and Enterprises seeking feedback/input on Commission processes and procedures in claims handling continued in the second half of the financial year with Manager and Staff of the Victims of Crimes Unit Women Tasmania, Women's Legal Service, and Working Women's Centre, Electoral Office, Office of Aboriginal Affairs, and Members of Parliament- House of Assembly and Legislative Council.

The Commissioner conducted over 60 public engagements, 9 interstate engagements (Sponsored), and was guest speaker at the Law Society of Singapore on 'Discrimination in Employment', 'Advances in Anti-Discrimination' at the Attorney-General's, and meetings at the Family and Children's Court, together with the Commissioner for Children, Ms Patmaral Ambikapathy, in Singapore.

In 2001-2002, the Commissioner convened the Police, Gay, Lesbian, Bisexual Transgender Liaison Committee, involved in the Tasmania Together Partnership Agreement between the State Government and the Hobart City Council for the Networking For Harmony Steering Committee, Human Rights Week Organising Committee, Local Branch of the 'Living in Harmony Network', Glenorchy City Council Social Planning Focus Group, International Women's Day Picnic, Taskforce for Tasmanian Filipino Women Achievement Awards 2001 (Appendix II).

International Guest From Afghanistan (RAWA)

The Commission invited Mrs Tahmeena Fahyal as guest speaker for International Women's Day. Ms Fahyal spoke at functions in Hobart, including a public forum at University of Tasmania and TasDEC Breakfast, and a major press conference. She was sponsored through the Global Sisterhood Network convened by Dr Lynette Dumble, and the Commission's guest for 2001 International Women's Day.

Publications – updated

Publications and Claimforms - available from the Commission Office and Website (Appendix - 12) Assistance or an interpreter available on request. Claims in languages other than English are accepted with provision for translation.

Administration

Administration of the Act is assigned to the Minister for Justice and Industrial Relations and the Department responsible to the Minister, Department of Justice and Industrial Relations. Corporate support to the Commission is provided by the Department.

Financial Statement

See: Department of Justice's Financial report in Annual Report 2001-2002. The Commission Training Unit has generated \$23,592 this financial year.

*Breakdown of claims includes the primary component only.

Note: In this Annual Report, 'claim' and 'claimant' refer to 'complainant' and 'complainant' under the *Anti-Discrimination Act 1998*.

Website: www.justice.tas.gov.au/ac/adcf/ncpage.htm

Embracing Differences

Embracing Equality

30 September 2002

Pursuant to section 10 of the Anti-Discrimination Act 1998 (Tasmania) I present the Commission's third Annual Report.

This report covers the Commission's activities from 1 July 2001 to 30 June 2002.

I commend the report to you.

Every good wish.

Jocelyne A. Scott (Dr)
Commissioner

The Honourable Judy Jackson MHA
Attorney General
Parliament House
HOBART TAS 7000

Review of the Act

The *Anti-Discrimination Act 1998* ('the Act') has been in operation for almost three years. It has generally worked well, although with an new law, improvements always be made. The Commission's *Third Report 1999-2000 and Annual Report 2000-2001* put forward proposals. These and others more recently identified need to be considered.

Drafted as 'user friendly' legislation, designed for public accessibility rather than for lawyers, the Act is a model for other jurisdictions. The abuse and outcry drafting criticised by the High Court is not replicated in the Tasmanian Act, and decisions made under interstate legislation ought not be imported where differences are crucial, or where they relate to versions of interstate laws no longer in existence.

The Act's accessibility, and its comprehensive character, are a tribute to the framers and drafters. Correspondence, framing of claims and provision of procedural advice, community groups, business enterprises, government department discussions and the like, have indicated how this may be built upon, extended and clarified.

The Commission's independence is crucial. Anti-discrimination and equal opportunity legislation are at the cutting edge of the law, with power, prejudice, bias and exploitation at the core. The pressure to conform to age-old expectations by allowing the powerful to continue operating on a 'business as usual' basis, rather than expecting them to accept that the law is meant for them, too, is enormous. Parliament expected the Anti-Discrimination Commissioner to operate 'without fear or favour'. The Anti-Discrimination Commissioner has obeyed this fundamental principle. The change to a Governor-in-Council appointment would give statutory support to the Commissioner's position as independent. This should not prevent pressure or expectation of the Commissioner to abide by a notion that the powerful, or those who see themselves thus, should not be affected by the application of the law. It would mean that adherence to the highest standards required of the role can be maintained at least cost.

In parallel with the need for statutory support to this independence, overwhelmingly, a proper dignity is recognized in 'claimants' making 'claims' of discrimination and prohibited conduct, rather than 'complainants' making 'complaints'. When rights are at stake, people do not want to be seen as 'whinging' or 'whining' or 'victims'. Respondents, too, have a right to be asked to respond to a 'claim' rather than being parties to actions described as 'complaints'. The dignity and seriousness of the process will be increased by recognizing that claims are not trivialities to be regarded as bothersome rather than to be taken seriously.

Attributes/Identities and Areas of Activity

'Prescribed attributes' found claims of discrimination. Yet race/ethnicity and sex/gender are not generally experienced as 'attributes'. Rather, they are core 'identities'. The Act should recognise them as such. On the other hand, an 'irrelevant medical or criminal record' is an 'attribute', not an 'identity'. Referring to 'attributes or identities', rather than 'attributes alone, recognises this important distinction. The change would solidify the reality of people's lives and how they see themselves in the world. It also recognizes differences, where some people might see an attribute as an identity whilst others do not.

The Act is ahead of other jurisdictions in its recognition of sexual orientation as covering heterosexuality, homosexuality, bisexuality and transsexual, and incitement to hatred on this basis. However, there are inconsistencies. A glaring omission is that the 'sexual orientation' provision is not replicated in 'family responsibilities'. 'De facto spouse' does not include 'same sex' partner; 'immediate family member' includes 'spouse' without listing ('domestic') partner. 'Significant others' and their responsibilities towards one another, and offspring, parents, dependent children, or older children with a disability and in need of care and support) should be affirmed. Family affiliations are important, and the promotion of responsibility, care and compassion amongst relatives and family constellations is vital. Society is created and recreated by human beings. The affirmation of familial and community linkages, and the acknowledgement of sound obligations between and amongst us all, enhances living together and in harmony. Including 'domestic partner' and/or 'significant other' in the definitions would be in concert with the 'sexual orientation' and 'lawful sexual activity' provisions of the Act as well as recognizing caring relationships generally.

Significant provisions relate to the health and safety, and promotion of positive industrial conditions. 'Industrial activity' is narrowly defined in the Act, focusing only on membership or non-membership of a union, and activity promoted or organized by a union. Industrial organisations are pre-eminent in promoting workplace safety, so that discrimination against workers engaging in such activism is covered. However, the narrow definition may prevent substantive claims from being accepted for investigation or upheld through Tribunal inquiry. 'Industrial membership or affiliation' could assist.

'Disability' is problematic. The definition confirms that 'illness', past disability or sickness, and transitory states of ill health are within 'disability'. Yet respondents as 'claimants' often seek 'disability' as a permanent impairment of an obvious and serious nature. Respondents challenge 'disability' on the basis that 'it's not a disability, therefore it's not an'! The Act does not support this, however, there is value in ensuring respondents understand the basis of disability claims without reiteration. For claimants, 'disability' can create difficulty, too. Many are reluctant to attach this term to themselves. Those with transitory illnesses do not see it as a 'disability'. 'Impairment' (an expression used in some jurisdictions) is just as likely to be seen as importing permanency and seriousness. 'Disability or illness' or 'impairment or illness' could replace 'disability'. Organisations, groups and individuals familiar and living with disability need to be reassured on the term 'disability', 'impairment' or something else most suitable to cover permanent conditions.

Other attributes not included as 'prescribed attributes' are 'promotion or limitation of employment' and 'sexual orientation' may be better defined or expanded. Physical features or appearance, occupation, and socio-economic status are obvious omissions. Apart from geographical location (a matter frequently raised by callers to the Commission and in community education and training sessions), occupation and socio-economic status are most often raised by claimants and organisations, community groups, and public. The Anti-Discrimination Bill originally embraced 'socio-economic status' but definitional difficulties intruded. Reconsideration is required. 'Bullying' arises time and again. It requires comprehensive coverage. Section 17(1), covering intimidation, ridicule, insult, offense and humiliation applies to bullying and activities of facilities, goods and services, pregnancy, breastfeeding, parental status and family responsibilities, an historical consequence of its origin in the *Sex Discrimination Act 1994*. So are areas of activity per section 22(1) and (g) - administration of any law of the State and any State program, and awards, enterprise agreements and industrial agreements. The limitation is criticised by claimants, unions, community groups, race and ethnic minority groupings, and others. Extending them to all attributes or identities under section 16 of the Act is needed. A recommendation from the Commission's *Bullying Conference* in 2000, this change deserves strong support.

Many people say they have been discriminated against or victimised. They may have been. However, for unlawful discrimination there must be:

- an attribute or identity at the base of the conduct, words, action, activity or events complained of; and
- an area of activity where the conduct, words, action, activity or events complained of have occurred.

Section 16 lists prescribed attributes or identities. Section 22(1) sets out areas of activity, saying that the Act applies 'to discrimination ...against a person engaged in, or undertaking any, activity in connection with ...' the area of activity listed - including employment, education and training, provision of facilities, goods and services, accommodation, clubs, etc. The provision would be enhanced by including 'by', to provide that the Act applies 'to discrimination ... against or by a person engaged in, or undertaking any, activity in connection with employment, education and training, provision of facilities, goods and services engaged in, or undertaking any, activity in connection with employment, education and training, provision of facilities, goods and services ...'

'Provision of facilities, goods and services' has been interpreted restrictively. The Act is beneficial legislation designed to correct the mischief of bias, prejudice and unfair preference. It must be interpreted to promote that goal. This may require changes, including dropping 'provision of' from the area of activity 'facilities, goods and services', to bring it into line with 'employment', 'education and training', which do not include a 'provision of' element. 'Provision of education and training'. The definition of 'services' should make clear Parliament's intention to assist in ending discrimination and prohibited conduct in all areas of public, business and organisational life.

Sport comes within 'recreation', contained in the definition of 'services'. However, sport takes many forms and could be specifically included. Limiting 'discriminated to hatred' (s. 19) to race/ethnicity, disability, sexuality and lawful sexual activity, and religious belief, affiliation or activity is debatable, and its possible extension to all attributes or identities raised. Limitation of the capacity to bring claims (standing or 'personhood') is not included as 'provision of services, accommodation, clubs, etc.' The definition of 'services' should be enhanced to include a high proportion of people complaining on altruistic grounds. Although not direct targets of the literature, which focuses mainly on persons of Jewish faith and background, and on minority race, sexuality and disability, recipients express offense, fear, loathing, anxiety, stress and distress at having to deal with letterheaded material. Their preference is not to receive it and, when they do, to have a right of action against distributors. Standing in the Act is based on 'direct' targeting (or action on behalf of direct targets). This applies to all claims.

'Incitement to hatred' may require another test of standing. Section 19(1) is being questioned. Some say they would not want to join clubs currently restricted to one sex/gender. Others say that is where major business decisions are made, and influential networks formed and joined. If institutions have state support through a liquor licence or 'peppercorn rent', retain land for which nothing or a token was paid, or otherwise reap major benefits from the state, the question requires consideration: s.27(2)

The exception for age discrimination on retirement, etc. is out of step. With the 65-year age limit removed from the *State Service Act 2000*, this is a clear oversight: s. 35

Section 21 covers 'less favourable treatment' of the Act, complementing section 20, 'promoting discrimination and prohibited conduct'. It says a person must not 'knowingly' cause, induce or aid another to contravene the Act, and would be improved by including 'recklessly':
A person must not knowingly or recklessly cause another person to contravene this Act ...

In late 2001, an amendment to the Act incorporated a new religious exception in employment in educational institutions based in the tenets, beliefs, teachings, principles or practices of any particular religion. The amendment was made in response to apparent concern that schools could not advertise for staff adhering to a particular religious 'ethos'. However, newspaper advertisements over the whole period 2000-2001 referred to the 'ethos' of named religions, or even membership of a religion as a requirement not only for teachers but administrative and property staff.

In January 2000, explicitly in the context of a highly publicised debate solely relating to employment agencies, I drew newspaper editors' attention to the religious discrimination provisions of the Act. My reference to employment agencies was explicit. No reference to the school system or principals, vice-principals or teaching staff was made.

To avoid misunderstanding as appears to have occurred here, I reiterate the Commission's availability for discussion and consultation. Terms such as 'direct' and 'indirect' discrimination are 'less favourable treatment' as in Acts around Australia. Complexities and lack of understanding are manifest, particularly for 'indirect' discrimination. The High Court has been especially critical.

Consideration should be given to revisiting the original *Race Discrimination Act 1975* (Ch) approach. That terminology came from conventions and declarations hammered out over many years, through stringent debate. Section 9 of the *Race Discrimination Act 1975* says:
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 basis, of any human right or fundamental freedom, in any field of public life.

'Distinction, exclusion, restriction or preference' is more readily understood and applied than 'less favourable treatment'. The understanding and operation of discrimination law would be enhanced by its incorporation.

However, the use of 'discrimination' in an ambulatory sense (as in the Tasmanian Act), is preferable to 'act' of discrimination. (Ambulatory) 'discrimination' can be combined with 'distinction, exclusion, restriction or preference'.

Rejection and Dismissal of Claims

Section 64 limits grounds for rejection of claims, together with section 71, dismissal. Problems arise where a claimant:

- had substance at acceptance for investigation, but the claimant disappears or fails to pursue the claim, not responding to correspondence;
- is received and, within the 42-day accept/reject period, the claimant does not reply to questions to elicit information to assist in the assessment of the claim.

'Abandoning a claim' could cover this:

Rejection of claims

(b) in the option of the Commissioner, a claimant has lost interest in continuing with or has abandoned the claim. Section 64(1)(a) has been used for this purpose by the Commission, the claim being classed as 'lacking in substance' because the claimant has no apparent interest in continuing. However, the claim may have substance, and not be 'vexatious', 'trivial' or 'misconceived', so that the provision doesn't apply. Valid reasons may underlie a claimant's not pursuing a claim. 'Any other reason' would provide another basis for rejection of claims.

The Act needs to cover the situation of a claim's being adequately dealt with, albeit the claimant may not agree. A claim may be accepted for investigation, then the respondent effects a solution, such as undertaking training, altering behaviour or conditions giving rise to the claim, offering compensation and an apology, providing for re-employment or reinstatement, and so on, but the claimant refuses to accept it. This can occur in investigation, or at conciliation. Sometimes at conciliation a respondent proposes a fair and reasonable outcome, but the claimant seeks:

- an admission of liability;
- a disproportionate amount of compensation;
- some other outcome realistically beyond what the Tribunal might order, if the claim were upheld on inquiry.

The Act does not enable the Commissioner to dismiss a claim where the claimant does not accept a reasonable settlement proposal. If this occurs after direct conciliation, the claim must be referred to the Tribunal for inquiry, whatever the likelihood of the claimant's gaining a better outcome.

To cover this and other circumstances, 'automatic dismissal' and 'early conciliation' have been introduced. Because early conciliation occurs before finalisation of the investigation, if it is unsuccessful, the claim returns to investigation. This provides leeway for dismissal of the claim on the basis that it has been 'dealt with adequately', if a respondent's proposal is such that a reasonable claimant would have accepted it or been prepared to negotiate an acceptable outcome from that position. However, the Tribunal has said the Commission cannot do this, saying a claim can be dismissed as 'dealt with adequately' only where the investigation is finalised (and another provision used), or a prior claim by the same claimant on the same matter has been before the Commission.

As with rejection, where the claimant has disappeared or is not responding, the claim is not 'lacking in substance', 'vexatious', 'trivial' or 'misconceived', nor is it 'not discrimination' or 'not a claim'. 'Any other reason' would cover this too. Finally, some claimants engage in conduct that could qualify as 'abuse of process', which needs inclusion in section 64(1), as a deterrent.

Streamlining the Act

- 42 days after receipt of the claim, for acceptance or rejection of a claim for investigation;
 - 10 days after acceptance of the claim for investigation, to notify the respondent;
 - 6 months to finalise the claim, unless the claimant, at the request of the Commissioner, extends the time.
- To ensure timeliness are met, the Commission has internal timeliness. Generally, a recommendation for 'acceptance for investigation' or 'rejection' is made to the Commissioner within 30 days by the Investigation Officer with care and control of the claim. If questions arise, or matters must be pursued, there is a ten-day leeway. Once a claim is accepted for investigation, respondents and claimants are requested to respond or reply 'within 14 days'. For 'good reason', extensions are allowed. However, parties must be required to provide requested information within a workable timeframe, to progress claims.

'Six month deadline' for finalising investigations. At the expiration of the 6 month date, an automatic referral of the claim to the Anti-Discrimination Tribunal for inquiry is required. This provision should be retained, with modification. Where an investigation is almost completed, or an investigation report finished, but (say) the Commissioner is unable to make an immediate determination of 'dismissal', referral to conciliation, or referral to the Tribunal, strict adherence to the 6 month date means the Tribunal will have claims referred to it which may have been dismissed. This can unfairly expose a respondent to Tribunal referral when with leeway, this