SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

Inquiry into discrimination in the law

Melbourne — 12 July 2005

Members

Ms L. Argondizzo
Ms L. D'Ambrosio
Mr A. Brideson
Mr K. S. Jasper
Mr M. A. Leighton
Mr P. J. Lockwood
Mr A. J. McIntosh
Mr J. Perera
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Chair: Ms L. D'Ambrosio
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Witness

Professor M. Neave, chairperson, Victorian Law Reform Commission.

The CHAIR — I declare open the second day of public hearings of the Scrutiny of Acts and Regulations Committee's inquiry concerning discrimination in the law, pursuant to a Governor in Council order made on 3 June 2003. By its terms of reference that order requires the committee to review provisions in Victorian legislation which may discriminate or lead to discrimination against any person as provided in section 207 of the Equal Opportunity Act 1995.

I welcome our first witness, Professor Marcia Neave. Thank you for attending today, Professor. We understand that you are not very well, so we will try to keep this as brief as possible for you. Anything you say in the public hearing is protected by parliamentary privilege. However, once you leave that ceases to be the case. In due course you will receive a draft transcript of the proceedings and that will be an opportunity to correct any errors in recording, although, of course, not to add or remove any evidence given. You now have an opportunity to make your contribution. You will have received a letter with some dot points which are issues for us. I will then allow questions from members.

Prof. NEAVE — I hope you can hear me because I am having a bit of a struggle with my voice. You asked me three questions and I thought I might address them separately, but begin with a qualification that I have not done any historical research into these provisions. I can speculate as to what the historical basis was but I have not gone back and looked at where they derive from. They almost certainly derive from quite old English legislation, but I cannot give you chapter and verse or quote the act. I taught property law at Melbourne and Monash universities for something like 25 years, and I never once had occasion to refer to any of the provisions, which I suspect means that they are probably not really relevant today.

There is a historical reason for using the male line as the basis for identifying inheritance, because that is what these provisions do. In certain situations they say that when people are claiming property by descent, the male line is to be referred, and that is in section 241 of the Property Law Act. I think that the historical reason for that was that English land law was based on a system of patriarchal distribution. Interestingly, in England there were two systems: there was a system under which property was divided equally between people; and there was a system under which property descended to the male heir — and we are talking about land. The rule that property descended to the male heir for a whole series of reasons, partly probably because it supported the continuation of the landed gentry, was the rule that came to predominate. So I suspect these provisions are derived from those English provisions. They are a codification of the English law rules that used to identify what happened when a person died and who their property passed to.

In my view those provisions are now defunct, with one small qualification, and I think they are defunct for a number of reasons. First of all, we have had freedom of testation for a very long time — that is, people now dispose of their property by will; it does not pass automatically. When these laws about inheritance were devised there were restrictions on people's capacity to pass land by will. Originally you could pass personal property by will but not land. I think the Wills Act in 1540 was the act that freed up land to enable it to be disposed of by will. But in Victoria we also have the Administration and Probate Act which governs what happens if a person dies without leaving a will, and it governs all forms of property. Given that is the case, if I die with lots of land and I have not made a will, the Administration and Probate Act says who is entitled to that property. I cannot see any continuing reason for these provisions being retained.

The last question I was asked was whether there is a reason to retain them for the purposes of a preservation of particular titles to real or other property. Again, I cannot envisage any scenario where you would need to do this. I thought about the old entailed estates, and I suppose people would have read about those in English Victorian novels where people held an interest in property that would last during their lifetime and then pass to a male heir, or it could even be a female heir or just an heir generally. So that was an entailed estate. Those were abolished in Victoria in the 1860s.

The questions you asked me do not refer to part VI, but there are a whole lot of provisions in part VI that refer to entailed estates, called 'estates tail'. Section 249 says that you can no longer create estates tail. Another section says that you can sell it as if it is not entailed. It is section 252 which says that if you are a tenant in tail, which is what you were called, then you have:

> … full power to dispose of for an estate in fee-simple absolute or for any less estate …

So that means that if you had one of these archaic interests you could dispose of it like a full fee simple interest. When I used to teach property law I remember asking the registrar of titles if they had ever come across an estate

tail which could theoretically have survived since the 1860s, and the answer was no. So I do not think that any of those interests are in existence any more. I think that also renders redundant the provisions in part V.

There is only one other issue, and I have to say that I do not know the answer to this question — I only thought of it this morning. Take this scenario. Suppose that I have been in occupation of land and disposed of it, but there is some outstanding claim against that land that goes back a long way and for some reason it has not been extinguished by the running of time. There are technical reasons why that could happen. Normally if I occupy land for 15 years then I will extinguish the rights of the person who originally had it, and I can then sell that land, dispose of it and so on. But occasionally there are situations where that does not arise for a period of time. The interest of the person who was dispossessed can pass on to their descendents, and I think that this provision might have been relevant to that scenario. If you were deciding who it passed on to, the person who is out of possession of the land, then historically these provisions might have been quite important, but as I understand it the Administration and Probate Act would pick up that situation too. That is the only very faint doubt that I have, and it would just take a tiny bit of legal research. It would just take someone to look at the definition in the Administration and Probate Act to ensure that it picks up that situation. I believe it does, but I cannot be absolutely conclusively confident about that proposition.

It is only because I am a cautious property lawyer that I am even raising that point. I think it is a good test of the fact that I never had occasion to look at those sections in all those years of teaching property and I do not know of anyone who knows anything about them. I made a couple of calls to colleagues at Monash to say, ‘Have you ever looked at these sections?’ and ‘Do you think they have any use?’. They all said, ‘Never looked at them; never used them’.

That is all I have to say, except that you might, in the course of your tidying up and looking at the discrimination issue, think about repealing part VI as well. Obviously the provisions abolishing estates tail have to be preserved but if you repeal that, the effect of the Acts Interpretation Act is to preserve the effect of the provisions that you repeal. That is all I have to say about the questions you asked me.

Mr McINTOSH — Professor, why has it taken so long for this to be considered? It just seems to be an anachronism that is well past its use-by date.

Prof. NEAVE — Absolutely. For many years I used to write letters to governments of both complexions saying, ‘Why don’t you clean up the Property Law Act?’. My colleague Jude Williams, who was at Monash, did some work for the Law Institute of Victoria probably 20 years ago in which she went right through the Property Law Act and said, ‘These are the provisions that need to be kept; these are the provisions that need to be rewritten in modern language; and these are the ones that need to go’. I was a member of that committee. Nothing ever happened with it. I suspect the reason is that it is not a particularly interesting area of the law, but it would be a cleaning up exercise which I actually think would be extraordinarily useful.

Mr McINTOSH — If I can hypothesise that given the fact that property law is the most feared subject amongst all law students, this was a mechanism in ensuring that it was a feared subject.

Prof. NEAVE — That is right. But I would really like to see some of the provisions on the statute book going. I keep thinking it would be a wonderful retirement project, going through saying, ‘Please strike that from the record’ — going through the Property Law Act and the Instruments Act that have a lot of provisions that are really no use or could be made much simpler so that the law was more accessible to ordinary people, which I think would be very useful. But elections are not fought on those issues, are they?

The CHAIR — Thank you, Professor.

Witness withdrew.

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Witnesses

Mr G. Tweedly, Chief Executive;

Ms E. McDowall, Manager, Scheme Policy; and

Mr D. Moody, Executive Officer, Victorian WorkCover Authority.

The CHAIR — Welcome. There are some preliminaries which no doubt you will be aware of but I will go through them. Information provided here is of course protected by parliamentary privilege but that ceases to be the case upon leaving. Eventually you will receive a copy of a draft transcript. You may correct any errors that you pick up but of course you cannot add or remove evidence from the documentation. You will have received from us correspondence explaining the nature of the inquiry and providing some dot points for some feedback or some evidence from you. We have received your written response to that, which is very thorough. Thank you very much for that. If you would speak to your submission and then we will leave it open for questions from members.

Mr TWEEDLY — I am happy to do that. I was informed that you had copies of our PowerPoint slides in your folders; is that right?

The CHAIR — Yes.

Mr TWEEDLY — What I intend to do is to quickly step through those, picking up the submission and doing it in an order which will hopefully help with any questions that you may wish to ask subsequently.

Overheads shown.

Mr TWEEDLY — By way of background, the first slide talks about the fact that you have received three submissions arguing that the retirement age in the Accident Compensation Act could potentially be discriminatory. The definition in the Accident Compensation Act under section 5 is reproduced on that sheet — I will not read it out. That definition was put into the Act in 1989. My understanding is that the submissions that were received by the committee predated the change in legislation that was put in place in November last year, so my presentation is going to focus in on what the law is today and reflect on what it was and how we have changed it, to see if we have in fact dealt with all relevant issues.

If we go to the next slide, 'WorkCover entitlements for older workers', section 93E of the Accident Compensation Act specifies that workers who are injured within 104 weeks of retirement age, and very importantly, and if they are injured after retirement age, they are entitled to 104 weeks benefits. In reading your interim report it said that there was concern that the entitlement did not exist post-retirement age. The effect of 93E is that if you are injured at work and you are 63 years of age or older — no matter how much older — you are entitled to 104 weeks. That was the legislative change that was put in place in November last year to endeavour to take discrimination out of the Act. In fact that was one of the reasons it was done last year.

The reference to section 93F of the Act deals with all other workers who may have been injured in their 20s, 30s or 40s, so that there is an end date in the compensation scheme and the retirement age definition comes in and is valid for that group of workers, not the group of workers who are 63 or older — 93E is the definition that is applicable. That is the only part of the Act that draws on the definition of retirement age.

Related to that, any worker who is injured is entitled to reasonable medical and like expenses for 52 weeks post weekly entitlements, and that then ceases. Again, if you are injured at over 65 years of age, or 63 because of the transitional arrangements, you are entitled to 52 weeks worth of medical expenses, or if you have difficulty with activities of daily living, that can be extended depending on the circumstances of individual cases. Very importantly, under the Act as well there is no age restriction for common law. If a person is injured post-65 at work, and there is negligence that can be proven and a worker can prove the serious injury test, they are entitled to common law like any other worker.

By way of background, why does the Act define a retirement age? It did not prior to 1989. In 1989 WorkCare, as the scheme was known in those days, was in significant financial concern with $4 billion unfunded liabilities. Sections 93E and 93F were introduced at the same time as the definition of retirement age, and with some anti-double dipping provisions. In the scheme prior to 1989 it was theoretically possibly that a worker who was injured and who then sought superannuation or disability insurance could remain on workers compensation benefits continuously, effectively until they die, which meant that they would be drawing upon two sets of safety net funds going forward. So in 1989 the retirement definition was introduced and the 93E and 93F was introduced to ensure that there was a cut-off in the scheme. I thought that background might be of assistance to give some relevance.

From the submission that we have put in, under the heading 'Are the provisions discriminatory?', our view is generally no. All workers are entitled to a maximum of 104 weeks regardless of their age when injured, and the entitlement to go beyond 104 weeks only occurs when a worker has no current work capacity. If you are 30 and

you get injured, you can actually have more than 104 weeks benefits if you are totally and permanently incapacitated, and that is a very small percentage of workers in our scheme. That group of workers may get more than 104 weeks but their benefits stop at retirement age, because there are other mechanisms in society to look after people.

There are two exceptions in trying to delve into whether there was any area that discrimination could be contemplated. There are probably two areas — and both for reasons — that might be able to be claimed. The first one is that if you are above 65, you get 104 weeks worth of benefits if you are incapacitated, but it stops at that point in time. You do not have the opportunity to go past 104 weeks ,yet a younger worker might. But a younger worker has a stop at retirement age anyway, so it is a judgment in the policy sense to say that once you are over 65 you get two years worth of protection and thereafter there are other mechanisms which you can draw upon not relating to the compensation scheme.

There is one other set of circumstances that is possible. Where a person has an injury prior to their 63rd birthday but does not have any time off at all, and they subsequently, after the age of 65, then lodge a claim, they are not entitled to weekly benefits. If they had any time off prior to the age of 65, then the 104 weeks still plays a part; they still get the protection of 104 weeks. For all people medicals are paid for injuries that are reported at any age.

Retaining the age of 65: clearly protecting a scheme and having fences around it is an important part of any scheme. At the time the Act was created, and subsequently in 1989, 65 was the normal retirement age in society and individuals had protection post that age through the pension, and superannuation was growing at that time. The reason to have 65 or a date is still valid from a policy perspective. Clearly if there are further changes in Australian government policy which enable some sharing or some other mechanism to do with superannuation and the pension et cetera, then that would be a time to re-evaluate the policy to see that there is protection for individual workers. Then we would have to go back and revisit the double dipping provisions that existed at the time.

The committee asked for some information or data on the participation rate of injury for people over 65. Our organisation does not keep participation rates of who is in the work force over the age of 65 but we do keep data as to our injured over the age of 65. The high-level summary is that less than 1 per cent of injured workers are over 65. From the statistics, which is a table in the report and in front of you, there are no apparent differences by industry for injured workers under or over 65. There is no discernible pattern but the number of people injured over 65 is very small — less than 1 per cent.

Another question asked was what was the consequence to the premium system of older workers being injured. By way of background, the premiums are influenced by the cost of claims for all workers. The size of the employer and the riskiness of the industry of which they are a part helps to determine price. All claims, irrespective of age, are treated the same way — that is, the costs that have been incurred to date and the estimate of what costs are outstanding into the future. Clearly the age of a worker comes into the calculations: a person with a certain injury at the age of 20 — who is injured and will require benefits for a long period of time — will have a higher estimate than someone who is in their 60s, clearly because of the age.

The premium rates differ between industries. We have 518 different industries in our system and every industry rate is calculated based on five years of statistics associated with injuries in that prior five years. If there is an older worker involved in an injury, they will be included in everything else in that industry.

Hopefully I have picked out the eyes of the submission. I am very happy to answer any questions.

Mr McINTOSH — Can I just go back to the top box on the second page of your presentation headed 'WorkCover entitlements for older workers'. I read your submission and I thought I understood it, but what I am reading there is there seems to be a logical inconsistency between the first dot point and the second dot point, or is the second dot point that all entitlements to weekly compensation benefits for other workers cease at retirement age?

Mr TWEEDLY — Section 93F is only triggered if you are injured prior to the age of 63. For anyone who is injured at age 63 or above, the first dot point applies. For anyone who is injured earlier than that, the second dot point applies. There is a different tranche of individuals involved there.

Mr McINTOSH — So all we are really talking about is that generally you can get beyond 104 weeks if you are injured at, say, 30 or whatever, but the class of workers we are really talking about here are workers who are injured after the age of 63 who would be limited to 104 weeks?

Mr TWEEDLY — That is correct.

Mr McINTOSH — And there is no exception to that?

Mr TWEEDLY — Not for weekly benefits, no. However, the medical and the like goes for another 12 months and if that individual has troubles with daily living associated with injury, those medical expenses can continue on. Those individuals also have the opportunity to sue at common law if it is serious enough and the circumstances of the case warrant the person pursuing that avenue. There are those avenues available as well.

Mr LEIGHTON — I understood you to be saying that if somebody is injured at age 63 or 64 and they have their first week off at age 64 and 51 weeks, they are looking at 104 weeks, but if they have their first week off having turned 65, then there is no income.

Mr TWEEDLY — Let me be quite specific there. When an individual who has an injury goes off work at 65 or earlier, the 104-week clock starts ticking. That can be in one tranche of 104 weeks or it can be a few weeks and a few weeks, so they get the maximum 104 weeks if they are injured and their first time of incapacity and the injury is prior to 65. The example I gave as the exception was that if a person was 50, for example, had a minor injury and continued to work through and it deteriorated over time and they had no cause to have time off before they were 65, then the retirement age provision comes in. That is the second of the very rare anomalies that I referred to before in terms of the process. In those circumstances if they did take a couple of weeks off when they were 50, then the 104 weeks applies.

The CHAIR — As long as it can be shown that it is related to the original injury?

Mr TWEEDLY — And time was taken off.

The CHAIR — If someone was 66 years old and then incurred an injury, what would occur in that situation?

Mr TWEEDLY — A person who is 66 and has an injury at work when they are 66 and it is a new injury is entitled to up to 104 weeks worth of benefits, depending on the level of incapacity, and medicals that follow.

The CHAIR — In that situation would they have to prove that they had intended to keep working for at least 104 weeks after that?

Mr TWEEDLY — No. The short answer is no, you have 104 weeks of incapacity.

Mr LEIGHTON — Am I correct in understanding that if they have had their injury prior to 65 but they do not have their time off until after 65, they are not entitled?

Mr TWEEDLY — To the weekly benefits? That is correct, unless a new injury occurs subsequently. You have to look at every case very carefully because if you have an injury when you are 50 — and I use 50 to make it not close to the boundary and to make it simple — and you do not take time off work, and you get through it and you continue to work in your 60s and then another event occurs which causes an injury, that would be seen as a new injury. However, if it was specifically the same injury all the way through, then it would be considered the old injury and 65 would be the cut-off and you would not be entitled thereafter.

Mr LEIGHTON — Would that be a rare situation?

Mr TWEEDLY — I believe very rare. If people are injured and they need time off work, the safety net of the compensation scheme is there for them to have their week's pay or however many weeks they need up to 104 weeks.

Mr LEIGHTON — If we concluded that this anomaly is discriminatory and recommended legislative amendment, it would not have substantial cost implications?

Mr TWEEDLY — I cannot answer that question. We have not analysed what it may or may not do. Clearly that would have to be taken off and actuarial calculations done as to what it might look like. One would have to consider in that process as to what the marketplace would do as a consequence of that change.

Mr McINTOSH — It is something of an embarrassment that I ask this question. You said there were amendments in November 2004. Was that section 93F?

Mr TWEEDLY — Section 93E. That is what changed it from 52 weeks to 104 weeks. Prior to that change the legislation said if you were 63 or older, your benefits stopped at 65 or when you reached 52 weeks — if you were 64½, you got 52 weeks worth, if you were 63½, you got 70-odd weeks, and then at 63 you got the whole 104 weeks. That change was made to deal with the sorts of circumstances this committee is looking at.

The CHAIR — On page 2 of your submission you have given a definition of retirement age. It states:

(a) if there is a normal retiring age for workers in the occupation in which the worker was employed at the time of the injury — that age —

in terms of retirement age —

or

(b) the age of 65 years —

whichever is the earlier, and , for the purposes of determining where there is a normal retiring age for workers in an occupation, regard may be had to any retiring age in any industry or establishment where that occupation is carried on.

I do not know if there are any instances of this, but if there is a normal retiring age in a particular industry which, say, is the age of 60, how would the compensation effects flow on in that situation in terms of entitlements and retirement age?

Mr TWEEDLY — I cannot think of an example of a retirement age other than that. I think airline pilots might be one area where it is less than 65, but the principle behind this is that if a person has reached retirement age, then the safety nets that exist in their occupation and/or society are there to look after a person subsequent to that date. That is the principle behind that. It goes back to the situation I referred to earlier when this was introduced in 1989, that it was theoretically possible, whether it be 65 or an earlier retirement age, that an individual who was injured at work could obtain workers compensation benefits and access their superannuation or disability insurance, which could potentially give them in excess of 100 per cent of their pre-injury average weekly earnings. So there would be no incentive for them to contemplate going back to work, or getting better if they were in that circumstance, from that date until they died. That was the reason that it was put in in those terms. If the retirement age was 60, then these provisions would come in, as it says, whichever is the earlier, so it would kick in at 60.

The CHAIR — I am just wondering how that sits with your last sentence on page 3:

If a worker is capable of proving that 65 is only a birthday and not the normal end of his or her employment …

et cetera. Obviously that is an individual instance. Would that override what the industry retirement age would be if in the particular industry it was less than 65?

Mr TWEEDLY — The purpose of that paragraph relates to the common-law provisions. Sections 93E and 93F are dealing with the statutory benefit regime of weekly benefits. That sentence is saying that it would be up to the injured person to demonstrate their intention to continue to work significantly after 65 as a basis to put forward their common law, and that would be a fact-base, case-by-case arrangement. That is to do with the common-law provisions, not to do with the weekly benefits.

Mr BRIDESON — Just as a matter of interest, can you advise the committee of any occupations where there is a retirement age greater than 65?

Mr TWEEDLY — Judges would be one that comes to mind that could be 70.

Mr BRIDESON — Any others come to mind?

Mr TWEEDLY — Not off the top of my head, no, I am sorry.

Mr BRIDESON — But you have got statistics that would show that, or is it up to an individual to prove?

Mr TWEEDLY — It is up to the individual, and the only statistics we keep is if a person puts in a claim if they are over 65 years of age, then we record it. The statistics you have there are all those who have obtained weekly benefits post the age of 65. They are time lost claims. But we do not keep the detail as to which professions have retirement ages at different levels.

Mr BRIDESON — I will not ask the claim rate for judges.

Mr McINTOSH — I would be interested. How many?

Mr TWEEDLY — I have got no idea.

The CHAIR — Thank you very much. You are welcome to make any closing comments but you do not need to, of course.

Mr TWEEDLY — No.

The CHAIR — Thank you very much for your participation and having provided us with a submission beforehand. It certainly gave us an opportunity to get into the detail before today, so thank you again.

Witnesses withdrew.

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Witnesses

Dr H. Szoke, chief executive officer;

Mr M. Carroll, manager, legal, policy and systemic; and

Ms K. Hoel, legal policy officer, Equal Opportunity Commission Victoria.

The CHAIR — Welcome to all of you. You will no doubt be aware that any evidence presented here today is protected by parliamentary privilege, which ceases upon your leaving the hearing. You will eventually receive a draft copy of the Hansard transcript, so if there are any errors that you pick up in the reporting of your evidence, then that can be dealt with; of course it will not be an opportunity to remove or add evidence. We have sent you a letter inviting you to make comment on certain issues that we are wanting to deliberate on. I think we have provided some dot points that we would like some specifics from you about, so perhaps if you can address those in your submission, after which members can ask questions.

Dr SZOKE — Thanks very much for the opportunity. Obviously from the Commission's perspective this is an important process, and particularly from our perspective we are keen to ensure that wherever possible there is significant leadership on the part of government in terms of working against discrimination in every aspect of our life. The particular issue that we have focused on in relation to your committee's deliberations relates to section 69 of the current Equal Opportunity Act, and this is the provision that actually deals with exemptions under the legislation. What we would like to do today is to elaborate on our earlier submission and to talk specifically about how we believe the current role of the government in terms of reviewing its legislation can be strengthened to avoid discriminatory practices. So I can just leap into that?

The CHAIR — Yes, please.

Dr SZOKE — If members want to clarify aspects as we go, then please feel free to interrupt. I will also draw on Matthew and Kristina, who have extensive legal knowledge of the area, to help out at various times.

Currently we have the provisions of section 69 of the act which in a sense provide for the possibility of discrimination to occur if it is necessary to comply or if it is authorised by the provisions of an act other than the Equal Opportunity Act. That is what exists now, as you are well aware, in relation to the equal opportunity legislation. Our concern, I suppose, is that that exemption needs to be limited in a sense, that in the context of what has gone on in Victoria we have 28 years or so of experience in administering equal opportunity legislation. From the perspective of the Commission, over that time various governments have recognised the need to build in additional attributes to recognise that discrimination occurs in various aspects of our lives and, consistent with the view that that legislation has been strengthened over time, we believe it is now time to tackle the particular provisions of the legislation as covered under section 69.

We have a sliding scale of options, if you like, that we would like to put to the committee today in terms of addressing how that section might be reviewed and particularly how Victorian laws might be reviewed against the provisions of section 69 in the equal opportunity legislation. We believe that it is important to look at a range of options, although our preferred option would be, as we say, to try to have some sort of statutory measures in place that require government to be quite stringent and quite transparent where there are exemptions in laws that relate to discriminatory practices.

It is the view of the Commission — it will come as no surprise to the members around the table — that it strongly opposes retaining any statutory compliance exemption as is currently evidenced under section 69 of the act. We propose a reform of the review mechanism in section 207. On that note, if I can draw from my own notes, we also of course acknowledge the committee's interim report where it identifies the mechanism as being onerous and ineffective in the way that it has been utilised in the past in terms of compliance. So we are pleased to see that that recognition is there and that there is clearly a recognition that this provision needs to be reviewed.

From the Commission's perspective, we believe the broad ambit of section 69, which subordinates the Equal Opportunity Act to other legislation, actually undermines the Equal Opportunity Act's educative functions. Again we agree with the committee's interim report in that section 69 is out of step with other Australian jurisdictions. We have a view in the general sense that the equal opportunity provisions in Victoria need to be modernised to bring them into line more broadly with human rights legislation and human rights initiatives in other jurisdictions.

It is our view that, in contrast to the standards imposed on non-government entities, section 69 provides the government with a very broad power to discriminate. From a public policy perspective we believe that is inappropriate, and it is actually contrary to the objectives of the act. So in a sense it does work to undermine the work that we are trying to do and trying to have reflected in government's activities.

The Equal Opportunity Act's objective is to seek as far as possible the elimination of discrimination, and the act purports to impose an obligation on Victorians by prohibiting discrimination on the basis of certain attributes which

have been expanded over the years. People may raise exceptions within the act as defences to conduct that could otherwise constitute unlawful discrimination or make applications to be exempted from the act under those provisions. Really what we are saying is that the same requirement, the same stringency, as that imposed on the private sector should be imposed on government and that to an extent section 69 in its current form can be interpreted as providing the government with an opportunity to absolve itself of the responsibility for eliminating discrimination. Similarly the review mechanism contained in section 207 presently fails to protect the community from potentially discriminatory and unjust legislation because basically the way the periodic review of legislation operates is that there is not consistency and there is not transparency in the interim periods.

That is, if you like, our rationale. What I would like to do is talk about our preferred option for addressing that in terms of statutory change. In the context of what is happening in relation to the government's consultation around a charter of human rights, our preferred option in fact is a combination of implementing a charter of human rights and a front-end review of the legislation. What we are again saying is that we believe a charter should provide that ministers and departments develop bills in compliance with human rights principles. Really what we are saying is that every piece of legislation that goes through government should have a human rights filter imposed on it, just as it has other filters imposed on it.

We endorse the idea of a compatibility statement or an explanatory memorandum which would provide details regarding human rights and the policy analysis of the bills within the context of a human rights framework. So the charter would provide the obligation of putting any legislation that passes through Parliament through quite a standardised, methodical process whereby should there be any discriminatory provisions contained in the legislation, there would have to be a clear rationale that outlines what the public interest or what the public policy basis is for having such discriminatory aspects in the legislation.

We have looked to many other jurisdictions to see what other models could operate. In particular we have looked at the Human Rights Act recently enacted in the ACT and also at the legislation in New Zealand as models that might work quite well in the context of Victoria, given the history that we have in relation to equal opportunity legislation. Under both of those acts bills must be presented to Parliament accompanied by a declaration of compatibility with human rights principles drafted by the Attorney-General, and under both instruments consideration must be given to whether laws infringe on non-discrimination rights, including people's rights to be free from discrimination subject to reasonable limits prescribed by law which can be demonstrably justified. We believe that is an important first step in the actual application of how a charter of human rights might work.

Secondly, with the existence of such a charter we believe a tribunal or court called upon to interpret the laws must therefore prefer an interpretation that is consistent with human rights. For example, in the ACT the Supreme Court can make a declaration of inconsistency with human rights, the Attorney-General is required to notify the Legislative Assembly of such a declaration, and the government can decide whether to amend the legislation or retain it in its discriminatory form — if I can use such blunt language. However, if the government does wish to retain the discriminatory law, the charter would ensure that the process is subject to robust debate. What it is really saying is that if the government determines that a piece of legislation should retain the discriminatory provision, the public policy basis, the rationale for that decision, has to be transparent and it has to be the subject of transparent debate so that the community, the people, and the Parliament understand the basis of that discrimination.

The CHAIR — Dr Szoke, you are very clear then that the role of the court is simply to make a statement of inconsistency rather than deliberate on which of two pieces of law should override the other?

Dr SZOKE — What the policy basis should be — —

The CHAIR — So the supremacy of Parliament in terms of the making of laws is maintained?

Dr SZOKE — Sure.

Mr CARROLL — We are certainly not advocating for something like the Canadian model where the court has the power to strike down legislation. We accept that.

Dr SZOKE — We should be clear about that point in terms of the role of the tribunal or court so it does not override the policy-making or law-making role of government, but it does impose on government that obligation to be transparent.

If I may, I will just continue a little bit more on the ACT model because we would like to put most of our focus on this particular option. In that model the human rights commissioner is empowered to report and provide advice to the Attorney-General about any review of the effects of the legislation on human rights, and the commissioner can intervene in matters involving human rights. We believe that would be an important function in terms of having an independent role, including when the Supreme Court considers declarations of incompatibility. Clearly, from our perspective as a commission that is an independent statutory entity, we believe a body such as ours in Victoria would provide rigorous scrutiny of all potentially discriminatory acts. We believe we have the expertise to actually perform that function.

In terms of the role of the charter, we think it would serve many purposes. I will summarise them. It would certainly enhance human rights dialogue between the three arms of government; it would establish a duty of accountability for government departments and agencies to conduct their affairs transparently and fairly; and, most importantly, it would bring human rights in as a mandatory consideration for any activity of government. We believe that is very consistent with modernising the concepts of equal opportunity and antidiscrimination to provide a much broader focus.

We also note that there is a further advantage of such a review — that is, that setting out human rights principles makes it easier for principles to be taken into consideration in the development and interpretation of legislation. The other thing I think we are all aware of at the moment with the current consultation going on is that the actual understanding in the community of what human rights are needs to be deepened and resourced, and we think that this process — bringing that dialogue into the way that government does business — will greatly facilitate that process.

The CHAIR — Obviously our reference is not to go down the road of human rights, although I understand you are using that as a model in terms of what we can learn in terms of the Equal Opportunity Act. How would you envisage the future of the Equal Opportunity Act and its provisions? Obviously they are akin to human rights in terms of equal opportunity, although, of course, they are not the same. Could you just make a comment in terms of the differentiation? How would you differentiate the two?

Dr SZOKE — Should a charter exist?

The CHAIR — Yes.

Dr SZOKE — To some extent we are in the process of developing our response to the consultation process that exists. Basically we would see the role of the commission as being similar to something like the human rights commissioner in the ACT. We would be a body that would provide, I guess, some scrutiny of what happens in terms of law-making. I will ask Matthew to elaborate a little bit more because he is working on our proposals and will be able to much more eloquently describe what that relationship might be.

Mr CARROLL — In terms of the possible relationship between a future charter and the Equal Opportunity Act, one way in which the commission is conceptualising is that the charter is the document or the act which deals with human rights issues and within that broader ambit the particular range of non-discrimination rights in terms of the government's relations with citizens. It is in a sense a governmental document. But operating alongside that is the Equal Opportunity Act which seeks to regulate the human rights conduct of private citizens within various aspects of public activity — primarily employment, education and goods and services.

We also think there is merit in looking at the formal link that is established under the New Zealand model between its bill of rights and its human rights acts — that is, between the equivalent of a charter and the Equal Opportunity Act — and utilising the conciliation-based complaint-handling model that exists under the act to deal with complaints or allegations of discriminatory public sector or government conduct. In terms of how that relates to the subject matter of this review, it would essentially deal with the section 69 issue by setting down substantive requirements in a charter and utilise the procedural requirements of the Equal Opportunity Act to monitor and enforce those substantive requirements.

Dr SZOKE — The other aspect I mentioned was to have an override mechanism of some sort. Whilst we believe the charter is a preferred option, and an important option, a less effective alternative may be to adopt a front-end review within the equal opportunity legislation so that should the consultation not result in the passage of legislation which leads to a charter, we would support the sunsetting of section 69, the provision of a front-end review and audit of enacted legislation as proactive measures to ensure that the acts comply with antidiscrimination

laws. That would involve new and existing acts being examined against an amended Equal Opportunity Act that sets out standards against which scrutiny could be applied to legislation to ensure that it complies with antidiscrimination principles.

From our perspective we believe the front-end review option — we have said that these options sound a bit like different sorts of motor cars — would allow government to prescribe certain acts to override the Equal Opportunity Act. Section 85 of the Constitution Act indicates that the Supreme Court has unlimited jurisdiction. A law purporting to limit the jurisdiction of the Supreme Court, however, may do so if it expressly states that it intends to do so. The commission suggests that the Equal Opportunity Act could be amended to state that a law purporting to override the jurisdiction of the Equal Opportunity Act would be required to state its intention to do so. It could then provide that some laws may be prescribed, and it would be appropriate for this to occur at the time the legislation is being passed. An intention to discriminate would consequently be identified in the passage of a law through Parliament prior to enactment. It would mean, again, that there is a review and an analysis of why a law passed by government is required to be in breach of the principles of the equal opportunity legislation. Again it imposes an obligation on the methodology of law-making and it provides for a requirement that debate analysis policy-making be quite transparent in terms of why a discriminatory practice should continue.

The CHAIR — At what point would the transparency kick in? Would it be at the point of, say, government making explanatory comments or a statement of compatibility when a bill is introduced? Is that the point?

Dr SZOKE — It would have to be in terms of the work-up of the bill coming into the Parliament. There would have to be a clear policy basis for why the discriminatory practice would occur.

The CHAIR — A front-end review, though, would be conducted by departments.

Mr CARROLL — Under the legislative planning process in terms of identifying whether the underlying policy and the drafted legislation is discriminatory in effect.

Mr LEIGHTON — Which could be a more difficult exercise than whether it is necessary to make a section 85 statement. It is probably clear as to whether you are limiting the powers of the Supreme Court — —

Mr CARROLL — It is far more nuanced whether something is going to have a discriminatory operation, that is right, than whether it might — —

Mr LEIGHTON — It would be possible that legislation that is being introduced today by today's standards is not discriminatory so you do not make the statement, but in a few year's time our standards may have changed enough so that it is discriminatory and it is not covered because that statement was not made in the second-reading speech.

Mr CARROLL — Conceivably that could arise in relation to the notion of indirect discrimination, yes, what is reasonable or unreasonable now could be assessed differently in the future.

Mr LEIGHTON — So it is reasonable now, therefore it is not necessary to make the statement, but therefore it is not protected.

The CHAIR — Or if there is a different attribute introduced, or whether there is retrospectivity in terms of compatibility statements that are made. How would you envisage the statutes that currently exist in going through a process?

Dr SZOKE — Basically we would propose that the current legislation would have to be amended to bring those standards into it. It is an opportunity to be much more rigorous in terms of the demands and the bar that has to be met in terms of what constitutes discrimination or otherwise, which may address the issue that I think you are raising. There are many aspects of the current legislation we believe should be subject to review which we will not canvass today. If our second preferred option were to be implemented, then it would require amendment to the current legislation.

I am wondering how much more to talk about in relation to that. Perhaps I had better cover it to make sure it is on the record. The committee's interim report suggested permitting prescribed acts to be excluded from the operation of the Equal Opportunity Act either temporarily or permanently. The Sex Discrimination Act, the Age

Discrimination Act and the Disability Discrimination Act are examples of legislation that identify and exclude prescribed acts from their scope.

It is our view that a capacity to challenge and review legislation to ensure compliance with the Equal Opportunity Act would extend the scope of the act from facilitating a reactive remedial complaint handling process to becoming much more proactive in terms of trying to implement a human rights agenda. During its 28 years of administering equal opportunity legislation one of the frustrations the commission has had is that the individual complaints handling process provides individual redress but does not often get to the basis of discrimination, which might be quite systemic and might be quite entrenched in practices. I guess we are looking for opportunities to allow the legislation to have a much greater reach, and we believe that is consistent with the Attorney-General's justice statement and other policy initiatives that have come from government of late.

We are working down the chain of options and we have called that one the specific override mechanism. The next, and less-preferred option, we have called the informal front-end review, combined with a narrowing of section 69. Obviously this is a less-preferred option from our perspective because of its informal nature. Our preferred option would be that there is a clear obligation imposed on governments and public services. But again recognising that you need to explore a range of options we have proposed this informal front-end review mechanism.

The purpose of this would be to test if discrimination is demonstrably justified. From our perspective departments have a key responsibility for developing legislation in accordance with the requirements of our act. Development of internal review guidelines that government departments follow when assessing the impact of proposed legislation may be an option. This is presently undertaken in relation to economic and environmental impacts and we believe it could be extended to consider human rights impacts as well.

The idea would be to have a human rights impact statement as well as an economic and environmental impact statement. Cabinet submissions would contain information for cabinet to assess whether these impacts have been identified, so it is part of the check-off list when material comes to cabinet, and it could make a decision obviously on the basis of whether the rationale behind it is justifiable.

Another possible review mechanism is the use of cabinet committees. They could assess submissions in the context of their terms of reference. An example is a sustainable development cabinet committee. A human rights impact cabinet committee could be set up to scrutinise legislation that may have an impact on human rights in the context of Victoria. If bills are presented to cabinet they would go with an approval in principle from that human rights impact committee, and cabinet could be assured that those measures had been addressed in that context. In addition we believe that this committee would then benefit from having a human rights specialist to advise about the potential discriminatory aspects of any laws proposed, and that would enhance the depth of understanding about how legislation may lead to discriminatory practices.

In addition to the informal front-end review mechanism we would propose a narrowing of the existing section 69 of the Equal Opportunity Act. If it were to be retained in some form as a minimum, the test for compliance with the section by other statutes and applications of the exemptions should be one strictly of necessity rather than convenience. So it becomes again a mandatory step along the path of law-making.

A method of limiting the operation of section 69 includes amending the wording to limit its scope to discrimination that is necessary to comply with other laws. As your committee notes in the interim report, section 39E of the repealed Equal Opportunity Act of 1984 permitted discrimination and 'necessary to comply with' other laws. As we alluded to in our previous submission, and also in this presentation to your committee today, the New South Wales and the ACT laws permit discrimination that is necessary to comply with another act. The section could be narrowly construed to permit only conduct complying with obligations directly imposed by the provisions of other acts. So it narrows its scope.

It is our view that a flaw about the test of necessity is that simply because it may be necessary to comply with an act does not mean that the provision offers the most appropriate or effective way of dealing with a particular situation. The test of necessity does not ask whether there are non-discriminatory alternatives, which is obviously fairly important in terms of trying to build a human rights culture within the context of law-making.

We would strongly recommend as a minimum measure that section 69 be limited to permitting only legislation that specifically intends to be excluded from the operation of the Equal Opportunity Act. It could allow a reasonable period of time for review of the legislation if the government wished to retain discriminatory acts. The government

could then retrospectively prescribe laws as overriding the Equal Opportunity Act. Another option may be to amend the exception section 69 and to focus on a test of whether the discriminatory conduct intended by the government should be upheld. The test could be whether the discrimination is reasonably and demonstrably justified in a free society.

That is all I want to say. I do not know if you have questions about that limiting of section 69, or if you wish to add anything, Matthew. If not, I will turn to our least favoured option — we have tried to canvass as many possibilities as we can — relying on statutory rules of interpretation. Your report raises the option of repealing section 69 while relying on the ordinary rules of statutory interpretation as a means of addressing discrimination. Your report raises the Racial Discrimination Act as an example of an antidiscrimination act that does not have a statutory compliance section to exempt conduct.

In this situation the ordinary rules of statutory interpretation apply, whereby a provision in an act that clearly intends to permit discrimination will override antidiscrimination law. It will come as no surprise to you that we think the problem with this approach is that the test of whether the legislation overrides the Equal Opportunity Act by requiring discriminatory conduct would not test whether the intended discrimination is sound from a public policy or a human rights perspective; so we do not believe the standard is imposed in that process. A provision in the Equal Opportunity Act stating that other legislation must conform to human rights standards could provide a limited safeguard if it required acts to voice a clear intention to discriminate, and a sound policy reason to justify allowing it.

We note your committee's observation that in the event of a dispute regarding whether a provision overwrites antidiscrimination laws, a complaint of discrimination would have to be made on the subject of litigation. The Equal Opportunity Commission considers that addressing possible discrimination at an early policy planning stage is preferable to relying on individual complaints and litigation, as I have already indicated.

Consequently we do not support the approach of relying on the rules of statutory interpretation. Whether a new mechanism of review forms a charter or alternative models, we believe that strategies need to be developed to examine existing legislation in order to determine whether the current acts are compliant with the future model.

If I may summarise for the purposes of our submission to the committee, we are strongly in favour of a sunset of section 69. We believe that this is an important opportunity for the government, in the context of its many other initiatives — the current consultation around a charter of human rights, the initiatives that have been expressed through the A Fairer Victoria statement and the Attorney General's justice statement — to strengthen its human rights legislation. We propose that should a charter of human rights be implemented, the best model for Victoria would be the New Zealand model, and it would accompany a front-end review or audit of legislation as an optimum measure to reform the Victorian antidiscrimination law. Then, as I indicated, an intermediate alternative to the charter may be the sunset of section 69 and the amendment of the Equal Opportunity Act to adopt a front-end review mechanism. So they are the two preferred options.

The CHAIR — As a point of clarification, the first option does or does not involve the removal or sunsetting of section 69?

Dr SZOKE — We are in support of that, with the charter.

Mr CARROLL — If there were a charter according to the New Zealand model, we would see section 69 as not being required. It would do away with section 69. Issues about defences, for want of a better term, would then be dealt with according to the usual override test that most charters adopt in terms of whether the limitation on rights is reasonable and demonstrably justified.

The CHAIR — So the two would have to be read in conjunction?

Dr SZOKE — Yes, and I guess that is why we have stepped back to the intermediate proposal. We recognise that the government is in the process of conducting a consultation in relation to the charter and the outcome of that is not known. At any measure we believe that these provisions should be strengthened.

Mr CARROLL — On that second option, I was concerned that we may not have fully responded to the important issue raised by Mr Leighton about what happens in the event that new legislation is presented to the Parliament in the belief that it is not discriminatory, and then over time attitudes change or indeed new attributes

are introduced. I think that could be dealt with by the prescription mechanism that would also attach to that model whereby the prescription could be retrospective in the event that in the future previously unidentified discrimination was in fact identified.

Dr SZOKE — I think that was actually proposed from the Chair as well — the retrospective component.

The CHAIR — Just go back to a point I touched on earlier about how you would deal with existing acts if things were to change: obviously we can look at New Zealand as one model; I think it collapsed under the weight of massive audits and review of its existing statutes. Do you have any information or any opinions to offer on how that could be conducted — that is, if it were to be conducted? The assumption there, of course, is that they would need to be brought into line, but that is not necessarily the case. Obviously that could mean any changes in dealing with future statutes could simply start from that point on.

Mr CARROLL — I suppose we would not purport to have the answer to the issue, which has been a challenge in other jurisdictions, particularly with the New Zealand experience. It is now on its second attempt at dealing with compliance of existing laws. We are still looking at that to see if we can in fact make a valuable contribution to that issue. But looking at it just slightly differently is to ensure that the mechanism that is introduced, be it through a charter or through an amendment to the Equal Opportunity Act, has some capacity to deal systematically and with a minimum of fuss with old discriminatory acts that are identified, so that their operation can, if it is the government's wish, be preserved; or alternatively, the discovery of the discrimination can lead to it being updated and amended.

A prescription model could assist with that, or indeed, under the charter model, because government has the right to say after a declaration of incompatibility, 'Well, thank you for that advice, but we believe there are policy reasons to continue with that practice', even if a review has not picked up on every single possible example of discrimination, it does not actually create a fatal problem.

Dr SZOKE — In any event there will be bodies such as ours that can, if you like, give advice on our view about what a priority of review might be on the basis of the issues that we are dealing with through our complaints mechanism as well.

The CHAIR — It sounds sensible. Are there other questions? You are welcome to add anything further if you like, but we do not seem to have any further questions.

Dr SZOKE — Thank you. We are delighted to have the opportunity. Obviously, as I have said, the commission has been in place for some time and any capacity to strengthen the powers that exist in relation to preventing discrimination we would welcome. We thank you very much for the opportunity to address the committee today.

The CHAIR — Thank you. We certainly appreciate the earlier submission and your presence here today with a further submission.

Witnesses withdrew.

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

Inquiry into discrimination in the law

Melbourne — 12 July 2005

Members

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Ms L. D'Ambrosio
Mr A. Brideson
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Witness

Professor M. Thornton, professor of law and legal studies, La Trobe University.

The CHAIR — Our next witness, whom I welcome, is Professor Margaret Thornton. Before we start, there are some formalities: anything that is said here in evidence or submission is protected by parliamentary privilege, but of course, as you would know, that ceases once the hearing is finalised or you leave the room. In due course you will receive a draft copy of the Hansard record for any corrections that need to be made, other than the removing or adding of evidence.

Professor, you would have received our letter articulating some dot points on which we would like to hear your opinions, which would help us finalise our recommendations for Parliament. I ask you to speak to your submission, after which there will be an opportunity for members to ask questions.

Prof. THORNTON — You asked in your letter simply about section 69, not the other provisions, which perhaps seemed too radical — I am not sure. I have certainly argued for the repeal of section 69, but I think that not only is the statutory exception over-inclusive, it is unnecessary. Of the 10 Australian Acts presently proscribing discrimination on multiple grounds, Victoria's deference to other legislation is couched in the broadest terms. Some Acts, such as the Racial Discrimination Act and two state Acts which have omnibus legislation — South Australia and Western Australia — contain no such provision. That has never presented any problem, and it seems to me that that in itself constitutes a compelling case for the repeal of section 69.

The fact that the Equal Opportunity Act covers future, not just existing, acts reveals, as I said in my submission, that the Victorian legislation has taken the position that the Equal Opportunity Act should be subordinate to all other legislation — a point that was picked up in the report. I have made that point before in various writings, including in my comprehensive study of anti-discrimination legislation in Australia, entitled 'The Liberal Promise', which was published in 1990. It seems to me that the exception would seem to evince an extraordinary lack of confidence and commitment on the part of the legislature towards its own legislation.

So the first point to be made in terms of how the Act operates, I think, is its symbolic effect. It sends a message to the legislature — future legislatures as well as the people of Victoria that human rights and equal opportunity are of low status. Indeed, apart from section 69 there are substantial exceptions; in fact, one could say that the Act was actually riddled with exceptions. I made reference simply to two others in my submission in terms of small businesses and private schools. But the totality of these exceptions, I suggest, then significantly reduces the ambit of operation and the efficacy of the Act.

How does section 69 operate? By and large it provides a defence for a respondent to a complaint of discrimination. There is no limitation in terms of attribute or ground in the act, and as the legislation is omnibus legislation involving something like 16 grounds, they are all covered.

There is also no limitation in terms of area of operation, whether it be employment, education, provision of goods and services and so on. Section 69(1) permits an act to be carried out that would otherwise be discriminatory, if it is authorised by a piece of legislation. Subsection (2) is particularly broad as the other Act need not make specific reference to discrimination. So it seems that on its face any other act including a discretion made by a statutory authority of whatever kind, would be protected.

The issue has arisen in the context of disability in the area of employment, and surprisingly, the defence has not been relied upon very often, and even when it has, it has been construed fairly narrowly, at least by the majority of judges. So in the case of Waters, which is well known because it went to the High Court from the Victorian Supreme Court, a purposive interpretation was adopted by the majority of the court. 'Purposive' means a generous interpretation in terms of the overall intention of the act.

The view was that it was only what was necessary to do under the other act, which in this case was the Public Transport Act, was protected. So the majority did not allow a broad interpretation which would have given full rein to the discretion.

A similar view has generally been adopted by other judicial and quasi-judicial bodies in Victoria and New South Wales. However, it should be noted that a broad view of the statutory discretion was initially adopted in New South Wales — *Director-General of Education v Breen* (1982) 2IR 93 (NSW CA) — which had fairly broad wording similar to Victoria at that stage in terms of its intent. That discretion was exercised by a statutory officer.

After that the New South Wales legislation was made a little more specific; it was narrowed down under section 54 of the Anti-Discrimination Act to include the words 'if it was necessary for the person to do it'. However, it might

be noted that section 54 of that Act does not include the broad proviso that we find in subsection 2 of section 69 of the Equal Opportunity Act.

My point in referring to this earlier history is that the vagaries of interpretation are always apparent in terms of the way particular judges might interpret a piece of legislation if it is couched in a very broad way. When we find that there is perhaps a more conservative swing, a more legalistic and technocratic approach is adopted by judges, and we are more likely to find that the non-discrimination principle is undermined.

In this regard I draw the committee's attention to an exemption that was recently granted by the Victorian Civil and Administrative Tribunal on the ground of race under the Equal Opportunity Act. That was at the end of last year and was the case of ADI Limited (AS 184) 2004. I think it is quite a shocking thing to find that discrimination on the ground of race is already being permitted on a case-by-case basis under the Act. So the relationship to my point about the symbolic significance of the act becomes apparent, because the message is being sent out that it is all right to discriminate and make exceptions of that kind by having something as broad as this particular provision.

In terms of what sort of provisions might be appropriate for an exemption, any other law should be exempt only if there is a very clear statement to that effect. At the moment I have suggested that the present law is over-inclusive: it is much too wide. The creation of new laws with discriminatory effect is altogether unacceptable. The fact that it covers past, present and future laws makes it very broad indeed. But it seems to me it is difficult to imagine when a legislative exception to the Equal Opportunity Act might be acceptable. We already have exceptions dealing with welfare and taxation which are primarily federal matters, and are excepted by virtue of the Constitution.

The Equal Opportunity Act also contains numerous exceptions dealing with special services and needs, such as on the grounds of disability and age, and of course they are perfectly acceptable because they are exceptions that have some sort of beneficent effect for particular groups. They are already expressed in broad terms which makes me ask the question as to what sort of exceptions would be otherwise brought in.

But if there are specific exceptions that might be identified, I think they need to be made very clear because the global provisions not only undermine the Act but produce uncertainty. The inclusion of future discriminatory Acts is particular worrying given the changes that are occurring in the political climate. So rather than continuing to produce discriminatory Acts and then reviewing them ex post facto, it would be preferable to foreclose the passage of discriminatory Acts at the outset.

Victoria did not engage in a thorough review of its legislation as New South Wales did in 1978 when it produced a five-volume opus, I suppose you could say, which looked at all Acts and regulations in New South Wales and then proceeded to do something about removing them from the statute books. There have been inquiries in the past in Victoria but the legislation after all has been operative here for almost 30 years, so one would think that was ample time to have conducted the process of review. But of course the earlier inquiry — and this one too — identified the preponderance of discriminatory provisions.

It seems to me the important point is action which unfortunately did not follow the 1993 inquiry. So in terms of the existing legislation, I recommend the model that was adopted in New Zealand. It seems to be the most practical that departments take responsibility and in particular, a dedicated officer in each department then takes on the task of reviewing legislation rather than having another wholesale review.

In terms of future acts, I did actually recommend in my submission that there be entrenchment of the Equal Opportunity Act or at least its primary provisions. It is unusual to do that because it would mean that a present parliament would be binding future parliaments but it is of course not impossible, I should think, provided that there was agreement on that from both parties. It would have the effect then of not allowing the Equal Opportunity Act to be overridden or undermined, as presently can occur very easily.

Short of entrenching the entire act is the other provision that is certainly mentioned in the inquiry and that is to have some sort of front-end provision. That is apart, of course, from changing the Victorian constitution, which is always a possibility but again more difficult. The idea of the front-end approach adopted by New Zealand, the UK and the ACT is a very positive step in terms of human rights, given that we have no bill of rights at present in Victoria, although there is some debate presently proceeding in that regard.

If there were entrenchment and Parliament then had to take cognisance of the various anti-discrimination principles and human rights in terms of the enactment of all future legislation that would be much more sensible than every

decade or so talking about reviews of past legislation after it has actually included discrimination within legislation. This step would overcome and perhaps redress the overly timid approach to the non-discrimination principle and human rights that presently is adopted by the Equal Opportunity Act. I am happy to answer questions.

The CHAIR — Thank you very much. That was very thorough and certainly dealt with all the questions we raised. You mentioned that there are ways other than through entrenchment. Is it in your mind the only way that the Equal Opportunity Act could be absolute in terms of its supremacy as a law?

Prof. THORNTON — It is not the only way; the other is constitutional change. Entrenchment deals with both points that I made in terms of the symbolic significance, so that it would actually reach out and influence other bodies like VCAT about allowing exemptions on a one-to-one basis but it would also, of course, bind the legislature and it would send out a strong message to the people of Victoria generally about the non-acceptance of discrimination. It is the future effect, of course, that is important about the exemption.

Mr BRIDESON — You mentioned the New Zealand model of a bill of rights. Could you explain to the committee how you would envisage seeing the Equal Opportunity Act working in conjunction — hypothetically at this stage — with a bill of rights in Victoria based on the New Zealand model?

Prof. THORNTON — I am not quite sure what would actually emerge in Victoria, but you could think of something similar. The two would, of course, work in tandem so that perhaps one would reinforce the other in terms of the importance of the non-discrimination principle. I am not sure whether the idea would be that it would act as a sword or simply a shield, which is the usual language that is used about these things, although it sounds a little bit warlike at the moment.

The idea of the shield, which I think has been adopted by the ACT, is that the issue would arise only in the course of some other litigation or some other issue, and then it would be used to protect a person, but it could not be used as a sword — you could not initiate legislation on that basis. I am not quite sure what would happen in Victoria. That is actually quite a weak model, that idea of the shield. I suppose the notion is to obviate a whole lot of litigation as we found, say, in the United States under the Bill of Rights guarantees of the constitution.

You could have both so that with the bill of rights you could have a sense in which legislation would take account of the principles, litigation would take account of the principles and adjudication would take account of the principles but nevertheless there would be provision for individual complaints to be dealt with as well under the Equal Opportunity Act. So that they would all be working to the same ends, one reinforcing the other.

The individualistic model that we have under the Equal Opportunity Act is problematic in that broader societal sense because it is always dependent upon a particular individual taking on the burden of trying to change the law for the public good. Given that 2 per cent of cases go on to a public hearing, there is very little publicity associated with the Act itself. It is largely dealt with at a subliminal level or behind closed doors in conciliation and so on, so that people who might need to know about this, people with disabilities and so on, really do not receive the educative benefit which I think would certainly flow from something like a bill of rights because people know about that. It becomes something that is important within the fabric of society.

Certainly I was very impressed at one stage in the United States to find that six-year-olds at school were doing little word finds and so on with concepts from the constitution, so it was seen to be very important, whereas I do not think that six-year-old children in Victoria are doing word finds on the Equal Opportunity Act, given the complexities that I have adverted to in terms of the exemptions and so on.

The CHAIR — You mentioned in your opening comments the narrowness of our inquiries. No doubt you have very strong views about the need for changes across the act. You have mentioned exceptions. Did you want to add anything further to that?

Prof. THORNTON — To comment on the exceptions and the points that I made in the submission, I simply selected two or three that I thought were the most significant, rather than write almost a book on them all, but I do think that they similarly undermine the legislation in terms of section 69. I mentioned particularly small business in terms of employment so that all employers with less than six employees are exempted. That seems to be quite an extraordinary exemption, and it is not one that you find in the federal legislation at all.

As I mentioned I am not quite sure of the proportion of employees in Victoria working in small organisations but I do know — and from work that I have done and positions I have held in the past — that it is in small business where the preponderance of employment discrimination takes place: it is going to be the cafe or the corner store or the service station and in the country of course this is highly problematic, and so this seems to me to undermine the legislation very significantly if you are actually exempting half the employees in the entire state from coverage. They have no redress other than that they are forced to then appeal to federal legislation, if it is not a state government respondent of course.

That sends out the same sort of message — the dual messages that I am mentioning in terms of the symbolic impact as well as the practical effect of actually denying people who have been subjected to discrimination to be able to lodge a complaint. I feel that that is unnecessary because it is treating small business as though it were a family — an extension of the family — and I think that is completely inappropriate because one is looking at business; people are engaged in these activities to make profits, but they have been able to make profits by discriminating. That is the message that is coming through from the exemption so I find that unacceptable.

The CHAIR — Professor, may I thank you on behalf of the committee for your time and certainly for all the work you have put into this submission; we greatly appreciate that.

Committee adjourned.