THE EQUAL OPPORTUNITY ACT — TOKENISM OR PRESCRIPTION FOR CHANGE?

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[*Victoria has recently joined the United Kingdom, New South Wales and South Australia in passing legislation directed against sex discrimination in employment and elsewhere. Dr Creighton compares a number of the key provisions of the Victorian Act with its British and Australian counterparts. He concludes that whilst the Equal Opportunity Act has some positive features, it is structurally incapable of making anything other than a marginal impression on the real problems which confront women in our society. As it stands, the Act represents little more than a token gesture to the cause of sexual equality.*]

Speaking during the Second Reading debate on the Equal Opportunity Bill in April 1977 the then Leader of the Opposition in the Victorian Legislative Assembly, Mr A. C. Holding, roundly condemned the Bill then before the House for the 'tokenism' which he felt manifested itself in virtually every one of its 54 clauses.[1] He went on to allege that it paid only lip-service to the principle of sexual equality, and purported to substantiate his view by reference to no less than ten major defects in the Bill as it then stood.[2] Many of these points were at least partly met in Committee in the Assembly, and in the Legislative Council,[3] with the result that in its final form the Equal Opportunity Act 1977[4] closely parallels the South Australian Sex Discrimination Act 1975,[5] and is substantially in line with the measures adopted by the legislatures of the United Kingdom[6] and New South Wales[7] in the mid-70s. It remains to be seen whether or not

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1 Victoria, 331 *Parliamentary Debates*, Legislative Assembly, 6 April 1977 7345(b). (Note: The suffix (a) in references to Parliamentary Debates indicates the left-hand column on the page, and the letter (b) the right-hand column.)

2 *Ibid.* 7346(a)-7355(a).

3 Notably in relation to partnerships (s. 21), accommodation (s. 27), the right of the Equal Opportunity Board to act on its own initiative (s. 35), the scope of the 'small employer' exemption (s. 18(3)(c)), the enforcement of the advertising provision (s. 53) and the prescribed maxima for offences under the Act.

4 Hereinafter referred to as E.O.A.

5 Hereinafter referred to as S.D.A. (S.A.). The South Australian Parliament also passed a Racial Discrimination Act in 1976. This Act is not discussed in detail in this article, but it is entirely consistent with the principles and trends discussed herein.

6 The Sex Discrimination Act 1975 (U.K.) c. 65, hereinafter referred to as S.D.A., and the Race Relations Act 1976 (U.K.) c. 74, hereinafter referred as R.R.A. Neither of these Acts applies to Northern Ireland, although the Sex Discrimination (N.I.) Order 1976 S.I. 1976 No. 1042 (N.I. 15) makes equivalent provision to the S.D.A. in that jurisdiction. Religious discrimination in employment in Northern Ireland is dealt with by the Fair Employment Act (N.I.) 1976 (U.K.) c. 25.

7 The Anti-Dscrimination Act 1977 (N.S.W.) hereinafter referred to as A.D.A.

that in itself acquits the E.O.A. on a charge of 'tokenism'. To anticipate somewhat, it is clear to this author at least, that it does not. The British, South Australian and New South Wales Acts must all stand condemned as little more than token gestures to the cause of the equality of the sexes, and perhaps the most distinctive feature of the Victorian Act is that it is an even more ineffectual gesture in this respect than its contemporaries elsewhere in Australia and in Europe.

THE E.O.A. AS NEGATIVE REGULATION

The pace-maker in the field of anti-discrimination legislation in the last thirty years has been the United States of America. Ever since the seminal *Brown* decision in 1954,[8] the U.S. Supreme Court has consistently interpreted the Constitution in such a way as to promote the interests of negroes and other disadvantaged groups in American society. Congress has followed the Court's lead, and in 1964 enacted a far-reaching Civil Rights Act, Title VII of which deals with discrimination on grounds of race and sex. It would be unrealistic to suggest that discrimination on grounds of race or sex has been eliminated in the United States as a result of these legislative and curial developments, but it would be equally unrealistic to argue that the law has not played a significant role in promoting such progress as has been made in the last 25 years or so.

A growing awareness of racial problems in Britain from the late 1950s onwards caused serious consideration to be given to the possibility of introducing anti-discrimination legislation in that country for the first time.[9] Naturally enough those who were concerned at the deterioration in race relations in Great Britain looked to North America for guidance as to the form which such legislation might take — and the first two legislative ventures in this field, the Race Relations Acts of 1965 and 1968,[10] did indeed draw extensively upon experience in the United States and Canada.[11]

By the late 1960s there was an increasing awareness of the injustices to which women were subjected in the employment field and elsewhere, an awareness which contributed to the passing by the British Parliament of

[8] (1954) 347 U.S. 483.

[9] See however the Government of India Act, 3 & 4 Will. IV. c. 85 (1833), s. 87 and the commentary thereon in Lester A. and Bindman G., *Race and Law* (1972) App. 1. It is also possible that the Sex Disqualification (Removal) Act 9 & 10 Geo. 5 (1919) c. 71 could have been interpreted in such a way as to provide relief for some victims of sex discrimination, although little attempt has been made to rely upon this Act in practice. See Creighton W. B., 'Whatever Happened to the Sex Disqualification (Removal) Act?' (1975) 4 *Industrial Law Journal* 155. The Victorian equivalent to the 1919 Act was the Women's Qualification Act 1928, latterly the Women's Qualifications Act 1958, and now embodied in s. 56 of the E.O.A.

[10] Chapters 73 and 71 of 1965 and 1968 respectively. Hereinafter these acts are referred to as R.R.A.

[11] See especially United Kingdom, *Report of the Street Committee on Anti-Discrimination Legislation* (1967) which had a profound influence upon the structure and content of the 1968 Act. See also Jowell J., 'The Administrative Enforcement of Laws Against Discrimination' [1965] *Public Law* 119.

an Equal Pay Act in 1970.[12] This Act did not become operative until the end of 1975, by which time Parliament had passed a further Act which dealt with sex discrimination in a broader context. In 1976 a new R.R.A. was passed which brought the law on race discrimination into line with that on sex. Like the Acts of 1965 and 1968 these later Acts drew extensively upon North American experience, albeit in a highly diluted form. It is by this route, rather than across the Pacific, that developments in North America have influenced the development of legislative policy in Australia. Not surprisingly perhaps the principles developed in the North American context have been further watered down in their translation to Australia.

Other international developments have also played a significant role in helping mould Australian (and British) anti-discrimination legislation — notably the International Labour Organisation *Conventions on Equal Remuneration*[13] and on *Discrimination in Employment and Occupation*,[14] both of which were ratified by the Whitlam Government.[15] Various international agencies, including the United Nations, have adopted conventions and recommendations over the last thirty years or so designed to help eliminate discrimination based on race and sex. Indeed it was one such instrument, the *Convention on the Elimination of Racial Discrimination* of 1966 which formed the basis of Australia's first tentative venture into the field of anti-discrimination legislation, the Commonwealth Racial Discrimination Act 1975.[16] It was however to the British experience that the legislators in South Australia, Victoria, New South Wales, turned for guidance when they came to formulate legislative policy in this area. In doing so they fixed their colours firmly to the mast of tokenism.

The British Act of 1965 was pathetically ineffectual. It did not extend to many of the more important manifestations of racial discrimination[17] and was to all intents and purposes unenforceable in respect of those few matters with which it did purport to deal.[18] The 1968 Act constituted a rather more serious attempt to deal with at least some of the substantive issues, although its enforcement procedures were gravely defective in a number of respects,[19] and it suffered severely at the hands of the House of

[12] C. 41. Hereinafter referred to as Eq. P.A. For comment see Barrett, B., 'Equal Pay Act — I' (1971) 34 *Modern Law Review* 308, Seear B. N., 'Equal Pay Act — II' (1971) 34 *Modern Law Review* 312 and Creighton W. B., *Working Women and the Law* (1978) chs IV and V.

[13] 1951 No. 100. See also the accompanying Recommendation No. 90.

[14] 1958 No. 111. See also the accompanying Recommendation No. 111.

[15] No. 100 on 10 December 1974 and No. 111 on 15 June 1973.

[16] No. 52 of 1975. The text of the Convention is set out in a Schedule to the Act.

[17] It applied only to discrimination in places of public resort (s. 1), the disposal of certain leases and tenancies (s. 5) and to various forms of insulting or inflammatory conduct (ss. 6 and 7). It did not deal with either employment or education, or with the provision of goods, facilities and services in the broader sense.

[18] Ss. 2, 3 and 4.

[19] See Lester and Bindman *op. cit.*, chs 8 and 9 and United Kingdom, *Racial Discrimination* (1975) Cmnd. 6234, paras. 36-43 (White Paper preceding the introduction of the Race Relations Bill of 1976).

Lords on every occasion that it fell to be interpreted by that court.[20]

The real significance of the 1965 and 1968 Acts was that they marked the acceptance of the principle of legal intervention in the discrimination field, and that between them they set out the parameters within which any such intervention would be required to operate in the future. In their first annual report the Race Relations Board, the body which had primary responsibility for enforcing the 1965 and 1968 Acts, summarized the role of anti-discrimination legislation by reference to five principles:

> '(i) A law is an unequivocal declaration of public policy;
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> (ii) A law gives support to those who do not wish to discriminate, but who feel compelled to do so by social pressure;
>
> (iii) A law gives protection and redress for minority groups;
>
> (iv) A law thus provides for the peaceful and orderly adjustment of grievances and the release of tensions;
>
> (v) A law reduces prejudice by discouraging the behaviour in which prejudice finds expression.'[21]

These principles have been adopted by successive British Governments as the rationale of legislative intervention in this area.[22] In Australia they were endorsed by the South Australian Government and by the Victorian Committee on the Status of Women,[23] and were heavily relied upon by the Victorian Premier when moving the second reading of the Equal Opportunity Bill in the Legislative Assembly.[24] The approach embodied in this statement of principle can best be described as one of 'negative regulation' — that is to say, of trying to regulate discriminatory conduct, and thereby eliminating the prejudices which directly or indirectly underpin all such conduct. These are entirely praiseworthy objectives, but in no way do they offer a satisfactory solution to the problems of sexism and racism in our society. In the first place it is, in practical terms, virtually impossible to enforce a statutory proscription of discriminatory conduct, however well drafted and apparently comprehensive that proscription might appear. What is more, any changes in social attitudes which might result from such legislation must inevitably take a very long time to work their way through the social system — certainly too long to be of any appreciable

[20] See *London Borough of Ealing v. R.R.B.* [1972] A.C. 342; *Charter v. R.R.B.* [1973] A.C. 868 and *Dockers' Labour Club and Institute v. R.R.B.* [1976] A.C. 285. Ironically the only 'favourable' decision of the House of Lords under the 1968 Act also involved a rather questionable interpretation of the Act — *Applin v. R.R.B.* [1975] A.C. 259. The effect of all four decisions has been reversed by the 1976 Act. See further Hucker J., 'The House of Lords and the Race Relations Act' (1975) 24 *International and Comparative Law Quarterly* 284.

[21] *Report of the Race Relations Board for 1966-67* (1967) para. 65. Hereinafter referred to as R.R.B.

[22] See for example United Kingdom, *Equality for Women* (1974) Cmnd. 5724, para. 19 (White Paper preceding the introduction of the Sex Discrimination Bill).

[23] Victoria, *Report of the Committee on the Status of Women* (1976) para. 4.2.

[24] Victoria, 329 *Parliamentary Debates*, Legislative Assembly, 11 November 1976 4078(b).

benefit to the present generation, and quite possibly the next as well. Most fundamental of all, however, is the fact that this strategy simply is not directed to the real problems with which immigrants, aboriginals, women and other disadvantaged groups in latter-day Australian society are confronted. There is for example, little point in telling an employer not to discriminate against immigrant or female applicants for a particular job if in real terms most non-British immigrants and women are so disadvantaged socially and educationally that they are simply not qualified to do the job in question. It is equally futile to order landlords not to discriminate on grounds of race or sex in the letting of business or residential accommodation if social and economic realities are such that few, if any, women or blacks are going to be in a position to lease such accommodation, even if they wanted to.

None of this is to suggest that there is a single, readily available panacea for all of these social ills. But it is to suggest that the problems faced by the disadvantaged groups in our society go to the very roots of that society, and that standing on its own legislation drafted by reference to the R.R.B. principles is at best little more than somewhat patronising tokenism, and at worst, cynical political opportunism. Radical problems require radical solutions. Negative regulation may be an important prerequisite of genuine progress in this area, but it can never provide anything other than a very partial solution to the real problems. It is all very well to have 'unequivocal declarations of public policy', but the harsh reality is that the disadvantaged groups in our society are increasingly less likely to be impressed by declarations of public policy equivocal or otherwise, unless the words are accompanied by deeds which are intended, and apt, to eliminate the disadvantages and inequities to which these groups are subjected as part of their everyday lives. Such 'deeds' are not likely to be forthcoming as a direct response to the standards currently embodied in the highly equivocal measure enacted by the Victorian Legislature in 1977.

It is now proposed to examine a number of key aspects of the E.O.A. and to measure them against the standards which have been adopted elsewhere in Australia, and in the United Kingdom and the United States. It will quickly become apparent that even as an exercise in negative regulation the Victorian Act leaves a great deal to be desired. Measured against the broader criterion of a radical approach to a radical problem it is, to all intents and purposes, a non-starter — a mere token gesture.

DEFINITION AND THE E.O.A.

A crucial determinant of the effectiveness of any anti-discrimination measure is its approach to the definition of 'discrimination'. Section 1(1) of the British Act of 1968 simply referred to treating someone 'less favourably' than another on the ground of their 'race, colour or ethnic or

national origins'. Implying as it does, a conscious decision to subject one's fellow-man or woman to some detriment because they happen to be possessed of a particular physical characteristic or to subscribe to a certain set of religious or other values, this definition has a great deal to commend it. Unfortunately it does not go far enough in a number of respects, most notably in that it does not extend to hidden discrimination the existence of which may not be immediately apparent to the victim, or indeed the discriminator, in the same way as would direct, intentional discrimination. This was very much the situation with which the Supreme Court of the United States was confronted in 1970 in the case of *Griggs v. Duke Power Co.*[25] The defendants in that case had applied seemingly objective aptitude and educational criteria to all employees, or potential employees, regardless of race or sex. It was shown however that the proportion of blacks and other minority racial groups who could comply with these requirements was considerably smaller than the proportion of whites. It was also shown that there was no real difference between the job-performance of those who were able to meet the stipulated requirements, and those who could not. In these circumstances the Court found that the employer must be regarded as having unlawfully discriminated because the *effect* of what he had done was to place the minority groups at an unfair disadvantage, notwithstanding the fact that there was no evidence of any intention to discriminate on grounds of race, or on any other unlawful ground.

The principle embodied in this decision duly found its way into s. 1(1)(b) of the S.D.A., whilst s. 1(1)(a) carries over the concept of 'less favourable treatment' originally embodied in s. 1(1) of the 1968 Act.[26] What s. 1(1)(b) actually provides is that a person (for purposes of exposition described as an employer) discriminates against another where he applies to her[27] a 'requirement or condition' which he applies equally to members of both sexes, *but* which is such that 'the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it', *and* which he cannot show to be 'justified' irrespective of that fact *and* which is to the detriment of a given complainant because she cannot comply with it. This provision is less than happily drafted in a number of respects.[28] The scope of the defence of 'justifiability' is not spelt out, but may well be unnecessarily wide;[29] and in all but exceptional cases, the problems of proving the existence of such discrimination are likely to be

[25] (1970) U.S. 424.

[26] See also R.R.A. 1976, s. 1(1).

[27] For purposes of exposition plaintiffs/complainants are assumed throughout to be females, and respondents/defendants to be male. The reverse is of course equally possible, and indeed respondents would usually be sexually neutral bodies corporate or public authorities.

[28] See Creighton W. B., (1978), *op. cit.*, ch. VII.

[29] See Richards M. A., 'The Sex Discrimination Act — Equality for Whom?' (1976) 5 *Industrial Law Journal* 35, 37-8.

insurmountable.[30] Nevertheless it is clearly necessary that some attempt be made to deal with such hidden or 'indirect' discrimination, and in principle at least s. 1(1)(b) should cause all employers to re-examine all job requirements, academic or otherwise, in order to determine whether or not they apply disproportionately to members of one sex rather than another, and if they do, whether such disproportionality can be justified.

The South Australian Act adopts a similar approach in that s. 16(1) is couched in terms of 'less favourable treatment', and subsection (3) of 'requirements' which can be complied with by a 'substantially higher proportion' of persons of one sex rather than the other, and which is not 'reasonable in the circumstances of the case'. It is open to question whether or not the concept of 'reasonableness' is any less unsatisfactory than that of 'justifiability', and certainly the problems of proof are just as great under the South Australian as under the British Act but at least the gesture has been made. The Victorian Committee on the Status of Women suggested that any Victorian legislation in this area should contain a similar provision,[31] and the tenor of some of the Premier's early remarks on the subject seemed to suggest that the Government was not averse to the idea.[32] However by the time the Bill was presented to the Legislative Assembly the Government had changed its mind, and all attempts to persuade them to reverse their decision proved to no avail.[33] As it passed into law therefore the Victorian Act defines discrimination solely in terms of 'less favourable treatment',[34] and is substantially the poorer for it.

By way of contrast, all three Australian Acts are considerably in advance of their British counterpart in their treatment of 'marital status', although once again the Victorian Act does not quite measure up to the standards set by its compatriots. The British Act applies to marital status in the sense only of discrimination on the grounds of being married, and only in relation to employment.[35] It does not therefore apply to discrimination on the grounds of being single, let alone being divorced or separated, or cohabiting with a member of either sex. It is also inapplicable to discrimination on grounds of marital status in relation to education or

[30] See however, *Meeks v. National Union of Agricultural and Allied Workers* [1976] I.R.L.R. 198; *Price v. Civil Service Commission* [1976] I.R.L.R. 405 and [1977] I.R.L.R. 292 and *Steel v. U.P.O.W. and the Post Office* [1977] I.R.L.R. 288. See also Lustgarten, L., 'Problems of Proof in Employment Discrimination Cases' (1977) 6 *Industrial Law Journal* 212, 218-28 and McCrudden J. C., (1977) 6 *Industrial Law Journal* 241.

[31] *Report, op. cit.*, paras. 4.4 and 4.5.

[32] See Victoria, 329 *Parliamentary Debates*, Legislative Assembly, 11 November 1976 4078(a) where the Premier indicated that the Government had accepted the recommendation contained in the *Interim Report of the Committee on the Status of Women* to the effect that legislation prohibiting direct or indirect discrimination on grounds of sex or marital status should be introduced in Victoria.

[33] See Victoria, 331 *Parliamentary Debates*, Legislative Assembly, 6 April 1977 7402(a)-09(b) and Victoria, 332 *Parliamentary Debates*, Legislative Council, 3 May 1977 8375(b)-76(b).

[34] S. 16(1).

[35] S. 3.

the provision of goods, facilities and services, even on a restricted definition of that term. The South Australian Act on the other hand defines 'marital status' in terms of 'the status or condition of being — (a) single; (b) married; (c) married but living separately and apart from one's spouse; (d) divorced; (e) widowed; or (f) cohabiting otherwise than in marriage with a person of the opposite sex'.[36] It is a pity that the definition does not extend to cohabitees of the same sex, but even as it stands this approach is a significant advance upon the British position. The Victorian Act adopts the first five of the South Australian criteria, but despite considerable Opposition pressure, the Government declined to adopt the sixth criterion.[37] Very wisely none of the Australian Acts adopt the British distinction between discrimination on grounds of 'marital status' in relation to employment and education or the provision of goods, facilities and services.

The Victorian Act departs from both of the other Australian Acts,[38] and the British Act, by providing in s. 3(6) that:

> A reference in this Act to the doing of an act on the ground of sex or marital status includes a reference to the doing of an act on two or more grounds that include, as the dominant ground, the ground of sex or marital status.

It is hard to see that this requirement serves any useful purpose, and indeed in some cases it could be positively mischievous. How, as a question of fact, is a semi-literate, non-English-speaking Greek, unmarried mother who has been discriminated against relative to an Australian-born, English-speaking, married male who is cohabiting with his wife, to establish what was the 'dominant ground' for that act of discrimination? Might it not be that there was in fact *no* 'dominant' ground, but that sex and/or marital status played a part in causing the discriminator to act as he did? Why indeed should it matter which, if any, was the 'dominant' ground so long as the act was contaminated by an unlawful purpose? It is no answer to say that this requirement protects respondents from vexatious or frivolous complaints in situations where sex or marital status played only a very minor part in the decision-making process. If employers or other persons in a position to discriminate act from motives, some of which are contrary to public policy, then they must surely be answerable for the consequences of their actions even though some of their motives were unexceptionable, or at least not contrary to the letter of the law. If vexatious or frivolous complaints are thought to be a danger to be guarded against there are other means by which this may be done without placing unnecessary obstacles in the path of *bona fide* complainants.[39]

[36] S. 4. S. 4 of the N.S.W. Act defines 'marital status' in identical terms.

[37] See Victoria, 331 *Parliamentary Debates*, Legislative Assembly, 6 April 1977 7388(b)-92(a).

[38] S. 18 of the Racial Discrimination Act 1975 (Cth) is however couched in similar terms to s. 3(6).

[39] See further s. 41 of the E.O.A. discussed *infra*.

UNLAWFUL DISCRIMINATION

It is important to appreciate that in none of the three Australian jurisdictions under review, or in Britain, is all conduct which falls within the statutory definitions of 'discrimination' automatically rendered unlawful. In all cases it is necessary to show not only that a particular act or omission on the part of the discriminator amounted to 'discrimination' as defined, but also that it falls within one of the categories of discriminatory conduct rendered unlawful by the Act in question.

Although there are some differences on points of detail all five Acts follow the lead of the 1968 R.R.A. in outlawing discrimination in employment (including discrimination by employers, trade unions, employers' associations, professional and trade associations, training bodies, and employment agencies), the provision of goods, facilities and services, the letting and disposal of accommodation, and education.

Granted the initial premise that negative regulation is the appropriate route by which to approach the problem of sex discrimination it is only to be expected that some attempt should be made to deal with discrimination in these areas. They are after all those areas in which overt discrimination is most likely to manifest itself, and where its victims will be most keenly aware of its impact, at any rate in the shorter term. It must be remembered however that this kind of discrimination is merely symptomatic of the much more all-pervasive and intractable problem of sexism, and that whilst it is necessary to try to control such symptoms, the more significant long-term objective must be to eliminate the problem at its source.

In an area such as education for example, it is clearly important that schools, colleges etc. should be enjoined not to discriminate in their admissions policies, or in the way that they treat their female students. But it is also necessary to go much further than that, and to look at such broader issues as the structure and content of what is taught and the availability of certain courses to ensure for example that subjects such as domestic science or woodwork are not automatically regarded as being suitable to members of one sex or the other, and that school text-books and other teaching materials do not perpetuate traditional sex-roles. Serious consideration also needs to be given to the question of whether or not it should be lawful to maintain single-sex educational establishments. Although racial discrimination in schools is now generally regarded as unacceptable on both social and moral grounds, there is much less general acceptance of the idea that this is also true of segregation on grounds of sex. Yet such must surely be the case. It is quite impossible to break down artificial barriers between the sexes in a single-sex environment or to foster healthy and balanced attitudes towards that half of humankind that is by its very nature excluded from the institution concerned.

None of the measures under review really comes to terms with these issues.[40] All except the N.S.W. Act proscribe overt discrimination in the educational field,[41] but all permit the continued existence of single-sex educational institutions.[42] Three of them invest a public agency with some kind of watching brief in the educational field,[43] although their powers actually to do anything about such discrimination are rather limited, especially in relation to 'discrimination' which is not strictly 'unlawful'.[44] In no case does the legislation permit, let alone require, positive discrimination in the educational sector, for example through the operation of quota systems in order to redress the effects of past discrimination — what in the United States is broadly termed 'affirmative action'.[45]

The situation in relation to employment is essentially the same. All of the measures under review proscribe discrimination in the filling of vacancies, and within the employment relationship. In all cases s. 6 of the British S.D.A. appears to have been the model upon which the draftsmen based themselves, although there are a number of interesting variations upon the British original. The position in relation to discrimination within the employment relationship is complicated in the U.K. by the existence of the Eq. P.A. of 1970. The sensible thing to do would have been to repeal this Act when the 1975 Act was being enacted, and to incorporate the 1970 principles into the new law. This approach did not commend itself to the Government at that time however, and instead the 1970 Act was substantially re-drafted,[46] although its meaning was not intended to be significantly altered. The two Acts are now meant to complement each other in the sense that the Eq. P.A. is meant to deal with any discrimination which is incorporated into the contracts of employment (not just 'pay' in the narrower sense of 'money wages') of women who do 'like work' or work 'rated as equivalent' with a man in the same employment,[47] whilst the S.D.A. is meant to deal with that which does not form part of the contract. Unfortunately the two Acts are drafted in such a way that

[40] See further Victoria, *Report of the Committee on Equal Opportunity in Schools* (July 1977) and *cf.* the *Minority Report* by Mrs Babette Francis (September 1977).

[41] See S.D.A., ss. 22-28; E.O.A., s. 25; and S.D.A. (S.A.), s. 25. The A.D.A. prohibits discrimination in the educational field on grounds of race, but not sex or marital status (s. 17).

[42] See S.D.A., ss. 26-27; E.O.A., s. 25(3); and S.D.A. (S.A.), s. 25(3).

[43] See S.D.A., ss. 53 and 54; E.O.A., s. 15 and A.D.A., s. 119. Strangely, the South Australian Sex Discrimination Board does not have any such general remit.

[44] The British (s. 53(1)), Victorian (s. 15(1)) and N.S.W. (s. 119) Acts all enjoin the respective administrative agencies established thereunder to work towards the elimination of 'discrimination'. This would include that which falls within the statutory definitions, but is not specifically rendered unlawful. They could not however initiate enforcement proceedings in respect of such 'lawful discrimination'.

[45] The whole issue of affirmative action is the subject of heated debate in the United States, and has spawned an enormous literature — a useful summary of the main trends can be found in Buckley M., 'Reverse Discrimination — A Summary of the Arguments with Further Consideration of Its Stigmatizing Effect' (1977) 16 *Washburn Law Journal* 421.

[46] See s. 8 of the S.D.A. The amended text of the 1970 Act is set out in Sched. 1. Part II to the 1975 Act.

[47] See s. 1 of the Act as amended.

they do not fit together properly, and some victims of discrimination find themselves without a remedy under either Act.[48]

Both South Australia and New South Wales have specific legislative provision in relation to equal pay,[49] and Victoria achieves the same result through the operation of s. 33 of the Labour and Industry Act.[50] The net effect of these provisions is that the State arbitration systems, and the Victorian Wages Boards, adopt the same view of equal pay as the Federal Conciliation and Arbitration Commission.[51] That view is in some respects a narrow one, and there is no reason in principle why the references to 'any other detriment' in s. 18(2)(b) of the Victorian and South Australian Acts, and s. 25(2)(c) of the N.S.W. Act, could not be used to import a wider definition of equal pay. This could not in fact happen in South Australia or New South Wales because s. 31 of the S.D.A. (S.A.) expressly excludes all 'discriminatory rates of salary, wages, or other remuneration' from the scope of that Act, whilst s. 50(e) of the N.S.W. Act excludes all over-award payments as defined therein. The Victorian Act does not contain any such exclusion, with the consequence that the argument is a tenable one only in that State. It is true that the E.O.A. does expressly protect anything 'done under statutory authority',[52] which means that if a determination expressly incorporates a discriminatory provision it could not be challenged as a 'detriment' for purposes of s. 18(2)(b). But if a particular 'detriment' is not expressly authorized by or under statute, for example because it is an 'over award' payment then there is no reason why it could not be challenged on the basis of this provision.

Allowing that it is necessary to try to control discrimination in relation to access to employment and to terms and conditions of employment, it must also be appropriate that analogous relationships such as that of principal and agent, contract workers, and partnerships should be subject to essentially the same measure of control as that of employer and employee. The South Australian Act adopts precisely this approach,[53] whilst the British Act differs only in that it does not make specific provision for principals and agents,[54] and the Victorian and N.S.W. Acts also follow suit, apart from their treatment of partnerships.[55] The N.S.W. Act ignores partnerships entirely, whilst the E.O.A. requires that partner-

[48] See *Meeks v. N.U.A.A.W., op. cit.*

[49] See the Industrial Arbitration (Female Rates) Amendment Act 1958 (N.S.W.), now s. 88D of the Industrial Arbitration Act 1940-77 (N.S.W.) and the Industrial Conciliation and Arbitration Act 1972-75 (S.A.) ss. 35 and 36.

[50] See also *Re Ice Cream Wages Board* [1970] A.I.L.R. Ref. 80 (Industrial Appeals Court).

[51] See the *Equal Pay Cases 1969* [1969] A.I.L.R. Ref. 208 and the *National Wage and Equal Pay Cases 1972* [1972] A.I.L.R. Ref. 696. See also Mills, C. P. and Sorrell, G. H., *Federal Industrial Law* (1975) paras. 179-80.

[52] See subsections 33(1)(d)(ii) and (iii) and (2) of the Victorian Act, and s. 54(a), (b) and (e) of the N.S.W. Act.

[53] See ss. 19, 20 and 21 of the S.D.A. (S.A.).

[54] See ss. 9 and 11 of the S.D.A.

[55] See E.O.A. ss. 19 and 20, and A.D.A. ss. 26 and 27.

ships consisting of five or more partners must not discriminate on grounds of sex or marital status in the way in which they treat their fellow-partners. It does not however prevent discrimination in the selection of new partners, and in its original form did not even provide for equal treatment for existing partners.[56] Presumably the rationale of the present position under s. 21 is that a partnership involves a personal relationship between the partners, and that it would be unreasonable and impractical to force them to accept a woman as a partner against their collective will. This view is not entirely without its merits, although it ignores the fact that many large partnerships do not involve particularly close relationships between the partners, and that in practice such relationships are not infrequently anything but amicable! In any case, it is no more unreasonable or impractical to expect a partnership not to discriminate in its choice of partners than it is to expect it not to discriminate in its choice of employees. In this as in so many other matters the framers of the E.O.A. appear to have been motivated by a desire to upset as few people as possible, to convey the impression of doing something without actually going so far as to upset anyone!

This almost obsessive desire not to ruffle too many feathers is also reflected in the extraordinarily wide range of exceptions, exclusions and special cases which are scattered throughout the Victorian Act. This again is very much in keeping with the pattern established by the British legislation. The S.D.A., for example, does not apply to 'special treatment accorded to women in connection with pregnancy or childbirth',[57] to employment 'for the purposes of a private household',[58] to situations where an employer employs fewer than six people,[59] to charities,[60] to certain sporting activities,[61] to actuarially based discrimination in relation to insurance policies etc.,[62] to 'acts done under statutory authority' or 'for the purpose of safeguarding national security'.[63] The Act also applies in only a modified form, if at all, to the police force, the prison service, ministers of religion, midwives, mineworkers and members of the armed forces.[64] Most significantly of all perhaps, it applies in a highly attenuated form where sex is a 'genuine occupational qualification' for a particular job.[65] Section 7 does not actually create a general category of 'genuine occupational qualification', but rather it sets out eight situations where it is to be so regarded, and which would include actors and actresses, lavatory

[56] See Victoria, 331 *Parliamentary Debates*, Legislative Assembly, 6 April 1977 7347(a)-(b).
[57] S. 2(2).
[58] S. 6(3)(a).
[59] S. 6(3)(b).
[60] S. 43.
[61] S. 44.
[62] S. 45.
[63] Ss. 59 and 60 respectively.
[64] Ss. 17-21 and 85(4) respectively.
[65] S. 7.

attendants, and business executives whose work is likely to take them to Saudi Arabia![66] The concept of the genuine occupational qualification is a curious one. In many respects it panders to the very prejudices which the legislation is meant to destroy. In other respects it represents a contradition in terms in that its application is not mandatory, which clearly suggests that the jobs in question are *capable* of being done by a woman, in which case sex can hardly be said to be a *genuine* occupational qualification for that job. It may well be that it is necessary to qualify general principle to some extent in order to avoid arbitrariness or absurdity,[67] but any such modifications should be as narrowly drawn as possible, and great care needs to be taken to ensure that they are really necessary, and that they do not run counter to the supposed objectives of the legislation by helping to perpetuate precisely those prejudices and discriminatory practices which it is meant to eliminate.

Unfortunately all three of the Australian Acts adopt the same ill-considered and haphazard approach to exemptions and special cases as do the British measures of 1975 and 1976, although with considerable variations in matters of detail. Like its British counterpart the E.O.A. does not apply to special treatment afforded to women in connection with pregnancy or childbirth,[68] employment for or in connection with a private household, the engagement of actors and actresses, situations where the employer employs fewer than six people, or to the offering of employment where the employee 'is required to reside in communal residential accommodation provided by the employer only for persons of that sex'.[69] Charities are also excluded under the Victorian Act, as are religious bodies, competitive sports, 'social, recreational community service or sporting' clubs, insurance policies, and, as indicated, acts done under statutory authority.[70] Wisely, neither the E.O.A. nor the South Australian Act adopts the British concept of the 'genuine occupational qualification',[71] although some of the specific exceptions contained in the Victorian Act would come within the scope of s. 7 of the British Act. Section 30 of the E.O.A. mirrors s. 6(4) of the British Act in providing that the Act 'does not affect discriminatory provisions relating to pensions or superannuation'. This exclusion was the subject of considerable controversy in both the U.K. and in Victoria, and in both instances the cause of the trouble was

[66] See s. 7(2)(a), (b) and (g) respectively.

[67] See *e.g.* the salutory tale of the Scottish housekeeper retailed by Lester and Bindman, *op. cit.*, 196-7. This utterly trivial incident had a totally disproportionate impact upon public attitudes to the R.R.A. of 1968.

[68] S. 16(2)(a). Special treatment is not defined, but it is presumably meant to refer to ante-natal and maternity leave, maternity pay etc. In theory though it could also apply to unfavourable treatment such as dismissal on grounds of pregnancy.

[69] S. 18(3)(a), (b), (c) and (d) respectively. On this last point, *cf.* ss. 7(2)(c) and 46 of the S.D.A.

[70] Ss. 31, 32, 33(1)(a), 33(1)(b), 33(1)(c) and 33(1)(d) and (2) respectively.

[71] *Cf.* s. 31 of the N.S.W. Act which does adopt this concept, although not in precisely the same terms.

money.[72] Since women generally live longer than men there is some ground for saying that in an actuarially-based pension scheme women should be treated differently from men because they are likely to be a drain on the funds of the scheme for a longer period. This physical reality may necessitate some adjustment of premium rates etc., but in no circumstances can it justify paying pensions to women at a lower rate than to men, refusing to admit them to occupational pension schemes, or admitting them on less favourable terms than men nor can it justify the application of differential retiring ages for men and women. It would certainly cost a lot of money to remove existing discrimination in these areas in private superannuation schemes. It would cost even more if State schemes were included as well and as a matter of political expediency it could be extremely difficult to legislate for one and not the other. It is scarcely surprising therefore to find that all three of the Australian legislatures have followed the example set by the Mother of Parliaments in this respect![73] There has been some progress in the United Kingdom in this area in recent years in that Part IV of the Social Security Pensions Act of 1975[74] requires that women be accorded equal access to all occupational pension schemes at least as regards age and length of service.[75] That apart, superannuation schemes and other provisions relating to death or retirement are entirely excluded from the scope of both the S.D. and Eq. P. Acts,[76] but the British Government has a clear commitment to reform in this area, and it seems resonable to expect some further progress in the not too distant future.[77] In Victoria the Premier gave a firm assurance during the Committee Stage of the Equal Opportunity Bill that the E.O.B. would examine the whole superannuation issue as a matter of urgency.[78] It is understood that this 'examination' is currently underway, although there is as yet no indication of when it is likely to be completed, or its findings made public — let alone be acted upon. Pending repeal of s. 30, and a major reform of social security law, current levels of discrimination in relation to pensions and

[72] See Victoria, 331 *Parliamentary Debates*, Legislative Assembly, 6 April 1977, 7413(a)-19(b).

[73] See S.D.A. (S.A.), s.34(2) and A.D.A., s. 36.

[74] C. 60.

[75] See further Reid, J. R., 'Women in Employment — The New Legislation' (1976) 39 *Modern Law Review* 432, 443-4.

[76] S. 6(4) *supra*, and s. 6(1A) of the Eq. P.A.

[77] See further United Kingdom, Occupational Pensions Board: *Report on Equal Status for Men and Women in Occupational Pension Schemes* (1976) Cmnd. 6599, and the subsequent *Consultative Documents* issued by the Department of Health and Social Security in August 1976 and March 1977. See also E.E.C., *Draft Directive on Equality of Treatment for Men and Women in Matters of Social Security* (January 1977) (R/48/77) which was the subject of a report from the House of Lords *Select Committee on the European Communities* in November 1977. (H.L. Papers 1977-78 No. 23.)

[78] See Victoria, 331 *Parliamentary Debates*, Legislative Assembly, 6 April 1977, 7414(b)-15(a).

superannuation[79] stand as a constant reminder of just how half-hearted a 'declaration of public policy' the E.O.A. is — assuming of course that it *is* public policy to eliminate discrimination on grounds of sex in our society!

In one important respect the range of exemptions available under the Victorian Act, and under those of New South Wales and South Australia, go considerably further than the S.D.A. in that s. 34 empowers the E.O.B. to grant exemptions from all or any part of the Act in relation to '(a) a person, or class of persons; (b) an activity, or class of activity; or (c) any circumstances of a specified nature'. Such exemption may remain in force for up to three years, renewable from time to time for further periods of up to three years, and it may be revoked on three months notice in accordance with the procedures laid down in s. 34(3).[80] It may be that in some instances some period of adjustment is necessary before legislation like the E.O.A. becomes fully operative, but in no conceivable circumstances is this need such as to warrant a total exemption from the requirements of the Act for successive periods of up to three years. It should be possible to deal with any transitional problems that may arise through conciliation procedures, and if need be, by making deferred enforcement awards. Just how serious an inroad s. 34 makes into such effectiveness as the Act might otherwise have will be largely dependent upon the criteria adopted by the Board in granting exemptions. It was certainly envisaged that any such powers should be exercised fairly sparingly,[81] although the circumstances of the first exemption actually granted do not give any particular cause for optimism in this respect.[82]

An effective anti-discrimination Act, even within the terms of the 'five principles', should not only proscribe identifiable acts of discrimination but also such ancillary activities as victimising complainants, pressurizing or assisting others to discriminate, and advertising an intention to discriminate. All of the measures under review attempt to deal with these issues, and so far as victimisation and aiding or abetting unlawful acts are concerned they

[79] For an interesting account of some of the more obvious forms of such discrimination see the speech of Mr S. M. Crabb during the Committee Stage of the Equal Opportunity Bill — Victoria, 331 *Parliamentary Debates*, Legislative Assembly, 6 April 1977, 7415(a)-17(b).

[80] See S.D.A. (S.A.), s. 37 (up to three years renewable for further periods of three years as in Victoria) and A.D.A., s. 126 (up to five years renewable for a further maximum of five years).

[81] See for example the *Report of the Committee on the Status of Women*, para. 4.6(f) and (g).

[82] On 8 May, 1978 a security firm was granted an exemption to allow it to 'employ people of a particular sex for its armed security division', and 'to choose people of a particular sex for promotion, transfer or training'. The basis of this decision appears to have been that it would be necessary to advertise for members of one sex or the other 'If the number of males or females in its armed security division dropped below a "workable" level'. At that time 75% of the company's staff were male — *The Age*, 9 May 1978. See also the limited exemptions granted to the Victoria Police — *The Age*, 13 May 1978, and to Lovelay International Pty Ltd — *The Age*, 20 July 1978.

do so fairly successfully.[83] On the other hand none of them handles advertising particularly well, although none of them displays quite the same level of ineptitude as s. 53 of the Victorian Act.[84]

There are three categories of advertisements which may have to be dealt with. First there are those which expressly or impliedly indicate an intention to do an unlawful act. Secondly there are those which indicate an intention to discriminate, but not in a way which is rendered unlawful by the Act. Thirdly, and most importantly, there are those which indicate no intention to discriminate, lawfully or otherwise, but which help perpetuate traditional sex stereotypes for example by presenting women as sex objects or as wife-and-mother, and the dominant male as hunter, or bread-winnner.

The first category obviously must be dealt with, and it ought to be possible to do so fairly easily simply by making it unlawful to publish, or cause to be published, an advertisement which indicates an intention to do an unlawful act.

The second category raises more difficult issues. On one view it seems odd to hold someone answerable in law for indicating an intention to do something which would not actually be unlawful if he did it. Alternatively it might be said that all discrimination is offensive, even if not strictly unlawful, and that for that reason it should be unlawful to indicate an intention to do an offensive, albeit lawful act. It by no means follows for example that if it is lawful to discriminate in the hiring of a butler it should automatically be lawful to advertise an intention to do so. Sexual stereotyping currently dictates that a butler should be male, and the law may decide to defer to that prejudice, and to the individual's supposed right to choose to be waited upon only by members of one sex. But might it not be that one of the ways to break down the stereotyping that gives rise to the need for exemptions in the first place, is to deny the would-be discriminator the right to advertise his intention of doing so? It is no answer to this case to suggest that that would be unjust and hurtful to a woman who responded to a 'neutral' advertisement only to discover that she could lawfully be refused the job because of her sex. Unjust it may be, but hardly any more so than to apply for any job and be *unlawfully* discriminated against on grounds of sex, and hardly any more hurtful or offensive than to be subjected to sexist advertising which is permissible because the thing advertised happens to be lawful.

Not only is the third category the most important of the three, it is also the most difficult with which to deal. Advertising is an enormously powerful medium, with a great potential for good or for evil. With its persistent presentation and endorsement of sexual stereotypes it is, in the present context, all too often the latter.

[83] See S.D.A., ss. 4, 39, 40 and 42; E.O.A., ss. 17 and 28; S.D.A. (S.A.), ss. 17 and 28 and A.D.A., ss. 50 and 52.

[84] See S.D.A., s. 38 and Creighton W. B. (1978), *op. cit.*, ch. VII; E.O.A., s. 53; S.D.A. (S.A.), s. 45 and A.D.A., s. 51.

It certainly would not be easy to deal with this issue in terms of conventional legal regulation. There would, for example, be considerable difficulties in relation to the right to initiate proceedings in respect of this kind of discriminatory practice, and it would be no easy matter to lay down standards against which to measure the lawfulness or otherwise of any given advertisement. Nevertheless the difficulties are not insuperable. The *locus standi* problem could be solved by vesting the right to complain in a public agency rather than in aggrieved individuals. Most difficulties with regard to the identification and measurement of discrimination could be dealt with by means of codes of practice, and by realistic and flexible conciliation procedures. It is certainly clear that it is not sufficient to rely exclusively upon goodwill and persuasion in this area. Non-discriminatory advertising is such an important element in the overall educative process of which legislation such as the E.O.A. is meant to be a part that it cannot and must not be left to the long-term educative effects of that same legislation, or the persuasive powers of the E.O.B., however formidable those may be.

How then does the E.O.A. approach these issues? Section 53(1) makes it an offence, punishable by a $100 fine, to publish an advertisement[85] that indicates, or 'might reasonably be understood to indicate' an intention to do an unlawful act. It is, however, a defence to show that the advertised act would not *in fact* be unlawful. The second part of this proscription appears to be otiose since it would surely not be possible for someone successfully to be prosecuted for advertising in a manner which 'might reasonably be understood' to indicate an intention to do an unlawful act if it is a defence to show that it would not *in fact* be unlawful to do the advertised act.

The publisher of an advertisement has a further defence if he can show that he believed on 'reasonable grounds' that the publication of the advertisement would not be unlawful,[86] whilst s. 53(6) provides that the publishers, sellers and distributors of newspapers and periodicals cannot be convicted of an offence under s. 53(1) 'unless it is proved that the person knew that the advertisement was unlawful'.

Section 53 is extraordinarily badly drafted in a number of respects. There is for example no definition of the term 'publisher' anywhere in the Act. On a narrow view it could be taken to refer only to the person who actually publishes a newspaper or periodical which contains a discriminatory advertisement, or who owns a television or radio station which broadcasts such an advertisement. This is certainly the impression conveyed by subsections (5) and (6), but such a view excludes the person who actually inserts or arranges for the transmission of the advertisement. It is scarcely conceivable that he should escape prosecution whilst the

[85] S. 53(7)(a) provides that without affecting the generality of the expression, 'advertisement' includes notices, signs, labels, circulars and 'matter that is not writing but by reason of the form or content in which it appears conveys a message'.

[86] S. 53(5).

publisher, in the narrower sense, is held liable. If on the other hand a wider view is adopted, and 'publish' is read to include 'cause to be published', then subsection (5) seems virtually to defeat the whole object of the section, especially on a broad reading of what constitutes 'reasonable grounds' for a belief that a given advertisement did not contravene subsection (1). Subsection (6) meanwhile would seem to place the publishers, sellers and distributors of newspapers or periodicals at an advantage relative to other 'publishers' in that they could successfully be prosecuted only if it was shown that they *knew* that the advertisement was unlawful!

Both the British and South Australian Acts avoid at least this difficulty by providing that it is unlawful 'to publish or cause to be published' an advertisement which indicates, or in the case of the British Act, might reasonably be understood to indicate, an intention to do an unlawful act.[87] The N.S.W. Act does not concern itself with publishers at all, but makes it unlawful 'to lodge for publication' an advertisement that indicates, or 'could reasonably be understood as indicating' an intention to do an unlawful act.[88] This seems to mean that in New South Wales the offence is committed even though the advertisement is never actually published! In all four jurisdictions the advertised act must *in fact* be unlawful, so that in no case is the second of the three categories described above covered.[89]

Assuming that it is possible to find someone to prosecute under s. 53, subsection (3) provides that a word with a sexual connotation (such as 'waitress' or 'salesman') is not to be taken as indicating an intention to discriminate, although curiously, subsection (4) provides that subsection (3) does not prevent the use of such a word being used in evidence in proceedings for breach of subsection (1)! The British Act in contrast, provides that the use of a sexually denotive term *is* to be taken to indicate an intention to discriminate, unless 'the advertisement contains an indication to the contrary'.[90]

Since it does not apply to advertisements which indicate an intention to do a lawful discriminatory act, it is hardly surprising to find that the E.O.A. makes no direct reference to the third category of discriminatory advertising, the perpetuation of sex-stereotypes. The same is true of the British, South Australian and N.S.W. Acts, but in all cases apart from South Australia this kind of issue is within the terms of reference of the respective public agencies who are invested with enforcement powers under the various Acts.[91] It follows therefore, that the E.O.B. could try to promote change in this area as part of its general educational function, even though it could not initiate formal enforcement proceedings

[87] S. 38(1) and s. 45(1) respectively.
[88] S. 51(2).
[89] See S.D.A., s. 38(2) and E.O.A., s. 53(2). Neither the South Australian nor the N.S.W. Acts spell out the defence of *de facto* lawfulness in express terms, but in both cases it can be implied from the wording of the Act.
[90] S. 38(3).
[91] See S.D.A., s. 53(1); E.O.A., s. 15(1); A.D.A., s. 119.

against an unco-operative advertiser or advertising agency. For the reasons set out above this is a serious gap in the scope of the legislation, and it is small comfort that it is shared by the British, South Australian and N.S.W. Acts.

THE COMMISSIONER FOR EQUAL OPPORTUNITY AND THE EQUAL OPPORTUNITY BOARD

Section 2(1) of the 1965 R.R.A. provided for the establishment of a public agency to be known as the Race Relations Board with the task of 'securing compliance' with the substantive provisions of the Act, and of resolving 'difficulties arising out of those provisions'. In furtherance of these objectives the Board was required to constitute local conciliation committees whose duty it was to 'receive and consider' complaints of discrimination, to 'make such inquiries as they think necessary with respect to the facts alleged in any such complaint' and to attempt to secure a voluntary settlement of the dispute 'by communication with the parties concerned or otherwise'.[92] If these attempts at conciliation failed then the matter had to be referred to the Board, who could then refer it to the Attorney-General or the Lord Advocate with a view to the possible initiation of enforcement proceedings.[93]

The enforcement procedures thus established were somewhat half-hearted and ineffectual, and they were substantially revised and strengthened three years later by the Act of 1968. Even in their revised form they left a great deal to be desired in a number of respects: the Board and committees were *obliged* to 'receive' all complaints, regardless of whether or not they were made in good faith, and however trivial they might be;[94] paradoxically, the Board had an absolute discretion as to whether or not to initiate legal proceedings in respect of any complaint referred to it, and their refusal to do so left many aggrieved individuals with an abiding sense of injustice;[95] the enforcement procedures were so hedged around with 'safeguards' and qualifications as to be virtually unworkable,[96] especially in employment cases;[97] the Board had only a very restricted right to act on its own initiative, rather than at the behest of a complainant;[98] and most serious of all perhaps, it had no powers to obtain information or compel the attendance of witnesses in the course of its investigations.[99]

The real significance of these provisions was that they established a pattern of two-tier enforcement machinery which has been carried over

92 S. 2(2).
93 Ss. 2(3), 3 and 4.
94 S. 15(2). For an example of the difficulties to which this sometimes gave rise see the Scottish housekeeper case referred to at n. 67 *supra*.
95 S. 19(1) and (10). See also *Selvarajan v. R.R.B.* [1976] 1 All E.R. 12.
96 Ss. 14, 15 and 19-22.
97 S. 16 and Sched. 2.
98 S. 17 and Sched. 3.
99 See Lester and Bindman, *op. cit.*, 309-12.

in a modified form in the British Acts of 1975 and 1976, and in the three Australian Acts of 1975, 1976 and 1977. It is also true to say that all five Acts show that at least some of the lessons of the 1965 and 1968 experiments have been learned.

The lower or 'executive' tier in New South Wales is known as the Counsellor for Equal Opportunity,[1] in South Australia as the Commissioner for Equal Opportunity,[2] and in Victoria as the Commissioner for Equal Opportunity.[3] The respective 'second tiers' are known as the Anti-Discrimination Board, the Sex Discrimination Board and the Equal Opportunity Board.[4] Under the British Acts the conciliation function in employment cases is now performed by the Advisory, Conciliation and Arbitration Service,[5] and the 'second tier' functions by the Equal Opportunities Commission[6] and the Commission for Racial Equality.[7]

There are considerable variations as to detail between the three Australian structures, but the basic approach is the same. The first tier receives complaints directly from aggrieved individuals, and attempts to secure a settlement by agreement.[8] If these attempts fail, or if the Counsellor or Commissioner feels that there is no point in trying to conciliate, the matter is referred to the appropriate Board.[9] The Board can then 'hear and determine' the matter,[10] and may grant relief as prescribed.[11] In all three States there is a right of appeal by way of re-hearing to the appropriate Supreme Court.[12] In addition to their powers as quasi-tribunals, the Boards also have extensive powers of an investigative and educational nature, and are possessed of the power to initiate investigations and/or enforcement proceedings in their own right in appropriate circumstances.[13] The educational and investigative functions of the two British Commissions are essentially the same as those of the Australian Boards,[14] but they do not actually hear and determine individual complaints, or grant relief in respect of them, the right to do this being

[1] A.D.A., ss. 60-9 and 88-94.
[2] S.D.A. (S.A.), s. 6.
[3] Hereinafter referred to as C.E.O.; E.O.A., ss. 5 and 6.
[4] Hereinafter referred to as E.O.B. See A.D.A., ss. 70-86 and 95-122; S.D.A. (S.A.), ss. 7-15 and 38-43; E.O.A., ss. 7-15, 35-42 and 44-52.
[5] Hereinafter referred to as A.C.A.S. See S.D.A., s. 64 and R.R.A., s. 55. For the establishment etc. of the A.C.A.S. see the Employment Protection Act 1975 c. 71, ss. 1-6 and Sched. 1.
[6] Hereinafter referred to as E.O.C. S.D.A., ss. 53-61, 67-73, 75 and Sched. 3.
[7] Hereinafter referred to as C.R.E. R.R.A., ss. 43-52, 58-64, 66 and Sched. 1.
[8] See E.O.A., ss. 38 and 39; S.D.A. (S.A.), ss. 39 and 40; and A.D.A., ss. 88-92 and 94.
[9] E.O.A., s. 39(5); S.D.A. (S.A.), s. 40(5) and A.D.A., s. 94(1). Section 95 of the A.D.A. provides for reference by the appropriate Minister of 'any matter' and for its investigation 'as a complaint' by the Board.
[10] E.O.A., s. 40(1); S.D.A. (S.A.), s. 41(1) and A.D.A., ss. 96 and 106.
[11] E.O.A., s. 40(2) and (3); S.D.A. (S.A.), s. 41(2) and (3); and A.D.A., ss. 112 and 113.
[12] E.O.A., s. 43; S.D.A. (S.A.), s. 43 and A.D.A., s. 118.
[13] E.O.A., ss. 35-37; S.D.A., s. 38 and A.D.A., s. 119(a) and (f).
[14] S.D.A., ss 53, 54 and 56A-61 and R.R.A., ss. 43-45 and 47-52.

vested in the industrial tribunals in employment cases,[15] and in the County Court in all other cases.[16] The Commissions do, however, have the right to issue non-discrimination notices[17] and to initiate proceedings in certain circumstances,[18] and they may render various forms of assistance to complainants where they deem it appropriate to do so.[19] Conciliation in the British system consists in the referral of all employment cases to an officer of the A.C.A.S. who may attempt to conciliate where he considers that he could do so 'with a reasonable prospect of success', or if 'he is requested to do so by the complainant and the respondent'.[20] In either case, the complainant has the right to press ahead with her complaint regardless of what happens at the conciliation stage. Curiously, neither of the British Acts makes provision for conciliation in non-employment cases.

THE REDRESS OF INDIVIDUAL GRIEVANCES UNDER THE VICTORIAN ACT

It is of the utmost importance that any piece of anti-discrimination legislation should provide adequate redress for the individual who has been subjected to an act of unlawful discrimination. Such redress can perform a number of functions: it can serve to reinforce the illusion that 'something' is being done; it can, as the fourth of the five principles of the R.R.B. has it, facilitate 'the peaceful and orderly adjustment of grievances and the release of tensions' — even the unsuccessful complainant may feel less aggrieved if she has had her day in court; and finally it can, and most decidedly ought to, afford a remedy to the individual who has been wronged. It is after all the individual upon whom the more obvious forms of discrimination have most direct impact. It is the individual who is denied access to a particular job because of her sex, or who is dismissed because she is pregnant, who has been humiliated, and who has quite possibly suffered economic loss. It is clearly right and proper that such an individual should be entitled to some form of legal redress in respect of that wrong, regardless of any wider, symbolic significance that the legislation under which it is granted may have.

The normal course of action to be followed by a woman who believes that she has been subjected to discrimination within the terms of the E.O.A. is for her to lodge 'a written complaint setting out details of the alleged act of discrimination' with the Registrar of the E.O.B.,[21] who is then required to refer the complaint to the Commissioner.[22] Any such

[15] S.D.A., s. 63 and R.R.A., s. 54. On the structure and functions of the industrial tribunals see further Whitesides K. and Hawker G., *Industrial Tribunals* (1975) *passim.*
[16] S.D.A., s. 66(2) and R.R.A., s. 57(2) and s. 67.
[17] S.D.A., ss. 67-70 and R.R.A., ss. 58-61.
[18] S.D.A., ss. 71-73 and R.R.A., ss. 62-64.
[19] S.D.A., s. 75 and R.R.A., s. 66.
[20] S.D.A., s. 64(1)(b) and (a) and R.R.A., s. 64(1)(b) and (a).
[21] S. 38(1) and s. 13.
[22] S. 38(4).

complaint must be lodged with the Registrar not later than 'twelve months after the date on which the act of discrimination the subject of the complaint is alleged to have been committed'.[23] This limitation period is more generous than the six months laid down in s. 39(2) of the South Australian Act, but is probably less satisfactory than the six months extendible 'on good cause' which is prescribed by the N.S.W. Act.[24] This latter approach has the considerable advantage that it makes it easier to deal with those forms of discrimination, the existence of which may become apparent to the victim only over a considerable period of time, for example a failure to promote. In practice it ought to be possible to deal with this problem by dating the limitation period from the most recent occasion upon which a man was promoted in preference to the complainant. However, this would not necessarily meet all situations which might arise, for example where the immediate past male promotee was better qualified than the complainant, but some or all of his predecessors were not. It would be better therefore to invest the E.O.B. with the same kind of discretion as that vested in courts or tribunals in the United Kingdom, and in the N.S.W. Anti-Discrimination Board. Once a complaint has been referred to the Commissioner he must first decide whether or not it is one that he ought to entertain, and if he comes to the conclusion that it is, he must decide what to do about it. The decision whether or not to entertain the complaint must be made by reference to s. 39(1) which enables the Commissioner, in writing, to decline to proceed with a complaint if he is of the opinion that it is 'frivolous, vexatious, misconceived or lacking in substance'. There is no right of appeal against a refusal to proceed, which at first blush seems to suggest that the Victorian Legislature has fallen into the same trap as the British Parliament in 1968 and allowed an administrative agency to deny the complainant the right to initiate proceedings on her own account. This is not the case however, because s. 38(5)(c) enables the complainant, 'by notice in writing' to require the Commissioner to refer a complaint to the E.O.B., regardless of whether or not he has decided to entertain it. The Board must then 'hear and determine' the matter in the normal way, although there is a disincentive to the vexatious or frivolous litigant in the form of s. 41(1) which empowers the Board to award costs and compensation for 'other pecuniary loss' incurred by the respondent in consequence of the proceedings. This is rather similar to the approach adopted by the British Acts of 1975 and

[23] S. 38(3).

[24] S. 88(3) and (4). The limitation periods under the British Acts are three months in employment cases, and six months in all other cases — S.D.A., s. 76 and R.R.A., s. 68. In all cases the court or tribunal may entertain a complaint which is out of time 'if, in all the circumstances of the case it considers it just and equitable to do so' — S.D.A., s. 76(5) and R.R.A., s. 68(6). See further, *Hutchinson v. Westward Television Ltd* [1977] I.R.L.R. 69, where the Employment Appeal Tribunal set out guidelines for the application of s. 76(5).

1976[25] and is quite a sensible way to deal with the problem of the vexatious complainant, so long as the power to award costs is not exercised in such a way as to deter complainants who have genuine, though legally problematic, complaints — these being the kinds of situation where the possibility of publicity etc. can often secure for the aggrieved individual that redress which the law is unable to provide, or where it is necessary to take a risk in order to find out precisely what the law does say. Assuming that the Commissioner does decide to entertain the complaint he has two courses of action open to him. He may decide to try to settle it by conciliation.[26] In furtherance of this objective he may serve written notice upon the respondent requiring him 'to attend before him for the purpose of discussing the subject-matter of the complaint',[27] and it is an offence punishable by a fine of up to $500 to 'refuse or fail' to comply with any such notice.[28] If the attempt at conciliation is successful, then that is the end of the matter. If it fails, then the Commissioner is obliged to refer the matter to the Board.[29]

It is also open to the Commissioner to decide that the subject-matter of a complaint cannot be settled by conciliation, in which case he may refer it directly to the Board.[30] Unless a complaint related to a respondent who had a particularly bad record as an unlawful discriminator it is unlikely that the Commissioner would not attempt to conciliate in other than exceptional instances, but it is important that he should have the reserve power to refer a matter directly to the Board in appropriate circumstances.

When a complaint has been referred to the Board under s. 39 it has no choice but to 'hear and determine' the matter.[31] Before doing so it must give everyone who is party to the proceedings reasonable notice of the time and place at which the matter will be heard, and must afford them 'reasonable opportunity to call or give evidence examine, cross-examine witnesses and make submissions'.[32] The Board has the same powers to order disclosure of documents, attendance of witnesses etc. as the Supreme Court,[33] but is not obliged to adhere to the rules of evidence except in so far as it decides to the contrary.[34] On the other hand it is obliged to 'act fairly and according to the substantial merits of the case',[35] and must state the reasons for its decisions if requested to do so by any party to the

[25] See the Industrial Tribunals (Labour Relations) Regulations 1974. S.I. 1974, No. 1386, r. 10 as amended by the Industrial Tribunals (Labour Relations) (Amendment) Regulations 1976, S.I. 1976, No. 661.
[26] S. 39(2).
[27] S. 39(3).
[28] S. 39(4).
[29] S. 39(5)(b).
[30] S. 39(5)(a).
[31] S. 40(1).
[32] S. 47(1)(a).
[33] Ss. 49-51.
[34] S. 45.
[35] *Ibid.*

proceedings.[36] The parties have the right to appear before the Board in person, or through an agent,[37] but there is no right to paid legal representation, other than with the leave of the Board,[38] and a lay representative is likewise required to obtain the permission of the Board before he can receive a fee.[39] These are sensible restrictions which are clearly designed to ensure that proceedings before the Board remain as informal and non-legalistic as possible. It is to be hoped that the Board will exercise its discretion to permit paid legal representation very sparingly, and that every effort will be made to avoid the kind of difficulty which is increasingly being experienced in the United Kingdom, where the industrial tribunals are becoming alarmingly like the courts to which they are meant to be a fast, cheap and informal alternative, despite the fact that legal aid is not available for such proceedings, and that the tribunals do not usually award costs.

Having 'heard and determined' a complaint the Board may dismiss it, or make one or more of the orders specified in s. 40(2), namely: (a) that the respondent 'refrain from committing any further act of discrimination against the complainant'; (b) that the respondent pay such compensation as the Board thinks fit to compensate the complainant 'for loss or damage suffered by her in consequence of the act of discrimination to which the complaint relates'; and (c) that the respondent

> perform any acts specified in the order with a view to redressing any loss or damage suffered by the person who made the complaint as a result of the act of discrimination.

These provisions are identical to those contained in s. 41(2) of the South Australian Act and go substantially further than either of the British Acts of 1975 and 1976, under which relief is limited to: declarations;[40] awards of compensation assessed in accordance with common law criteria for breach of statutory duty, including injury to feelings, and subject to an upper limit presently fixed at £5,200;[41] and 'recommendations' that

> the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.[42]

The only sanction for failure to comply with any such 'recommendation' is an increased (or new) award of compensation, but still subject to the upper limit of £5,200.[43] The relief available under the N.S.W. Act is

[36] S. 42.
[37] S. 46(1).
[38] S. 46(3).
[39] S. 46(4).
[40] S.D.A., s. 65(1)(a) and R.R.A., s. 56(1)(a).
[41] S.D.A., s. 65(1)(b) and (2), and s. 66(1) and (2) and R.R.A., s. 56(1)(b) and (2) and s. 57(1) and (2).
[42] S.D.A., s. 65(1)(c) and R.R.A., s. 56(1)(c).
[43] S.D.A., s. 65(3) and R.R.A., s. 56(3).

substantially the same as under its Australian counterparts, although awards of damages are subject to an upper limit of $20,000.[44]

The overall effect of s. 40(2) of the E.O.A. is that the Board can order a discriminator not to discriminate against the complainant in the future; it can order him to pay compensation for loss or damage suffered in consequence of past discrimination; and it can order him to do *anything* with a view to redressing the loss suffered by the complainant. In principle there is no reason why this last order could not include an instruction to give the complainant the job he had refused to give her because of her sex, and since s. 33(1)(d)(i) legalizes anything done 'in order to comply with a provision of an order of the Board', it could even include an instruction to dismiss the successful male candidate in order to make way for the complainant.

Harsh as it may seem from the point of view of the 'innocent' male this is the kind of thing that may have to be done if the 'negative regulation' approach is to have any significant impact upon sex discrimination in our society. It is unlikely that the Board would be prepared to go as far as to order the dismissal of one employee and the employment of another, other than in very exceptional cases. Nevertheless, it is of the utmost importance not only that they should have the power to take such extreme measures in some instances, but also that they should be prepared to do so if and when the need arises.

Unfortunately, even if the Board was minded to do go to such lengths, the effectiveness of the remedies available under s. 40(2) is severely circumscribed in a number of respects. First of all, failure to comply with an 'order' of the Board does not attract the sanctions available in respect of contempt of court — unlimited fines and commital to prison as appropriate. Instead the defaulter is liable to prosecution and if found guilty may be fined a maximum of $1,000.[45] Secondly, all orders of the Board are subject to appeal by way of rehearing to the Supreme Court, and on such appeal the Court may 'affirm, vary or quash' the order appealed against, or it may 'substitute, or make in addition any order that could have been made in the first instance'.[46] It may also remit the matter to the Board for 'further hearing or consideration or for re-hearing',[47] and it may 'make any order as to costs that the justice of the case requires'.[48]

There probably is a need for some measure of judicial review of the activities of the Board, but it is hard to see that that need extends to a right of appeal by way of re-hearing. The Board could reasonably be expected to build up some special expertise in this area, and their more relaxed rules as to procedure etc. are presumably intended to encourage

[44] S. 113.
[45] S. 40(4).
[46] S. 43(3)(a).
[47] S. 43(3)(b).
[48] S. 43(3)(c).

this. It is both unfortunate and unnecessary that, having gone through the specialist machinery established by the Act, a complaint should be subject to re-hearing on its merits before a court of law. Quite apart from the fact that this appears to be a waste of time and money, and that in procedural terms the courts are not really the institution best-equipped to deal with this kind of issue, there is also the danger that the judiciary in Victoria will exhibit the same kind of hostility to the objectives of the legislation as was so evident in the House of Lords decisions under the 1968 Act,[49] and in the more recent decision of the Court of Appeal in *Automotive Products Ltd v. Peake*.[50] It would have been altogether more sensible to have provided for review by means of prerogative order,[51] or at the very most by appeal on point of law. As the Act stands the enforcement machinery is rendered unnecessarily cumbersome, and there is a very real possibility that even if the Board was prepared to take a liberal view of its powers under s. 40(2), its decisions would be set aside on appeal.

The third major constraint upon the likely effectiveness of s. 40(2) is in many respects the most basic of the three. In a sense it does not matter how wide a view the Board takes of its powers under s. 40, or how ill-disposed the Supreme Court may be towards the objectives of the legislation, for the good and simple reason that the Board will only rarely get the chance to make orders under subsection (2), or the Supreme Court to overturn them, because very few complainants are likely to be able to prove that they have been subjected to unlawful discrimination under the Act.

This problem bedevils both of the British Acts, and also those in New South Wales and South Australia. The White Paper which preceded the introduction of the British Sex Discrimination Bill had originally proposed that the normal civil law burden of proof should be partially reversed in order to help offset some of these difficulties.[52] Unfortunately the Government subsequently changed its mind, and remained unresponsive to all suggestions that it should revert to its original position.[53] The burden of proof is partially reversed under British unfair dismissals legislation, and has undoubtedly proved beneficial to some complainants.[54] There is no reason why it should not prove to be similarly beneficial in the context of anti-discrimination legislation, although the problems of proof in this area are so intractible that it could not realistically be expected to have other than a marginal impact.

[49] See n. 20, p. 506, *infra*.
[50] [1977] 3 W.L.R. 853 — see especially the judgment of Lord Denning M.R., 855-8.
[51] See s. 54(2).
[52] Cmnd. 5724, *op. cit.*, para. 86.
[53] See United Kingdom, 893 *Parliamentary Debates*, House of Commons, 18 June 1975, cols. 1467-73.
[54] See the Trade Union and Labour Relations Act 1974 (U.K.) c. 52, Sched. 1, para. 6(1).

Much the same must be said of the questioning procedure first introduced by s. 74 of the British S.D.A.[55] which enables would-be complainants to question potential respondents as to their actions, and their motives therefor, in advance of (or subsequent to) the initiation of formal proceedings. The answers to such questions, or a failure to respond, may be used in evidence in subsequent proceedings, but are not determinative of liability or otherwise. Although such procedures may be of some assistance to a minority of complainants, given the inevitable superficiality of both questions and answers,[56] it is hard to see that they can be of other than marginal relevance. None of the Australian Acts contains any provision of this nature.

Unfortunately marginal relevance appears to be the invariable fate of attempts at negative regulation in the discrimination area. It has already been suggested that the assumption that this is the best way to approach this problem is an erroneous one, and that it is necessary to take a much broader view of the issue than is inherent in the concept of negative regulation. It has to be recognized that sexism and sex discrimination are central to our entire social structure, and that they have to be dealt with as a fundamental structural problem. It does not follow from this that negative regulation does not have an important part to play in trying to eliminate these social evils, but it does suggest that something more is required than is offered by the E.O.A., and that too much should not be expected of even a well-drafted, better-structured measure than any of those under review.

It was also suggested earlier that to have any real prospect of success, even as an exercise in negative regulation, an anti-discrimination Act should provide a sure and effective remedy for the individual who has been subjected to unlawful discrimination. Equally clearly that is not enough in itself. There are for instance some kinds of discrimination which do not have impact directly upon any identifiable individuals so much as upon an entire class of them, whilst others may be so insidious that the victims are unaware of their existence, but are nevertheless disadvantaged because of them. These are the kinds of issues which can most appropriately be dealt with at a collective level, through the instrumentality of a public agency.

COLLECTIVE ENFORCEMENT UNDER THE E.O.A.

It has been seen that all five Acts under review invest their 'second tier' agencies with general responsibilities of an educational and an investigative character. In all cases these general functions can give rise to more specific enforcement proceedings of some kind.

[55] See also R.R.A., s. 65.

[56] For the prescribed form under the S.D.A. see the Sex Discrimination (Questions and Replies) Order 1975. S.I., 1975 No. 2048. Sched. 1.

Section 35(1) of the Victorian Act for example, provides that where, in the course of carrying out its general responsibilities under s. 15, the E.O.B. 'becomes aware of circumstances where an act of discrimination may have been committed' it may refer that matter to the Commissioner. This latter functionary is then obliged to investigate the matter,[57] and if he becomes satisfied that some such act of discrimination has been committed he is obliged by s. 36(1) to 'make all reasonable endeavours to resolve the matter by negotiation'. If these attempts at conciliation fail then he must refer the matter to the Board.[58] According to s. 36(2)(a) the Commissioner must also refer an issue to the Board if he 'is of the opinion that . . . [it] . . . cannot be resolved by negotiation'. This rides strangely with the mandatory terminology of s. 36(1), which makes it hard to see how a subsection (2)(a) situation could ever arise, since if s. 36(1) has been complied with the requirements of subsection (2)(a) must, by definition, also be satisfied.

It is also strange that both ss. 35 and 36 are couched in terms of 'acts of discrimination' as opposed to 'acts of discrimination in contravention of a provision of this Act', which are the concern of proceedings under ss. 38-42. This seems to mean that the rights and duties conferred upon the Board and the Commissioner under ss. 35 and 36 extend to acts of discrimination which are not actually unlawful. But if conciliation fails, and the issue is referred back to the Board under s. 36(2) then the lawfulness or otherwise of that act becomes of crucial importance since the Board can only make orders in respect of contraventions of the Act, and not just acts of discrimination in the wider sense.

Section 37(1) requires the Board to 'investigate' any matter referred back to it, and if it is satisfied that a person has contravened any part of the Act then it may make an order requiring him to refrain from doing so again, or requiring him to take the same kinds of positive steps as may be spelt out under s. 40(2)(c). If on the other hand the investigation discloses the existence of no unlawful act then there is nothing further the Board can do about it, at least so far as the Act is concerned. In conducting inquiries under s. 37(1) the Board is under precisely the same procedural constraints as when it is conducting proceedings under s. 40(1), and has the same rights to obtain information and to compel the attendance of witnesses. Failure to comply with an order is again subject to a penalty of up to $1,000,[59] and there is the same right of appeal as in respect of s. 40(2) orders.[60]

The British Acts confer rather more extensive powers upon their 'second tiers' in that both the E.O.C. and the C.R.E. have the right to conduct 'formal investigations', either on their own initiative, or at the behest of the Secretary of State for Employment or the Home Secretary.[61]

[57] S. 35(2).
[58] S. 36(2)(b).
[59] S. 37(2).
[60] S. 43(1).
[61] S.D.A., s. 57(1) and R.R.A., s. 48(1).

In the course of, or at the end of, such an investigation they may make any 'recommendations' that they consider appropriate,[62] although no formal sanction is prescribed in respect of a failure to comply with any such recommendation. Also during or at the end of a formal investigation the Commission may issue 'non-discrimination notices' which can direct the respondent not to repeat, or not to continue to commit, an unlawful act.[63] Again, there is no direct sanction for failure to comply with a notice, but any such failure may form the basis of subsequent proceedings in respect of 'persistent discrimination',[64] and may also lead the Commission to conduct a further formal investigation.[65] Proceedings in respect of persistent discrimination may also be based upon a finding of unlawful discrimination by a County Court or an industrial tribunal within the previous five years.[66] If either the E.O.C. or the C.R.E. succeeds in establishing the existence of persistent discrimination, plus a likelihood of repetition, then it may obtain an injunction restraining such future unlawful conduct.[67] Breach of an injunction obtained by this procedure is punishable as contempt of court as with any other injunction, so that at the end of a very long road the British Acts finally do have some bite. It must be said though that it would be immensely difficult for either Commission ever to find sufficient evidence of persistent discrimination successfully to be able to apply for an injunction against any but the most obdurate and foolhardy offender.[68]

The powers of the three Australian Boards are broadly similar, although the N.S.W. Board does have a wider general remit than its counterparts in Victoria or South Australia.[69] None of the Australian Acts adopts quite such complex collective enforcement procedures as those established under the British Acts, which is not to say that they are not unnecessarily complex, but rather that they are less absurdly so than their British contemporaries! It is unlikely that these collective procedures will prove a great deal more effective than the individual grievance procedures discussed earlier, except that they do make it possible to view the issues in a rather wider perspective, and the fear of the adverse publicity which might be attendant upon a formal inquiry may cause some discriminators to change their practices during the conciliation phase.

THE E.O.A. IN PERSPECTIVE

The form and content of the E.O.A. is very much in keeping with the pattern established by the British R.R.A.'s of 1965 and 1968, and as developed and refined by the S.D.A. of 1975 and the R.R.A. of 1976. It is

[62] S.D.A., s. 60(1)(a) and R.R.A., s. 51(1)(a).
[63] S.D.A., s. 67(2) and R.R.A., s. 58(2).
[64] S.D.A., s. 71(1)(a) and s. 73 and R.R.A., s. 62(1)(a) and s. 64.
[65] S.D.A., s. 69 and R.R.A., s. 60.
[66] S.D.A., s. 71(1)(b), (2) and s. 73 and R.R.A.; s. 62(1)(b), (2) and s. 64.
[67] S.D.A., s. 71(1) and R.R.A., s. 62(1).
[68] There have been no proceedings under either s. 71 or s. 62 at the time of writing.
[69] S. 119.

also in step with the measures adopted in the two other Australian States which have introduced legislation in this area. In one or two respects it marks an advance upon its British fore-runners, notably in relation to the remedies which may be available to the victim of unlawful discrimination, and the orders which may be issued by the E.O.B. under s. 37(1). In other respects it falls short of even the rather mediocre standards set by the British Acts, for example in that its definition provisions do not extend to 'indirect' or 'effects' discrimination. More often it follows in the footsteps of the British Acts. There are too many exceptions, exclusions and qualifications of general principle. The availability of blanket exemption, albeit on only a temporary basis, is quite unsupportable. The individual enforcement procedures are far too cumbersome, and especially in view of the location of the burden of proof, are largely unworkable. The collective procedures are little better, although they may have some impact in the longer term, especially if the E.O.B. evinces a greater degree of flair and enthusiasm than has thus far been exhibited by its British counterparts.

All of this suggests that the Act leaves a great deal to be desired, even within its own limited terms of reference. This impression is further strengthened by the observation that it makes little concession to two of the most interesting features of American legislation and practice in this area: positive discrimination or affirmative action, and class or representative actions.

In a situation where discrimination on grounds of sex is not unlawful there is no reason in principle why an employer, or an educational establishment, should not decide positively to discriminate in favour of women in order to redress the effects of past injustices. As soon as it becomes legislative policy that discrimination against both men and women on account of their sex is to be unlawful it automatically follows that any positive discrimination in favour of women must be regarded as unlawful negative discrimination against men, unless it is expressly permitted by law. In a series of decisions dating from the early 1960's the United States Supreme Court has held that such discrimination is not only permissible, but that, in certain circumstances, it is mandatory.[70] As indicated,[71] the whole concept of affirmative action is the subject of considerable controversy in the United States, and at the time of writing the decision of the Supreme Court is pending in a case which may well reverse the trends of the last twenty years or so.[72]

[70] See for example *U.S. v. Jefferson County Board of Education* (1966) 372 F. 2d. 836 and *U.S. v. Montgomery County Board of Education* (1969) 395 U.S. 225.

[71] See n. 45, p. 512, *supra.*

[72] *Bakke v. Board of Regents of the University of California* (unreported, Supreme Court United States, 28 June 1978). The Court handed down a somewhat indecisive judgment, the nett effect of which seems to be that affirmative action remains constitutional so long as it is applied in a more flexible manner than had hitherto been the case. See *The Australian*, 30 June 1978 and *The Times*, 29 June 1978. The decision of the Supreme Court of California in this case is reported at (1976) 18 Cal. 3d. 34. See also *De Funis v. Odegaard* (1974) 416 U.S. 312.

There are powerful arguments on both sides of the debate on the merits and demerits of affirmative action. It is certainly necessary to take care to ensure that in promoting the interests of certain disadvantaged groups the formerly dominant group, or even other disadvantaged groups, do not become so aggrieved that the entire exercise is counter-productive. On the other hand the disadvantages to which women, aboriginals, non-British migrants etc. are subjected in our society, and have been for so long, are so profound and so unjust as to require drastic remedial action. Any marginal unfairness to the formerly dominant groups is more than compensated by the massive discrimination to which the disadvantaged groups have been subjected in the past. The argument that legislation like the E.O.A. can bring about the necessary changes over a period of time lacks conviction. First, because it is highly questionable whether such legislation could *ever* have the desired effect, and secondly because discrimination is an area in which time is in very short supply.

Such arguments carried little weight with the British legislature in 1975 and 1976, and even less with that of Victoria in 1977. The S.D.A. does allow a measure of discrimination in favour of women in relation to industrial training, and to representation on the governing bodies of trade unions and professional associations.[73] Beyond that the British Government was not prepared to go, and the Victorian Government did not even go that far, despite the fact that the Commission on the Status of Women thought that there might be some place for such discrimination on a short-term basis.[74] As the Act stands therefore the only measure of positive discrimination which appears to be permissible under the E.O.A. would be in accordance with an order under either of ss. 37(1)(b) or 42(2)(c), read together with s. 33(1)(d)(i).

Class actions have not commended themselves, to either British or Australian legislators, although they have long played an important role in the United States. In simple terms the class action consists of an action brought by one or more named individuals as representing the members of a much larger class, for example all of the voters in a particular State, or all black, female employees of a major utility undertaking.[75] Its advantage is that it enables individual issues and grievances to be seen in their context, and it also makes it possible to reflect the true dimensions of the problem in awards of damages and in prescribing other forms of remedial action. Neither of the British Acts makes any concession to this approach. Section 38(2) of the E.O.A. on the other hand does provide that one or more persons together may present a complaint setting out 'details of alleged acts of discrimination against her or them or against her

[73] Ss. 47-9 *cf.* R.R.A., ss. 37 and 38.
[74] Report, *op. cit.*, para. 4.7.
[75] See Federal Rules of Civil Procedure, Rule 23. See also Janofsky S., 'Class Actions Under Title VII' (1976) 27 *Labour Law Journal* 323 and Phifer R. S., 'The Class Action Device in Title VII Civil Suits' (1977) 28 *South Carolina Law Review* 639.

or them and against other persons'. Unfortunately that is as far as the matter goes. There is for example no special procedure for dealing with such complaints, and no mention is made of how compensation is to be assessed in respect of loss incurred by an 'other person' for purposes of s. 38(2). Nevertheless this provision can be seen as a move in the right direction, and is certainly no less satisfactory than the halting recognition of the representative action contained in ss. 88(1) and 113(b) of the N.S.W. Act.

Although such marginal concessions to progress are to be welcomed, they cannot disguise the fact that the E.O.A. is simply not competent to deal with the real problems which face women in Victoria at the present time. It does not deal with the sex discrimination which is implicit (or explicit) in so many areas of the legal system, for example in relation to taxation, social security and family law. It does not deal with the massive discrimination to which women are subjected in relation to pensions and superannuation or men in relation to the age of retirement. It does not even touch upon the enormously complex issues which are raised by woman's dual role as wife and mother, and as participant in the labour force — problems with major social, educational, economic, psychological and political, as well as legal implications. It does not take any account of the fact that very many women are not subjected to discrimination solely, or even mainly, because of their sex.[76] It is also impossible adequately to deal with problems of sex discrimination without looking also at discrimination on grounds of race, colour, ethnic or national origin, and nationality to say nothing of age and religion. The Federal Racial Discrimination Act is better than nothing in this regard, but that is just about the most that can be said for it. What is needed is a unified and integrated approach to all of these issues perhaps along the lines of the N.S.W. Act, but with much more effective enforcement procedures, and with more comprehensive substantive provisions than are currently contained in that particular piece of legislation. As matters stand in Victoria there is a bewildering array of Committees, Commissions, Bureaux and Councils having some kind of responsibility in the discrimination field. Racial discrimination is dealt wth at Federal level by the Commissioner for Community Relations, and Conciliation Committees.[77] Also at Federal level is the National Committee on Discrimination in Employment and Occupation. This is a non-statutory body which performs a general conciliation and advisory role in relation to discrimination in employment, and has published a number of interesting and informative reports.[78] Under the umbrella of the N.C.D.E.O. there are six State

[76] For an interesting over-view of sex discrimination in Australia today see the *Final Report of the Royal Commission on Human Relationships* (1977) Part VI, ch. 2.

[77] Racial Discrimination Act 1975, ss. 19 and 23.

[78] See *Annual Reports* for 1973-74, 1974-75 and 1975-76. The Report for 1976-77 was not available at the time of writing. Hereinafter referred to as N.C.D.E.O.

Committees on Discrimination in Employment and Occupation, all of whom are answerable to their parent at national level.[79] Finally, at Federal level, a recent Working Party Report recommended the establishment of a new Women's Advisory Committee to the Price Minister.[80]

At State level there is, in addition to the machinery established under the E.O.A., a non-statutory Anti-Discrimination Bureau. This body can investigate, and try to settle, allegations of racial or other discrimination which is outside the scope of the E.O.A. It is answerable to a further non-statutory body, the Equal Opportunity Advisory Council to the Premier, which as well as receiving, and trying to act upon reports of the Bureau if appropriate, has a general remit to promote equality of opportunity for women.[81]

This plethora of enforcement agencies and advisory bodies must leave many complainants in a state of considerable uncertainty as to how to go about obtaining redress for their grievances, assuming of course that they are aware of the fact that they have a grievance, and that there may be something they can do about it. To make matters even more difficult, both the E.O.A. and the Racial Discrimination Act require the complainant who does find her way to one or both of those Acts to establish that the 'dominant ground' or 'dominant reason' for the discrimination was her sex or her race as the case may be.

Tokenism as it undoubtedly is, it is better to have the E.O.A. than to have nothing so long as it is not allowed to obscure the need for a much more radical approach to the problems with which it purports to deal. Even a rather half-hearted gesture like the E.O.A. can serve a useful purpose as a consciousness-raising exercise both for the victims of discrimination and for the perpetrators of it. Experience elsewhere suggests that at least some members of this latter category are not aware that they are discriminating, and can relatively easily be persuaded to change their patterns of behaviour once the error of their ways is pointed out to them. Many others may be conscious of the fact that they discriminate, but may not do so out of a sense of conviction so much as out of force of habit. These groups also should be amenable to peaceful persuasion and to the stimulus which even legislation cast in the British tradition of negative regulation can provide. It remains to be seen whether or not the E.O.A. can attain even these limited objectives, but even if it does, it will have made only a very marginal impact upon a very large problem.

[79] The recent decision of the Full Bench of the Conciliation and Arbitration Commission in a case involving the practice of Rockhampton City Council in requiring its female employees to resign when they got married has some interesting implications for the National Committee and its State off-shoots — see the *National Times*, 10 June 1978.

[80] See *Report of the Women's Advisory Body Working Party* (1977) ch. IV.

[81] Neither of these bodies had published any reports on their activities at the time of writing.