EQUAL OPPORTUNITY

Except for you... and you... and you

MIRANDA STEWART points to some insidious provisions in new Victorian legislation.

On 14 June 1995, the Victorian *Equal Opportunity Act 1995* became law with surprisingly little fanfare. The Act extends the grounds for prohibiting discrimination to age, industrial activity, lawful sexual activity, physical features, pregnancy, and status as a carer, in addition to the existing grounds of race, sex, impairment, marital or parental status and political or religious belief or activity. The Kennett Government, it seems, has become truly politically correct in its attempt to ensure that all Victorians have equality of opportunity.

The maintenance and extension of the grounds of anti-discrimination law, its coverage of direct and indirect discrimination (as under the 1984 Act) and the introduction of broader provisions concerning sexual harassment are clearly to be welcomed. However, several elements of the new Act are a cause for concern. The large number of exceptions, many of them new, the problematic treatment of sexuality and a new transfer procedure to the Supreme Court mean the Act does not live up to its liberal promise.

Sexuality

The new Act outlaws discrimination on the basis of 'lawful sexual activity', defined as 'engaging in, not engaging in or refusing to engage in a lawful sexual activity'. This provision should protect most lesbians and gay men or people perceived as lesbian or gay from discrimination, so in practice it is a positive step. However, it fails to recognise sexuality as an identity or way of living. A person may identify as lesbian or gay and be discriminated against on this basis without engaging in any sexual activity. The failure to mention lesbians, gays or even homosexuality maintains the silence around lesbian and gay existence, while the insistence on 'lawful' sex acts seems to be driven by an unspoken, homophobic assumption that gays and lesbians engage in unlawful sexual activity. Homosexuality, barely tolerated, must not be seen to be condoned.

Further, this provision builds on existing discriminatory laws, such as the age of consent law for gay sex (18 as opposed to 16). Discrimination against a 17-year-old gay man could be allowed. It also fails to cover transgender people, who may be better protected under the sex discrimination provision, but who have not been explicitly mentioned in the Act.

The notion of 'lawful sexual activity' was opposed by Gay Men and Lesbians Against Discrimination (GLAD), who lobbied unsuccessfully for a provision outlawing discrimination on the basis of 'sexuality', defined as 'homosexuality, lesbianism, heterosexuality and bisexuality'. GLAD's stance was supported by Feminist Lawyers.

New exceptions

An even more insidious provision, in its potential consequences for lesbians or gays, is the new, broad exception for care of children. The Act allows an employer to discriminate against an employee or prospective employee if the employment involves the care, instruction or supervision of children and the employer genuinely believes, on rational grounds, that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children. The exception encompasses all areas of employment involving children (aged under 18) including secondary schools, but does not cover TAFE colleges.

This exception seems to be a sop to the homophobic Right. It will not educate people that discrimination is unacceptable but will reinforce their worst prejudices: in particular, those connecting gay men and lesbians with child abuse. It is difficult to conceive of a rational basis for excluding a suitably qualified person from caring for children because she or he is lesbian or gay, elderly or of a particular race. Would a genuine belief that homosexuality is unnatural and dangerous be 'rational' in this context?

Other new exceptions are also problematic. There is a new general exception for discrimination by a person which is 'necessary' for him or her 'to comply with genuine religious beliefs or principles'. The Explanatory Memorandum (EM) gives no examples of the kind of discrimination which may be excepted under this provision and one might ask what discriminatory acts not already covered by existing exceptions for charities, religious bodies and schools could be considered 'necessary'. Genuine religious beliefs are often discriminatory and the full consequences of this exception do not seem to have been considered.

A further new exception allows discriminatory standards of dress, appearance and behaviour at work and schools. The EM states that this will allow (for example) employers in food production to require all employees to wear hairnets — but this should be covered by health regulations and it is hard to imagine a situation in which this requirement would be discriminatory at all. This exception seems unnecessary and is potentially wide enough to enable codes requiring women to wear skirts or men to have short hair — hardly a progressive move!

Finally, in a backward step, the exception for small businesses which was previously limited to businesses with three or fewer employees has been extended to cover businesses with five employees.

New transfer procedure

Some of the procedures for taking a case against discrimination have been revamped in the new Act. In particular, the Government (whether or not a party) or a party to a case can seek to transfer a discrimination complaint, which may have significant social, economic or financial effects on the community, or which may establish a precedent, from the Anti-Discrimination Tribunal to the Supreme Court.

The Court decides if it should hear the complaint or if it should be referred back to the Tribunal. The procedure thus necessitates a Court hearing and could potentially undermine the authority of the Tribunal. It is also contrary to the original intention to create a costs-free jurisdiction. Some provision for costs has been made in relation to complaints against government agencies. However, other organisations will be able to seek transfer to the Court and ordinary costs may be awarded against complainants who lose the case. This new development could lead to complaints being dropped because complainants cannot risk a costs order. In any event, proceedings in the Court will be more difficult and expensive than in the Tribunal.

In conclusion, the new Act opens up a number of new grounds for anti-discrimination claims but defendants to such claims have also been provided with a significant set of grounds on which they can seek to support discriminatory conduct. Unfortunately, neither the Victorian Opposition nor the media raised these issues effectively and the Bill was pushed through with little public debate. A close watch must be kept on the impact of the new exceptions.

Miranda Stewart is a Melbourne lawyer.

SOCIAL SECURITY

90s relationships

CRAIG SEMPLE looks at the AAT's interpretation of the concept of 'marriage-like relationship'.

A recent decision of the Administrative Appeals Tribunal (AAT) has criticised the concept of 'marriage-like relationships' as employed in the *Social Security Act 1991* (the Act). The AAT, in deciding to exercise a discretion contained in s.24(2) of the Act, has proposed a way of making the Act more relevant to the changing nature of relationships in the 1990s.

Cancellation of family payments

The facts of the case, *Secretary of the Department of Social Security v Le Huray* (V94/667, 15 March 1995) involved the cancellation by the Department of Social Security (DSS) of the respondent's family payments. The payments were cancelled when the respondent began cohabiting with her male companion on the basis that the relationship was 'marriage-like'. Accordingly, the respondent and her companion were treated as 'members of a couple' under s.4(2) of the Act. Eligibility for the family payment was therefore assessed on the joint income of the respondent and her companion, which precluded the respondent from receiving the family payment.

The decision of the SSAT

After an unsuccessful internal review of the decision, the respondent was successful with her appeal to the Social Security Appeals Tribunal (SSAT). The decision of the SSAT (AMS 54521:KM, 16 June 1994) relied on the non-traditional nature of the relationship between the respondent and her companion. As is becoming more common in relationships in the 1990s, the respondent and her partner wished to retain their financial independence from each other. The respondent was responsible for the financial expenses of the household, and her companion paid her weekly board. In all other respects they were financially separate. The respondent's children maintained a good relationship with their father, and the respondent's companion assumed no parental role whatsoever.

The SSAT held that although the respondent and her partner were living in a 'marriage-like' relationship, the discretion contained in s.24(2) of the Act should be exercised. That discretion allows the Secretary to determine that a person in a marriage-like relationship should not be treated as a member of a couple for the purposes of the Act if there is a 'special reason' for doing so. The SSAT determined that this discretion be exercised because the respondent's companion assumed no responsibility for the children and that as a consequence, 'the only people to be affected by the Tribunal's decision are Ms Le Huray's children' (at 8).

The decision of the AAT

The DSS appealed the decision of the SSAT to the AAT. The AAT, like the SSAT, found that the relationship between the respondent and her companion was 'marriage-like', but that there was a 'special reason' to justify the exercise of the s.24(2) discretion.

The AAT exercised the discretion on a different basis to that relied on by the SSAT. The AAT rejected the SSAT's conclusion that the 'special reason' justifying the exercise of the discretion was that the respondent's children would be the people who would suffer because of the cancellation of benefits:

> We are satisfied that, in all cases concerning family payment, there would be at least a direct connection between the child's welfare and the family payment as there is in this matter. Thus we do not consider that the effect of a loss of family payment on the children of Ms Le Huray can be 'a special reason in the particular case'. [at 26]

Rather, the AAT focused on the role of the respondent's companion with respect to her children:

> [H]e does not in any way stand in the position of a father to her children, who are in frequent contact with, and supported by, their father. We think it would be inappropriate for the Tribunal or the Secretary of the Department of Social Security to interfere with the relationship between the boys and their father, by requiring another man to undertake financial responsibility for them. [at 27]

The Tribunal decided that although the relationship was 'marriage-like', the lack of responsibility assumed by the respondent's partner was a 'special reason in the particular case' justifying not treating the respondent as a member of a couple.

Analysis and implications of the decision

The AAT acknowledged that the notion of a 'marriage-like relationship' is an increasingly unsatisfactory standard to be applied to relationships:

> There is such variation in relationships between couples that it is very hard to say which relationships are 'marriage-like' and which are not. [at 17]

The AAT made an unambiguous call for reform of the Act in this area, suggesting that, 'some other formula should be developed' (at 27). This is not a new position. Similar sentiments can be located in *Re Stuart and Secretary, Department*