SEXUALITY AND WORKPLACE OPPRESSION*

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[Gay and lesbian workers report substantial levels of harassment and discrimination in their paid working lives. Instances range from the near-universal silencing of sexuality difference by way of enforced self-censorship through to harassment, not being hired, or being dismissed from a position after sexuality becomes known by others in the workplace. Although it appears to be commonly assumed that Australian anti-discrimination law provides an answer to such discrimination where it occurs, this view is far from accurate. A number of factors explain why the different statutory schemes have played only a minor role in providing redress in relation to sexuality oppression in the workplace. This article explores those reasons and then raises questions of strategy in the use of the law by the lesbian and gay movements.]

Prejudice and violence against lesbians and gay men in Australia is endemic. The sites of this oppression are diverse. They include: public violence against lesbians and gay men;[1] harassment and discrimination in the paid workforce[2] and at school;[3] inadequate service, or refusal of service;[4] criminal sanctions in

* Editorial Note: The Equal Opportunity Act 1995 (Vic) introduces a 'lawful sexual activity' ground into Victoria. It also contains a number of new exemptions including a 'dress, appearance and behaviour' exemption, a working with children exemption and a provision which exempts discrimination where the conduct complained of was necessary for the person to comply with the person's 'genuine religious beliefs or principles'. The effect of this new Act is described in an addendum to this article commencing on page 345.

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1 A study conducted in Victoria from September 1990 to January 1993 surveyed 1,002 lesbians and gay men. The results revealed that approximately 70% of both lesbians and gay men reported being subjected to violence in a public place, including being verbally abused, threatened or physically assaulted. Physical assault was reported by 11% of lesbians and 20% of gay men: Gay Men and Lesbians Against Discrimination (GLAD), *Not A Day Goes By: Report on the GLAD Survey into Discrimination and Violence Against Lesbians and Gay Men in Victoria* (1994) 18-19. These high levels of public violence have been confirmed in other Australian reports: Vic Barbeler, *The Young Lesbian Report: A Study of the Attitudes and Behaviours of Adolescent Lesbians Today* (1991-92) 51-2. One report names 15 men who have died from hate crimes in New South Wales alone since 1989: Gary Cox, The Lesbian and Gay Anti-Violence Project, *The Count & Counter Report: A Study Into Hate Related Violence Against Lesbians and Gays* (1994) 2.

2 GLAD found that approximately 45% of both male and female respondents recorded unfair treatment in their paid working lives: GLAD, above n 1, 10.

3 Almost one-third of GLAD respondents recorded harassment and discrimination in education: ibid 9. Other Australian surveys record higher levels: Barbeler, above n 1, 50; Jacqui Griffin, *School Watch Report* (1993), examined in Daniel Philps, 'The Blackboard Jungle', *Campaign* (Sydney), April 1994. The New South Wales Minister for Education has announced the introduction of anti-discrimination policies to cover lesbian and gay secondary students: Kirsty Machon, 'Harassment on Syllabus', *Sydney Star Observer* (Sydney), 25 January 1995.

4 GLAD recorded that 41% of lesbians and 25% of gay men reported inadequate service, or a refusal of service, in shops, bars, clubs, motels, restaurants, taxis, government agencies and financial institutions: GLAD, above n 1, 19-20.

relation to same-sex sexual activity;[5] and the lack of legal status accorded to gay and lesbian relationships.[6] There are virtually no aspects of lesbian and gay lives in Australia today which are untouched by the prejudices of the dominant culture.

Workplaces constitute one of the principal sites of this oppression. Not only does it appear that almost half of all lesbian and gay workers experience unfair treatment in their paid working lives,[7] but for many gay men and lesbians, as for other people, paid work occupies a large and important part of their lives, not only temporally and socially, but as the main determinant of material well-being. Constrictions in labour markets generally, the need for a good reference and the

[5] Australian criminal law continues, through a number of different mechanisms, to exert control over same-sex sexual behaviour. Differential ages of consent between homosexual and heterosexual sexual behaviour still exist in New South Wales, the Northern Territory and Western Australia. These laws continue to be enforced: see, eg, 'Foreign Nationals Fall Foul of WA Laws', *Westside Observer* (Perth), July 1994. Sex between men that occurs at 'beats' (usually toilet blocks or parks used by men to engage in same-sex sexual behaviour) also continues to be censured in all jurisdictions through the laws of offensive behaviour, gross indecency and soliciting: see John Godwin, Julie Hamblin, David Patterson and David Buchanan, *Australian HIV/AIDS Legal Guide* (2nd ed, 1993) 209-29; 'Gay Men Not "Criminals"', *Melbourne Star Observer* (Melbourne), 11 November 1994. The Tasmanian Criminal Code Act 1924 proscribes 'unnatural sexual intercourse' and 'indecent practices between male persons': ss 122-3. These provisions render consensual sexual activity occurring between men in private a criminal offence. Although it appears likely that the Tasmanian provisions would, if challenged, be found to be inconsistent with the Human Rights (Sexual Conduct) Act 1994 (Cth) and so inoperative to the extent of the inconsistency under s 109 of the Constitution, they remain, nonetheless, on the Tasmanian statute books. See Wayne Morgan, 'Protecting Rights or Just Passing the Buck? The Human Rights (Sexual Conduct) Bill 1994' (1994) 1 *Australian Journal of Human Rights* 1.

[6] See Lesbian and Gay Legal Rights Service, *The Bride Wore Pink: Legal Recognition Of Our Relationships* (2nd ed, 1994) 11-14; NSW Young Lawyers, *Lesbian and Gay Couples and the Law* (1994); Women's Legal Resources Ltd and the Gay and Lesbian Rights Lobby Inc, *Lesbians and the Law: A Practical Guide* (1991); Sylvia Winters, 'Gay and Lesbian Relationships and the Law of New South Wales' (1992) 1 *Australian Gay and Lesbian Law Journal* 71; Australian Law Reform Commission, *Equality Before the Law*, Discussion Paper No 54 (1993) 101-3. Note, however, that recent legislation in the ACT providing for the distribution of property on the ending of a relationship does cover gay and lesbian intimate relationships: Domestic Relationships Act 1994 (ACT). Similar legislation has been proposed in Queensland: Queensland Law Reform Commission, *Shared Property*, Discussion Paper No 36 (1991). The Australian Democrats propose a Private Member's Bill prohibiting discrimination on the ground of sexuality (drafted to include relationships): Sid Spindler, *Prohibiting Discrimination on the Grounds of Sexuality*, Issues Paper No 1 (1995).

[7] As noted above, GLAD found that approximately 45% of both male and female respondents recorded unfair treatment in their employment. Experiences included being harassed at work (approximately 32% of both gay men and lesbians), a breach of confidentiality at work (21% of lesbians and 17% of gay men), being pressured out of a job or dismissed (14% of lesbians and 11% of gay men), being refused a promotion (6% of lesbians and 8% of gay men), and being refused a job (approximately 5% of lesbians and 6% of gay men): GLAD, above n 1, 10. It is noted that these figures do not include the less overt but no less damaging form of discrimination of enforced silence and self-censorship: see below n 16 and accompanying text. Another report conducted in New South Wales found that 21% of all physical and sexual assaults on lesbians occurred at work or study. Such assaults occurred mostly during office hours and involved one assailant who was known to the victim: Lesbian and Gay Anti-Violence Project, *The Off Our Backs Report: A Study Into Anti-Lesbian Violence* (1992) 17-25; see also, Barbeler, above n 1, 50; Anti-Discrimination Board of New South Wales, *Discrimination and Homosexuality* (1982) 421. Studies conducted overseas document similarly high levels of harassment and unfair treatment of lesbians and gay men in workplaces: Martin Levine and Robin Leonard, 'Discrimination Against Lesbians in the Work Force' (1984) 9 *Signs* 700; Martin Levine, 'Employment Discrimination Against Gay Men' (1979) 9 *International Review of Modern Sociology* 151; William Rubenstein (ed), *Lesbians, Gay Men and the Law* (1993) 244-8, 257.

apparent prevalence of discrimination against lesbian and gay workers compound the problems faced by such workers trying to extricate themselves from oppressive work environments.

This article examines the oppression of gay men and lesbians in their paid working lives and the role of the Australian anti-discrimination jurisdictions[8] in providing redress in relation to such experiences.[9] Although it appears to be commonly assumed that the Australian legislation provides an answer to harassment and discrimination on the basis of sexuality, this view is far from accurate. As will become apparent, the legislation is rarely used by lesbians and gay men, and when used is of limited potency and effect.

The limited role of the anti-discrimination legislation can be explained by a number of factors. Before analysing these in detail, the types of experiences in relation to which lesbian and gay workers may wish to seek redress are examined.

I THE OPPRESSION OF LESBIANS AND GAY MEN IN THEIR PAID WORKING LIVES

The experiences of gay men and lesbians in their workplaces are diverse. Each person's experiences are shaped by a number of interrelated factors. As well as sexual orientation and sexual identity, these factors include class background, racial, ethnic or cultural background, age and (dis)ability. These factors intersect with each other to create a complex web through which all life experiences, including those in the workplace, are filtered.

Two themes cut across these variables and transcend the many differences in experiences between lesbians and gay men: systemic oppression of women and the AIDS epidemic. Although lesbians and gay men appear to have felt the impact of both these issues in their lives generally and their working lives more particularly, the extent and nature of the impact has differed. The experiences of lesbians in workplaces appear most powerfully shaped by the subordination of women; the experiences of gay men at work, in contrast, appear more likely to be shaped by the AIDS epidemic and the fear surrounding it.[10]

Experiences of oppression, both generally and in the workplace, are also shaped by the degree to which a lesbian or a gay man is identified as lesbian or gay by the people around her or him. Unlike the members of most other op-

[8] The main statutes examined include the Human Rights and Equal Opportunity Commission Act 1986 (Cth) ('HREOCA'); Equal Opportunity Act 1984 (Vic) ('EOA (Vic)'); Anti-Discrimination Act 1977 (NSW) ('ADA (NSW)'); Anti-Discrimination Act 1991-1992 (Qld) ('ADA (Qld)'); Equal Opportunity Act 1984 (SA) ('EOA (SA)'); Equal Opportunity Act 1984-1994 (WA) ('EOA (WA)'); Discrimination Act 1991 (ACT) ('DA (ACT)'); Anti-Discrimination Act 1992 (NT) ('ADA (NT) ').

[9] Some workplaces are excluded from this study. Discrimination in the defence forces, the Australian Security Intelligence Organisation and religious orders gives rise to issues which cannot be adequately canvassed here.

[10] AIDS has triggered an increase in discrimination and violence generally against gay men: Commonwealth Department of Community Services and Health, *National HIV/AIDS Strategy: A Policy Information Paper* (1989) 65; New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic: Report of the Inquiry into HIV and AIDS Related Discrimination* (1992) 67-70.

pressed groups, many lesbians and gay men perceive that they have a choice as to whether to identify themselves as lesbian or gay to the people around them. They see this choice as arising from the fact that the dominant culture assumes heterosexuality and so, unless that assumption is displaced, the gay man or lesbian is seen by the outside world as heterosexual. Most workplaces reflect this culture. Their organisational values are imbued with gender role stereotyping, and more particularly, heterosexuality.[11] It is clear that the more open lesbians and gay men are about their sexuality, the greater is the risk of being on the receiving end of overtly discriminatory conduct.[12]

Workplace environments and occupations differ in their acceptance of gay and lesbian workers. Childcare work and school teaching appear to be occupations which are particularly resistant to gay and lesbian workers.[13] The myths that lesbians and gay men proselytise and sexually abuse children and young adults continue to inform public discourse on lesbian and gay workers in these occupations.[14] Examples of workplaces which, in effect, exclude lesbian and gay workers abound. In these workplaces employees known to be or suspected of being gay or lesbian may be refused employment, dismissed, or subjected to ongoing campaigns of harassment, often ending in the resignation of the victimised worker.[15]

[11] On hetero-centricity generally, see Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence' in Henry Abelove, Michèle Barale and David Halperin (eds), *The Lesbian and Gay Studies Reader* (1993) 227; Marilyn Frye, 'A Lesbian Perspective on Women's Studies' in Margaret Cruikshank (ed), *Lesbian Studies: Present and Future* (1982) 194. On heterosexism in the workplace and the consequent positioning of lesbian and gay sexuality as 'other', see Cynthia Cockburn, *In the Way of Women: Men's Resistance to Sex Equality in Organisations* (1991); Clare Burton, *The Promise and The Price: The Struggle for Equal Opportunity in Women's Employment* (1991); Catharine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979); J Cindy Eson, 'In Praise of Macho Women: *Price Waterhouse v Hopkins*' (1992) 46 *University of Miami Law Review* 835; Celia Kitzinger, 'Lesbians and Gay Men in the Workplace: Psychosocial issues' in Marilyn Davidson and Jill Earnshaw (eds), *Vulnerable Workers: Psychosocial and Legal Issues* (1991) 223, 223-4.

[12] GLAD noted a strong correlation between openness about sexuality and the frequency and severity of discrimination and violence experienced: GLAD, above n 1, 29.

[13] For an example of a gay man whose referees for a position in child-care were asked about his sexuality, see GLAD, ibid 10. For an example of a teacher who resigned after being harassed by students for several months, see Steven Carter, 'Men in Suits: Eleven Gay Professionals Talk Shop', *Outrage* (Melbourne), October 1991. For an example of a gay man who alleges that he was constructively dismissed from his position at a Catholic school after he was seen marching in the Gay and Lesbian Mardi Gras, see Vanessa McQuarrie, 'Gay Teacher "Fired"', *Melbourne Star Observer* (Melbourne), 17 March 1995.

[14] Concerns over the suitability of lesbians and gay men as teachers were evident in both *Thorne v R* (1986) EOC ¶ 92-182 ('*Thorne*') and *Jobling v Director-General, Education Department of South Australia & Anor* (1993) EOC ¶ 92-554 ('*Jobling*'). Myths surrounding gay and lesbian school teachers and child care workers appear reflected in a 'working with children' exemption specific to the sexuality grounds in the ADA (Qld) and ADA (NT): see below nn 60-73 and accompanying text. In relation to the difficulties faced by gay men and lesbian teachers generally, see Jacqui Griffin, *The School Watch* Report (1993); Philps, above n 3; Madiha Didi Khayatt, *Lesbian Teachers: An Invisible Presence* (1992); New South Wales Anti-Discrimination Board, *Discrimination and Homosexuality,* above n 7, 466-95; Commissioner for Equal Opportunity (Cth), *Discrimination on the Basis of Sexuality,* Discussion Paper No 3 (1994) 10.

[15] Examples of such workplace environments include the case of an applicant for a position with the public service who, after he revealed that he was gay, was told by the interview panel that he would not be offered the position because the public service 'did not want those types': Equal Opportunity Commission of South Australia, *The Equal Opportunity Act and You: 'Fair Go' Series 16,* 4. For an example of a gay man who was told by the manager of a company that it

In other workplaces the existence of lesbian and gay workers may be tolerated on the implicit condition that, for example, they do not dress like a 'poof' or look too 'dykey', talk about their weekends, or have a photo of their lover on their desk. There are very few workplaces where gay and lesbian workers are free to be themselves and to talk openly about their lives in the way that heterosexual people are.[16]

Most lesbian and gay workers appear to engage in at least some level of self-censorship in their workplaces.[17] They may censor their discussions of weekend activities, change pronoun when referring to a lover, or censor themselves by not taking a lover to a work function. For such lesbian and gay workers the working week is spent in

> a state of constant duplicity, internally and externally divided by a lie that is not spoken, by an act of deception that is never acted out. Even the most mundane or natural aspects of human interaction and communication are distorted by the invisible presence of the void such duplicity creates.[18]

Duplicity has its costs. All denials of self result, on some level, in harm both to the individual silenced as well as to that person's community.[19] Although remaining hidden behind a heterosexual facade may save a lesbian or gay man from more overt manifestations of prejudice, it leaves them in a world of double lives, with the stress, alienation and anxiety that entails. In such a world, the fear of being 'found out' may be pervasive.

Importantly, lesbian and gay relationships are commonly not recognised for

would not hire gay men, 'given all the concern about AIDS and things', see New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 9. Examples of on-going harassment suffered by lesbian and gay workers which resulted in their resignation can be found in GLAD, above n 1, 11; Lavender (ed), *What is Lesbian Discrimination?*, Proceedings of an October 1987 Forum Held by the Anti-Discrimination Board (1990) 29; New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 13. See also Anti-Discrimination Board of New South Wales, *Annual Report (1993-94)* 24.

16 In the words of one GLAD respondent:

> I feel that a large part of the discrimination inflicted on gays and lesbians is the pressure to keep such a large part of their lives secret. To talk openly of our lovers, social activities, desires or goals is not nearly as acceptable as for heterosexual people. I'm forever choosing my words carefully and making excuses because I often don't feel secure enough to face the potential drama which may ensue after an 'open' discussion with workmates, peers, neighbours or relatives. And I came out years ago and work in a ... reasonably supportive environment.

GLAD, above n 1, 13. For a view from an employer who would not mind having a gay employee provided he 'keeps to himself ... keeps the fact that he is homosexual to himself': Geoffrey Robertson, *Does Dracula Have Aids? and Other Geoffrey Robertson Hypotheticals* (1987) 46, cited in Joseph Chetcuti, 'Continuing Legal Discrimination in Australia Against Homosexual Men' in Robert Aldrich (ed), *Gay Perspectives II: More Essays in Australian Gay Culture* (1994) 316, 317. For an example of a homophobic workplace, see *Daniels v Hunter Water Board* (1994) EOC ¶ 92-626; see also Marc Fajer, 'Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men' (1992) 46 *University of Miami Law Review* 511, 570-607.

17 Kitzinger, above n 11, 225; GLAD, above n 1, 11-12; Carter, above n 13; Shane McClelland, 'The Office Closet', *Melbourne Star Observer* (Melbourne), 20 January 1995.

18 Paula Bennett, 'Dyke in Academe (II)' in Cruikshank, above n 11, 5.

19 Self repression is perhaps the most entrenched form of oppression: GLAD, above n 1, 13; Lavender, above n 15, 29, 31. For a detailed description and analysis of the costs of such concealment, see Fajer, above n 16, 595-600; Kitzinger, above n 11, 227.

the purpose of conferring tangible employment benefits.[20] Various terms and conditions of employment are framed in ways that exclude their application to gay men and lesbians. Benefits such as travel allowances,[21] bereavement leave, relocation expenses, superannuation[22] and workers' compensation payouts generally do not recognise gay and lesbian relationships.[23] In the recent *Family Leave Test Case* the Federal Industrial Relations Commission declined to expressly recognise same-sex couples as constituting 'immediate family'.[24]

Even in the limited cases where gay and lesbian relationships are recognised for the purpose of employment benefits, the threat of possible discrimination consequent upon revealing one's sexuality may discourage gay men and lesbians from claiming these benefits.

These are the experiences of gay men and lesbians in the paid workforce: subordination and marginalisation. As noted above, anti-discrimination law has, at least to date, played only a minor role in providing redress in relation to such conduct. The explanations for this are to be found both in the reality of lesbian and gay lives today, as well as in the ambit and procedures of the different statutes.

The scope of the different Acts is such that many instances of oppressive

20 Fringe benefits are an important source of employment remuneration, especially as Australian labour markets move towards enterprise bargaining as the main method of determining remuneration. The disadvantaging of gay and lesbian workers in this respect, therefore, appears to be increasing. Lesbians may be further disadvantaged because as women they are less likely than men to be in a position to receive fringe benefits: Human Rights and Equal Opportunity Commission, *Just Rewards: Report of the Inquiry into Sex Discrimination in Overaward Payments* (1992).

21 For two examples of successful challenges to employer policies which conferred travel allowances and discounts on heterosexual married and de-facto partners but not on gay and lesbian partners, see 'O'Grady Complaint Upheld', *Melbourne Star Observer* (Melbourne), 22 January 1993 (a complaint by a gay state MP to the New South Wales Equal Opportunity Tribunal); 'Airline Gays Demand Equal Travel Rights', *Melbourne Star Observer* (Melbourne), 3 April 1992; *contra Wilson v Qantas Airways Limited* (1985) EOC ¶ 92-141.

22 See, eg, 'Gay Spouse Super Denied, *Melbourne Star Observer* (Melbourne), 5 August 1994; 'Super Schemes Questioned', *Melbourne Star Observer* (Melbourne), 16 September 1994; 'Superannuation Hearing', *Melbourne Star Observer* (Melbourne), 23 December 1994; 'Gay Super Furore', *Age* (Melbourne), 8 March 1995. As to the use of HIV/AIDS exclusion clauses in superannuation policies, see Commonwealth Department of Health, Housing, Local Government and Community Services, *HIV/AIDS and Superannuation and Life Insurance* (1993).

23 See, eg, The University of Melbourne Personnel Services, *Personnel Policies and Procedure Manual*. Although the University's equal opportunity policy includes sexual preference as a prohibited ground of discrimination (clause 10.1.1), some conditions of employment do not, on their face, recognise same-sex relationships. See, eg, clause 9.4.2 (compassionate/bereavement leave), clause 9.8.30 (long service leave payment on termination of employment for the purpose of marriage), clause 14.1.4 (travel allowance) and clause 14.1.10 (establishment expenses). At present the Superannuation Scheme for Australian Universities does not currently recognise same-sex couples: see 'Super Schemes Questioned', above n 22.

24 Gay and lesbian partners may, however, come within the meaning of 'a member of the employee's household' and as such be recognised as a 'family member': *Family Leave Test Case* (1994) 57 IR 121 (Australian Industrial Relations Commission) ; *Family Leave Test Case, Supplementary Decision* (Print L9048, 3 February 1995). Note that the recent NSW test case on this issue expressly included 'a same sex partner who lives with the employee as the de facto partner of that employee on a bona fide domestic basis': cl 1.3(ii)(d); *Family Leave Test Case (NSW) May 1995* (Fisher P, Cahill VP, Bauer and Hungerford JJ, McKenna C, IRC 220 of 1995, 12 May 1995). The National Council for the International Year of the Family declined to recognise same-sex couples as 'families': The National Council for the International Year of the Family, *Creating the Links: Families and Social Responsibility* (1994) 20-1, 25.

treatment of lesbian and gay workers are excluded from protection. In addition, the usefulness of the substantive rights that do exist is undermined by a number of interrelated matters of procedure. These matters of scope and procedure are analysed in turn.

II THE AMBIT OF ANTI-DISCRIMINATION LEGISLATION

A number of factors circumscribe the scope of the legislation in relation to instances of oppression experienced by gay men and lesbians at work. The main limitations are as follows.

A *The lack of a proscribed sexuality ground*[25] *in Victoria, Western Australia and Tasmania*

Perhaps the most obvious deficiency in the scope of the legislation is that, at present, lesbians and gay men in paid work in Victoria, Western Australia and Tasmania do not have access to a proscribed sexuality ground.[26] The only recourse to a sexuality ground in these states lies with the Human Rights and Equal Opportunity Commission Act 1986 (Cth) ('HREOCA').[27]

[25] The terminology 'sexuality ground(s)' is used in this article to refer to the differently worded grounds which encompass lesbianism or gay male sexuality:

- HREOCA covers 'sexual preference': Human Rights and Equal Opportunity Commission Regulations (Cth) (SR No 407 of 1989) reg 4(a)(ix);
- ADA (NSW) refers to 'homosexuality' which is defined to mean a male or female homosexual: s 4(1);
- ADA (Qld) refers to 'lawful sexual activity': s 7(1)(l);
- EOA (SA) refers to 'sexuality' which is defined to mean 'heterosexuality, homosexuality, bisexuality and transsexuality': s 5(1);
- DA (ACT) refers to 'sexuality' which is defined to mean 'heterosexuality, homosexuality (including lesbianism) or bisexuality': s 4(1);
- ADA (NT) refers to 'sexuality' which is defined to mean 'the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality': s 4(2).

The EOA (Vic) and EOA (WA) do not, at the time of writing, include sexuality as a prohibited ground. Such a ground has, however been recommended by the Western Australian Commissioner for Equal Opportunity. The recommended wording is 'sexuality', further defined to encompass heterosexuality, homosexuality, bisexuality and transsexuality: Commissioner for Equal Opportunity (WA), *Discrimination on the Basis of Sexuality,* Discussion Paper No 3 (1994) v. In Victoria a 'lawful sexual activity' ground appears likely to be enacted this year. See Shane Green, 'Gay Law: Kennett Set to Try Again', *Age* (Melbourne), 25 January 1995; see also the Victorian Scrutiny of Acts and Regulations Committee's review, which recommended that 'lawful sexual orientation/sexuality' be included in the EOA (Vic): Scrutiny of Acts and Regulations Committee (Vic), *Review of the Victorian Equal Opportunity Act 1984*, Final Report (1993) 23; and the Law Reform Commission of Victoria's Report which recommended the inclusion of the ground of 'sexuality' further defined to mean heterosexuality, homosexuality, lesbianism and bisexuality (expressly excluding paedophilia): Law Reform Commission of Victoria, *Review of the Equal Opportunity Act*, Report No 36 (1990) 24-5, 69, 187.

[26] For an analysis of Australian anti-discrimination legislation as reaffirming and perpetuating the regulatory category of 'homosexual'/'lesbian' see Bridget Gilmour-Walsh, 'Exploring Approaches to Discrimination on the Basis of Same-Sex Activity' (1994) 3 *Australian Feminist Law Journal* 117, 145-52.

[27] On the potential for claiming in Australia that sexuality discrimination is a form of sex discrimination and so unlawful on that basis: ibid 120-41. The United Nations Human Rights Committee has expressed the view that the reference to sex in the International Covenant on Civil and Political Rights includes sexual orientation: United Nations Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the Interna-*

The HREOCA is, however, extremely limited as a practical avenue of redress. It does not render discrimination on the ground of sexual preference unlawful. It merely gives the Human Rights Commissioner power to hold an inquiry into a complaint and to attempt to effect a settlement by conciliation. There is no recourse to compulsory adjudication. Thus, a recalcitrant employer is not penalised if she or he declines to take part in efforts to resolve the dispute. The Commissioner's report, produced at the conclusion of the inquiry, cannot be enforced in a court.[28] The voluntary nature of the HREOCA has meant that it is a largely ineffective means of redress for complainants alleging discrimination in employment, particularly for employees in the private sector.[29]

B *Intersectionality and the Range of Proscribed Grounds*

Issues relating to intersecting oppressions arise for lesbians and for many gay men. Most obviously, lesbians experience life through the oppressions of sex discrimination and sexuality discrimination simultaneously.[30] Gay men's experiences may take place at an intersection between sexuality oppression and oppression associated with HIV/AIDS status.[31] Other systems of oppression based on, for example, race, ethnicity, class background, age, physical and intellectual impairment also disadvantage many gay men and lesbians.[32]

tional Covenant on Civil and Political Rights — Fiftieth Session, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) para 8.7. Using sex discrimination provisions to challenge discrimination against gay men and lesbians has been explored at length in the USA. Such a claim has, however, never succeeded before the American courts: see, eg, *De Santis v Pacific Telephone and Telegraph Co Inc* 608 F 2d 327 (1979), 329; *Smith v Liberty Mutual Insurance Co* 569 F 2d 325 (1978), 326-7; see also Samuel Marcosson, 'Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII' (1992) 81 *Georgetown Law Journal* 1; I Bennett Capers, 'Sex(ual Orientation) and Title VII' (1991) 91 *Columbia Law Review* 1158; Fajer, above n 16, 633-50; see also Ruthann Robson, who argues that asserting that 'sex discrimination includes sexual orientation subordinates lesbianism to feminism': *Lesbian (Out)Law: Survival Under the Rule of Law* (1992) 84-6. For an English analysis, see David Pannick, 'Homosexuals, Transsexuals and The Sex Discrimination Act' [1983] *Public Law* 279.

28 Where an allegation of discrimination has been found to be substantiated, a copy of the report is provided to the federal Attorney-General.

29 Kim Rosser, paper given at a seminar on Indirect Discrimination and the Sex Discrimination Act, Equal Opportunity Commission (Vic), Melbourne, 21 June 1991, referred to in Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992) 287.

30 If indeed a distinction can be drawn between the subordination of women and the oppression of lesbians. For examples of the harassment of lesbians in their paid working lives which reveal elements of both homophobia and misogyny, see GLAD, above n 1, 11; Lavender, above n 15, 29. As to the relationship between sexism and heterosexism generally, see Rich, above n 11, 235 (and MacKinnon referred to therein); Gilmour-Walsh, above n 26 (and the analyses referred to therein); see also, Suzanne Pharr, *Homophobia: A Weapon of Sexism* (1988).

31 The harassment of gay men is often tied to HIV and often includes references to gay men 'spreading AIDS': Anti-Discrimination Board of New South Wales, *HIV & AIDS in the Workplace: What You Should Know* (1992); see also Anti-Discrimination Board of New South Wales, *Annual Report (1991-92)* 11; New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 13, 67; see *contra Jobling* (1993) EOC ¶ 92-554, where, although it appeared that Jobling believed that his experiences were triggered by a combination of his HIV status and sexuality, the South Australian Equal Opportunity Tribunal found that the motivating factor was his sexuality and not his HIV status.

32 Gay men and lesbians who are disadvantaged by more than one system of oppression may feel able, in some instances, to attribute the unfair conduct they experience to a particular system or systems of oppression. In other instances, they may not be able to do so. For example: '[a]s a person who is Black and female and lesbian all of the time and all at the same time, I cannot al-

Complainants who believe that the unfair treatment they experienced was a manifestation of intersecting oppressions may encounter difficulty in bringing the instance complained of within the scope of anti-discrimination legislation. This difficulty does not appear to arise so obviously where all the applicable systems of oppression are represented by proscribed grounds in the statute under which the complaint is lodged.[33] However, it may arise where the proscribed grounds in the statute do not cover all the forms of oppression and unfair conduct which lesbians and gay men may encounter.

A simple example will illustrate this potential problem. The scenario involves a lesbian complainant in Victoria, Western Australia or Tasmania who believes that the basis of her being refused a promotion was a combination of her sex and sexuality. She faces the limitation that in these states, only sex discrimination is proscribed,[34] whereas sexuality discrimination is not. This may give rise to difficulty in establishing the required causal connection with the ground of sex, a difficulty compounded under the Equal Opportunity Act 1984 (Vic) ('EOA (Vic)'), where she would be required to establish that her sex was 'a substantial reason' for the conduct complained of.[35]

A respondent to such a complaint may argue that the complainant's lesbianism was the sole reason or, in Victoria, the only substantial reason, for refusing her the promotion. The strength of this argument would of course depend largely on the evidence adduced. Part of this factual material might be the timing of the conduct complained of. Had the complainant received annual promotions up until the time when the respondent discovered her lesbianism, it may strengthen the respondent's argument that she was refused a promotion because of her lesbianism, rather than her gender as such. Other factual material might include evidence of the respondent's views on lesbianism, the respondent's conduct towards women in the workplace generally and the gender composition of the respondent's workforce, particularly at levels more senior than the complainant's present level.

Another example of this potential problem is provided by the situation of a South Australian gay man who is dismissed due to a combination of being gay and asymptomatic HIV positive.[36] Such a complainant appears to have recourse under the Equal Opportunity Act 1984 (SA) ('EOA (SA)') to a sexuality ground

ways compartmentalise and distinguish either the oppression or the injury': Angela Gilmore, 'It is Better to Speak' (1991) 6 *Berkeley Women's Law Journal* 74, 74-5.

33 See, eg, *Fares v Box Hill College of TAFE & Ors* (1992) EOC ¶ 92-391, in which a woman of non-English speaking background successfully claimed under both the ground of sex and the ground of race in the EOA (Vic). Cf *Jobling* (1993) EOC ¶ 92-554, where, although the complaint was lodged under both the EOA (SA) sexuality ground and the impairment ground, the Tribunal found that the complainant's HIV status was not a motivating factor in the action complained of. The complainant's sexuality motivated the respondent's conduct.

34 EOA (Vic) s 4(1)(a) definition of 'status'; EOA (WA) s 8; Sex Discrimination Act 1994 (Tas) (commenced 27 September 1995).

35 The EOA (Vic) requires complainants to establish that at least one ground alleged in the complaint was 'a substantial reason' for the conduct complained of: EOA (Vic) s 4(7). In contrast, the EOA (WA) requires only that complainants establish that at least one of the grounds alleged in the complaint was 'one of the reasons' for the action complained of, whether or not the dominant or substantial reason: EOA (WA) s 5.

36 *Contra Jobling* (1993) EOC ¶ 92-554.

only.[37] The problem is that any claim of sexuality discrimination may be answered by a successful argument on the part of the respondent that the sole substantial reason for the dismissal was the complainant's HIV status, not his sexuality.[38] The success of this argument depends again on the persuasiveness of the evidence put forward at the adjudication.

Complainants who experience intersecting oppressions may, then, encounter difficulty in bringing their complaints within the proscribed grounds of the statute under which they lodge their claim. They are likely to encounter such difficulty where the grounds in the relevant statute do not cover all the systems of oppression present in the conduct of which they complain.[39]

C *Intersectionality and the Statutory Concept of Direct Discrimination*

Issues relating to intersecting oppressions may present problems for lesbian and gay complainants, not only in terms of the range of proscribed grounds, but also in relation to the statutory concept of direct discrimination. In most of the proscriptive statutes this concept encompasses the idea of a comparison.[40] It places the onus on the complainant to establish that she or he was treated less favourably than a member of the comparison group was, or would be, treated by the respondent in the same (or not materially different) circumstances.[41]

The way that the comparison group is drawn, therefore, is pivotal in establishing the occurrence of proscribed conduct. This is itself problematic in that the

[37] The impairment ground in the EOA (SA) does not appear to cover a person who is HIV positive and asymptomatic in the sense of having no apparent illnesses (the definition of 'physical impairment' in EOA (SA) s 5(1)). In practice, however, the administering agency in South Australia does accept complaints from people who are HIV positive but do not have AIDS or a related condition: Commissioner for Equal Opportunity (SA), *Seventeenth Annual Report of the Commissioner for Equal Opportunity (1992-93)* 23.

[38] He could alternatively claim under the Disability Discrimination Act 1992 (Cth) ('DDA'). It clearly covers people who are asymptomatic HIV positive (DDA s 4(1)) and provides that disability need only be 'one of the reasons' for doing the act, 'whether or not the ... the dominant or a substantial reason' (DDA s 10). A claim under this Act may of course be answered by the employer asserting that sexuality was the only motivating factor behind the less favourable treatment, not HIV status.

[39] An analogous problem arises in relation to the proscriptive statutes at federal level: the SDA, the Racial Discrimination Act 1975 (Cth) and the DDA. In essence each proscribes one system of oppression only. See further, Australian Law Reform Commission, *Equality Before The Law: Justice For Women*, Report No 69 (Part I) (1994) 63-9; see also, Association of Non-English Speaking Background Women of Australia, *Race and Sex Discrimination in Employment and Training*, Policy Paper No 3 (1994). It is noted that the proposal of the Australian Democrats for a Commonwealth Act proscribing discrimination on the ground of sexuality may give rise to an analogous problem for complainants: Spindler, above n 6.

[40] ADA (NSW) s 49ZG(1)(a); ADA (Qld) s 10(1); ADA (NT) s 20(2). Two of the statutes refer instead to the concept of being treated 'unfavourably' on the ground of sexuality: EOA (SA) s 29(3)(a); DA (ACT) s 8(1)(a). See also, ADA (NT) s 20(1) which includes, in the concept of discrimination, any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity.

[41] As to the effect of this comparative process in reinforcing the *status quo* by setting up heterosexuality as the norm and homosexuality as the dichotomous 'other', see Gilmour-Walsh, above n 26, 141-5. See also Margaret Thornton, 'The Seductive Allure of EEO' in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (1994) 215; Margaret Thornton, 'The Indirection of Sex Discrimination' (1993) 12 *University of Tasmania Law Review* 88, 90.

methodology used to create comparison groups under the sexuality grounds appears to be far from settled, particularly in relation to complaints in which issues of HIV/AIDS are present.[42] For example:

> A highly qualified man [John] applied for a nursing position, and was told that he was considered suitable. He was then unexpectedly asked if he was homosexual. He was taken off-guard and replied yes, and he was then told that he would need to provide evidence of his HIV status, and that his employment was dependent upon him being HIV negative.[43]

In such a situation, should John choose to pursue his claim under a sexuality ground,[44] he would presumably argue that the comparison group is similarly qualified and suitable job applicants who were not thought by the employer to be homosexual. It is likely that such applicants would not be required to provide evidence of their HIV status as a precondition to employment.

The employer may attempt to refute this analysis by identifying the group of people with whom John's treatment is to be compared not as heterosexual job applicants as such, but rather as job applicants from other 'high risk groups' such as haemophiliacs and intravenous drug users. The employer would then argue that John was treated no differently from any other job applicant for the position, whether heterosexual or not, who was discovered to have haemophilia or to be an injecting drug user.

It is far from clear which submission would be accepted by a tribunal[45] as being the correct interpretation of the requirements of the statute. Support exists for both views.

Constructing the comparison group as intravenous drug users and people with haemophilia has the support of *Ferguson v Central Sydney Area Health Service & Anor*,[46] a 1990 decision of the New South Wales Equal Opportunity Tribunal. The complaint involved a gay man whose elective surgery was postponed by the surgeon after his sexuality became known to a hospital intern. The Tribunal held that the appropriate comparison group by which to assess discriminatory treatment in such a case was not heterosexual patients as such, but patients in other

[42] This is not to suggest that the methodology of drawing comparison groups under other grounds does not, on occasion, cause problems: see, eg, *Borenstein v Lynch* (1994) EOC ¶ 92-597; *Jamal v Department of Health* (1986) EOC ¶ 92-162 and on appeal, *Jamal v Secretary, Department of Health* (1988) EOC ¶ 92-234 (analysed in Hilary Astor, 'Anti-Discrimination Legislation and Physical Disability: The Lessons of Experience' (1990) 64 *Australian Law Journal* 113, 119-22; Hilary Astor and John Nothdurft, 'Anti-Discrimination Law and Physical Disability: A Leap in the Dark' (1986) 11 *Legal Services Bulletin* 250, 251-2).

[43] New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 25. For two examples of employers requiring particular employees to produce medical certificates stating whether or not they are HIV positive/have any infectious diseases, see Privacy and HIV/ AIDS Working Party, *Report of the Privacy and HIV/AIDS Working Party* (1992) 40, 45.

[44] He may, alternatively, lodge a complaint under a ground of imputed HIV status.

[45] The word 'tribunal' is used in this article in the generic sense to refer to the Victorian Equal Opportunity Board (EOA (Vic)); the NSW Equal Opportunity Tribunal (ADA (NSW)); the Queensland Anti-Discrimination Tribunal (ADA (Qld)); the SA Equal Opportunity Tribunal (EOA (SA)); the WA Equal Opportunity Tribunal (EOA (WA)); the ACT Discrimination Commissioner (DA (ACT)); the NT Anti-Discrimination Commissioner (ADA (NT)).

[46] (1990) EOC ¶ 92-272 ('*Ferguson*').

'high risk groups', such as haemophiliacs and intravenous drug users, whether they be heterosexual, lesbian or gay. Constructing the comparison group in this way led the Tribunal to find that the complainant had not been treated any differently from any other patient, whether heterosexual or not, discovered to be in a 'high risk group' on the day of the operation.

For a number of reasons such a construction of the comparison group should be rejected. Although the phrase 'high risk groups' continues to be used in public discourse, it is based on concepts that are both inaccurate and harmful. It suggests that gay men *per se* are at risk of HIV transmission and, inferentially, that everyone else is not. This is incorrect. It is unsafe sexual activity (and other exchanges of bodily fluids) which places persons at risk, not whether they are gay, lesbian or heterosexual. The thinking behind the phrase implicitly justifies discriminatory treatment of gay men on the ground that they 'spread AIDS'.[47]

The construction should also be rejected because it means that respondents who treat the members of different outsider groups[48] equally badly may not have engaged in proscribed conduct against any of them. In other words, on this interpretation, the relevant statute is not contravened where a respondent treats the complainant the same as a member of the comparison group, where the comparison group is itself an outsider group that raises similar prejudices and fears in the respondent.

Such a construction does not accord with the intention of the Parliaments which enacted the various statutes.[49] The intention was clearly that all people in the same or similar circumstances be treated equally in the sense that no-one is treated less favourably than anyone else.[50] The view that the comparison group should be similarly qualified, suitable job applicants who were thought by the employer to be heterosexual, is supported both by the wording of some of the statutory provisions,[51] as well as other decisions in this area.[52] In one case,

47 See New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 125.

48 Mari Matsuda suggests the terminology 'outsider' group in preference to 'minority' group in recognition of the fact that the groups referred to are often numerically the majority: Mari Matsuda, 'Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Land' (1988) 11 *Harvard Women's Law Journal* 1.

49 A mandatory purposive approach to statutory interpretation is to be found in the Interpretation Act 1987 (NSW) s 33; Acts Interpretation Act 1954 (Qld) s 14A; Acts Interpretation Act 1915 (SA) s 22; Interpretation Act 1967 (ACT) s 11A.

50 See, eg, the long titles to: the ADA (NSW) ('to promote equality of opportunity between all persons'); the ADA (Qld) ('to promote equality of opportunity for everyone' and see the lengthy preamble, especially clauses (6)(a) and (7)); the EOA (SA) ('to promote equality of opportunity between the citizens of this State'); and the ADA (NT) ('to promote equality of opportunity in the Territory'). See also DA (ACT) s 3(d); ADA (NT) s 3(a) which set out the objects of those two statutes.

51 The wording of some of the sexuality provisions point to sexual orientation as the defining characteristic of the comparison group, not the perceived likelihood of being exposed to HIV: ADA (NSW) s 49ZG(1)(a); ADA (Qld) s 10(1); ADA (NT) s 20(2). Both the ADA (NSW) pre-August 1994 wording and post-August 1994 wording are the clearest in this respect. The current provision requires that the treatment of the complainant be compared to the treatment that was or would have been received by 'a person who ... [the respondent] did not think was a homosexual person': ADA (NSW) s 49ZG(1)(a). In contrast, the EOA (SA) and DA (ACT) do not expressly require a comparison as such. Rather, they proscribe John being treated unfavourably because of his sexuality: EOA (SA) s 29(3)(a); DA (ACT) s 8(1)(a).

brought under the impairment ground of the Equal Opportunity Act 1984-1992 (WA) ('EOA (WA)'), Anderson J of the Supreme Court of Western Australia rejected the appellant's submission that the appropriate comparison group was comprised of people whose 'presence would excite the very same fears, prejudices or emotions'.[53]

The methodology of drawing comparison groups appears then to be an area of some uncertainty in relation to the sexuality grounds. As illustrated in *Ferguson*, this uncertainty may create unpredictability in the outcome of complaints.

D *Exemptions*

A number of different exemptions may apply to narrow the ambit of the legislation in relation to complaints that gay and lesbian workers may wish to bring. The main exemptions include provisions relating to working with children,[54] less favourable treatment based on the complainant's appearance or dress,[55] employment with religious institutions,[56] and work in a private household[57] or small businesses with less than three or five employees.[58] In addition, the different statutes provide a number of exemptions specific to the impairment grounds which may be relevant to a gay, or (less likely) lesbian complainant who brings a complaint on the ground of actual or imputed HIV/AIDS status.[59]

[52] *Daniels v Hunter Water Board* (1994) EOC ¶ 92-626, 77, 343; *City of Perth & Ors v DL, Acting as Representative of All Members of People Living with AIDS (WA) Inc* (1992) EOC ¶ 92-466, 79, 337; *City of Perth & Ors v DL (Representing the Members of People Living with AIDS (WA) Inc) & Ors* (1994) EOC ¶ 92-634, 77, 387-8. Note also that a complaint alleging similar facts to those raised by *Ferguson* was recently settled during the hearing before the New South Wales Tribunal: *G v L* (1995) EOC ¶ 92-712. See also, Steve Dow, 'Anger at Pre-Surgery AIDS Test Order', *Age* (Melbourne), 2 March 1995.

[53] *City of Perth v DL, Acting as Representative of All Members of People Living with AIDS (WA) Inc* (1992) EOC ¶ 92-466, 79,337. Murray J in a later appeal in this complaint agreed with the view expressed by Anderson J: *City of Perth v DL (Representing the Members of People Living with AIDS (WA) Inc)* (1994) EOC ¶ 92-634, 77, 387-8.

[54] ADA (Qld) s 28; ADA (NT) s 37.

[55] EOA (SA) s 29(4). A similar exemption has been suggested in Victoria: Green, above n 25. The recommended exemption will allow employers to 'set standards regulating appearance and/or behaviour and, provided that the standards are reasonable in the circumstances, ... will not be taken to be unlawful discrimination': Scrutiny of Acts and Regulations Committee (Vic), above 25, 23. Note that the Law Reform Commission of Victoria recommended the inclusion of a sexuality ground without any exemptions specific to it, as did the Western Australian Commissioner for Equal Opportunity: Law Reform Commission of Victoria, above n 25, 24-5, 69, 187; Western Australian Commissioner for Equal Opportunity, above n 25, v.

[56] EOA (Vic) s 38; ADA (NSW) s 56; ADA (Qld) ss 29, 109; EOA (SA) s 50; EOA (WA) s 72(d); DA (ACT) s 32; ADA (NT) s 51.

[57] EOA (Vic) ss 21(4)(a), (j); ADA (NSW) s 49ZH(3)(a); ADA (Qld) s 26; EOA (SA) ss 34, 71(1); EOA (WA) s 66B(3); DA (ACT) s 24; ADA (NT) s 35(2).

[58] EOA (Vic) s 21(4)(f); ADA (NSW) s 49ZZH(3)(b).

[59] The main ones include:

- exemptions relating to the protection of public health: DDA (Cth) s 48; EOA (Vic) s 39(da); ADA (NSW) s 49P (which took effect from 8 August 1994); ADA (Qld) s 107; DA (ACT) s 56; ADA (NT) s 55);
- the protection of the complainant as well as other people at the workplace: EOA (Vic) s 21(4)(h); ADA (Qld) s 108; EOA (SA) s 71(2)); and
- the inability of the complainant to perform the work required (reasonable accommodation by the employer): DDA (Cth) s 15(4); EOA (Vic) s 21(4)(g); ADA (NSW) s 49D(4); ADA (Qld) ss 35, 36; EOA (WA) s 66Q(1); DA (ACT) s 49 (1); ADA (NT) ss 35(1)(b), 58.

The exemptions relating to working with children and appearance or dress relate solely to the sexuality ground. They are perhaps the most contentious, and certainly the most obscure, of the exemptions that may be relevant to complaints brought by lesbian and gay complainants. For these reasons their scope is analysed.

1 *Working With Children*

Both the Anti-Discrimination Act 1991-1992 (Qld) ('ADA (Qld)') and Anti-Discrimination Act 1992 (NT) ('ADA (NT)') exempt discrimination on a sexuality ground where the work involves the care or instruction of minors[60] and the discrimination is reasonably necessary to protect the physical, psychological or emotional well-being of minors having regard to all the relevant circumstances of the case, including the person's actions.[61]

The meaning of this exemption is far from clear. It does not appear to have ever been raised in a reported decision of the Queensland Anti-Discrimination Tribunal or the Northern Territory Anti-Discrimination Commissioner and so no help can be gained from decided cases as to its interpretation and breadth. The parliamentary debates dealing with this exemption do, however, offer some guidance as to its meaning.[62]

The last element of the exemption, 'having regard to all the relevant circumstances, including the person's actions'[63] was inserted by the Queensland Legislative Assembly during the Committee stage of debate on the Anti-Discrimination Bill 1991 (Qld).[64] The amendment was moved by the then Attorney-General as a result of approaches made to him by teachers concerned about the impact of the exemption.[65] The Attorney-General explained the intention of the amendment as being 'so that this clause will be a clause that can be used in respect of actual behaviour and the actual actions of the person concerned, and not just on the basis of ... some rumour'.[66]

On this view, respondents should be required to prove more than that a worker is a lesbian or a gay man in order to justify excluding her or him from working with children. Respondents should be required to establish, on the balance of probabilities, facts about the conduct or behaviour of the complainant which lead to the conclusion that the discriminatory treatment is reasonably necessary to

Note however that in 'the vast majority of occupations and occupational settings, work does not involve a risk of acquiring or transmitting HIV between workers, or to members of the public': Worksafe Australia, *National Consensus Statement on AIDS and the Workplace* (1988) 1; see also Worksafe Australia, *National Consensus Statement on HIV Infection/AIDS and the Workplace* (1993).

60 A 'minor' or 'child' is a person who is under 18 years of age: see Acts Interpretation Act 1954 (Qld) s 36; ADA (NT) s 4(1).

61 ADA (Qld) s 28; ADA (NT) s 37.

62 As such the debates point the way to the mandatory purposive approach to statutory interpretation: Interpretation Act 1987 (NSW) s 33; Acts Interpretation Act 1954 (Qld) s 14A; Acts Interpretation Act 1915 (SA) s 22; Interpretation Act 1967 (ACT) s 11A.

63 ADA (Qld) s 28(b).

64 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 December 1991, 3609.

65 Ibid.

66 Ibid.

protect the physical, psychological or emotional well-being of children.

On this interpretation, the additional words just spell out what ought to have been implicit in the clause as it originally stood; that to bring the exemption into effect respondents must establish facts rather than rely on prejudice, stereotypical assumptions and rumour about gay men and lesbians generally, and/or the complainant in particular. Unsubstantiated accusations have never been sufficient to establish either a contravention of the Act, or that one of the exemptions applies.[67]

An almost identically worded exemption was included in the Bill presented to the Northern Territory Parliament some nine months after the Queensland Act received assent.[68] In his second reading speech the Minister presenting the Northern Territory Bill voiced what may, at first glance, appear to be a relatively narrow interpretation of this exemption. He said:

> Persons in specific employment situations to which I have referred [working with children] who act appropriately in the course of their employment have nothing to fear from the legislation. It is only those who engage in improper conduct relating to their sexuality in the course of their employment who will be affected .... [I]t does mean that those people who do not conduct themselves in a proper manner in the course of their employment and who are involved in the education, care or supervision of children, whatever their sexual preference, will not be able to hide behind the provisions of the legislation by claiming that they are being discriminated against on the basis of their sexuality.[69]

On this interpretation, the exemption contains two components: firstly, 'improper conduct relating to ... sexuality' and secondly, 'in the course of employment'.[70] The real issue then is what would amount to 'improper conduct' in the sense used by the Minister.

It is clear that the exemption was seen by the Northern Territory Legislative Assembly as primarily relevant to lesbian and gay school teachers.[71] Moreover, the debates indicate that the conduct at which the exemption is directed is that which 'promotes' gay and lesbian 'lifestyles'. The concern was with gay and

[67] For example, respondents seeking to rely on an exemption to an impairment ground are required to establish facts which render the exemption applicable: see, eg, *Waters v Public Transport Corporation* (1991) 173 CLR 349.

[68] As to the process of consultation in relation to the sexuality provisions in the Northern Territory Bill generally, see Camilla Hughes, 'Calling all Ratbags and Paint Throwers' (1993) 18 *Alternative Law Journal* 92.

[69] Northern Territory of Australia, *Parliamentary Record*, Legislative Assembly, 1 October 1992, 6525.

[70] On this view, charges and convictions arising out of 'beat' sex which took place outside work hours would appear to be irrelevant.

[71] Although the debates include some references and discussion of heterosexual teachers as being within the ambit of this exemption, it is clear that the exemption was viewed as being of primary application to gay and lesbian school teachers: Northern Territory of Australia, *Parliamentary Record*, Legislative Assembly, 1 October 1992, 6525; Northern Territory of Australia, *Parliamentary Record*, Legislative Assembly, 17 November 1992, 6662-4, 6670, 6677, 6680-1, 6686-7, 6689-97, 6710-2. There was little debate on the meaning of this exemption in the Queensland Legislative Assembly: Queensland, *Parliamentary Debates*, Legislative Assembly, 3 December 1991, 3576, 3598-9, 3608-9.

lesbian teachers 'proselytising'.[72]

What conduct would be seen as 'promoting' gay and lesbian sexuality or 'proselytising'? What of a lesbian teacher who reveals, in response to a class discussion about relationships, that her partner is a woman and that she is happy in this relationship? Is she 'promoting' her 'lifestyle' such as to render the exemption applicable? It seems likely that the answer is 'yes'. Indeed the presentation of any positive information about gay men and lesbians which presents gay and lesbian lives and choices as valid may be viewed by an adjudicative body as triggering the exemption. The debates reveal an underlying view that any positive representation of gay and lesbian sexuality poses a threat to the well-being of children, constituting, by its nature, an unreasonable risk.[73]

In this sense, then, the effect of the exemption is to permit the oppression of gay and lesbian school teachers in the form of enforced self-censorship and duplicity. People whose work involves the care or instruction of minors enjoy the protection of the relevant sexuality ground only so long as they do not reveal their sexual orientation to the children they care for. In this way, the exemption substantially reduces the scope of protection which is afforded gay men and lesbians in Queensland and the Northern Territory.

2 *Appearance or Dress*

The EOA (SA) exempts discrimination that is reasonable in all the circumstances and which is based on appearance or dress that is characteristic of, or an expression of, a person's sexuality.[74]

This exemption did not appear in the original Bill. During the Committee stage in the Legislative Council, a clause was inserted to exempt discrimination that is reasonable and which is based on the 'appearance or dress or the manner in which he [sic] behaves'.[75] This amendment was moved by Mr Lucas. He explained the rationale for the amendment in the following way:

> If the employment of ... a homosexual, bisexual or transsexual is driving customers and potential customers away from a small business, it is not fair on the employer that he or she should be penalised for the prejudiced views of customers and potential customers.[76]

As to the meaning of the clause, which was drafted by Parliamentary Counsel, he explained that if

[72] See, in particular, Northern Territory of Australia, *Parliamentary Record*, Legislative Assembly, 17 November 1992, 6681, 6687, 6694-6, 6710-2. The Minister for Public Employment pointed out that the Northern Territory public education system curricula promotes a heterosexual lifestyle: Northern Territory of Australia, *Parliamentary Record*, Legislative Assembly, 17 November 1992, 6695.

[73] See, in particular, Northern Territory of Australia, *Parliamentary Record*, Legislative Assembly, 17 November 1992, 6681, 6687, 6694-6, 6710-2. The legislative requirement of reasonableness does not appear, from the debates, to have been given any content.

[74] EOA (SA) s 29(4). Such an exemption appears likely to be introduced into the Victorian Act: Scrutiny of Acts and Regulations Committee (Vic), above n 25, 23.

[75] South Australia, *Parliamentary Debates*, Legislative Council, 31 October 1984, 1640-1.

[76] South Australia, *Parliamentary Debates*, Legislative Council, 25 October 1984, 1507.

> the appearance, dress or behaviour of an employee clearly was having or was likely to have a significantly detrimental effect on the business, if the employer was to take action either not to employ or to sack, and if that person went to the Tribunal ... the employer would have a good chance of making out the grounds that what they had done was reasonable.[77]

He went on to explain that

> if an employer chose not to employ or to sack someone who came along wearing a red and white shirt and an earring, from my discussions [with Parliamentary Counsel] it would appear — and I would agree — that it would be unreasonable for that person to be acted against by the employer on the grounds of wearing a red and white or a pink shirt and possibly an earring.[78]

After the amendment was rejected by the Legislative Assembly a compromise was reached which saw the exemption, minus the reference to the manner in which the complainant behaves, passed. These words were rejected as being 'too broad ... and ... [because] it was sufficient to confine it [the exemption] to appearance or dress'.[79]

It is apparent, then, that this exemption has, in effect, two parts: firstly, being identified or identifiable by clients and potential clients as a lesbian or a gay man, and secondly, that this visibility is sufficiently bad for business to render the employer's discriminatory conduct reasonable. In other words, it is not enough for the complainant to look gay or lesbian, whatever that might mean. A respondent must establish that this visibility is sufficiently detrimental to the business in order to render discrimination reasonable.

Reasonableness appears, however, to be a problematic concept.[80] The concern is that reasonable behaviour by respondents may leave lesbians and gay men censoring their conduct and conversations at work in a way that confirms that the only acceptable, visible face of sexuality is heterosexuality. In this respect the exemption conveys a similar message to that contained in the ADA (Qld) and ADA (NT) exemption: lesbian sexuality and gay male sexuality should be kept hidden.

In addition to the concerns and uncertainties over the scope of these exemptions, in different respects both of them reflect, and so reinforce, the very myths and prejudices that the legislation purportedly addresses. The ADA (Qld) and ADA (NT) provisions imply that there is an inherent risk involved in employing gay men and lesbians to work with children. The EOA (SA) provision implies

77 South Australia, *Parliamentary Debates*, Legislative Council, 31 October 1984, 1635.

78 South Australia, *Parliamentary Debates*, Legislative Council, 31 October 1984, 1635. Although red and white shirts do not appear to have any special significance in indicating lesbian and gay identity in the 1990s, the point nonetheless remains that certain clothing, jewellery and hairstyles are seen as indicating gay male/lesbian sexuality.

79 South Australia, *Parliamentary Debates*, Legislative Council, 6 December 1984, 2269 (The Hon C Summer, Attorney-General). Note that the exemption recommended in relation to the Victorian Act refers to 'appearance and/or behaviour': Scrutiny of Acts and Regulations Committee (Vic), above n 25, 23.

80 That 'reasonableness' is constructed by the views of the dominant voice has been revealed in many feminist analyses: see, eg, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 362-70: see also Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69 (Part II) (1994) 23-5.

that gay men and lesbians who are open about their sexuality are bad for business. It excuses and so condones public resistance to lesbian and gay visibility in workplaces.[81] In the result, these exemptions seriously undermine the scope, as well as the educational value, of the sexuality grounds in the ADA (Qld), ADA (NT) and EOA (SA).

These are the main deficiencies in the scope of the different statutory schemes which purport to provide redress to gay men and lesbians who experience unfair treatment in their working lives. Importantly, proscribed sexuality grounds are not available in all states. Even in those states where they are available, the statutory concept of discrimination on the ground alleged may take effect to narrow the ambit of the relevant statute. In addition, the range and potential width of the exemptions provided in some of the statutes in relation to the sexuality ground further reduce the effectiveness of the legislation in providing redress for the workplace oppression of lesbians and gay men. Other exemptions, both in relation to particular workplaces and those relevant to the impairment grounds, may operate to place the conduct complained of outside the ambit of the Act.

A number of interrelated and complex procedural problems further limit the usefulness of legislative rights, such as they are, for gay and lesbian workers.[82] Substantial impediments exist both in invoking the complaints-based system provided in the different statutes and in following a complaint through to a resolution.

III INVOCATION AND ENFORCEMENT OF THE LEGISLATION

The reasons for the limited usefulness of the legislation are complex and lie both in the positions of lesbians and gay men in mainstream society and in more specific procedural matters associated with the legislation. Although the analysis in this part of the article focuses on the sexuality and impairment grounds[83] in the different statutes, it is by no means limited to those grounds. Many of the problems identified also apply to other grounds under which gay men and lesbians may choose to lodge their complaints.[84]

[81] The South Australian Commissioner for Equal Opportunity, Ms Josephine Tiddy, has expressed the view that this exemption is inherently discriminatory. She is of the view that it reflects stereotypical concerns about the behaviour of gay men and lesbians and contradicts the human rights philosophy of the legislation: Scrutiny of Acts and Regulations Committee (Vic), above n 25, 23.

[82] Many of these procedural matters also limit the usefulness of the legislation to the members of other outsider groups.

[83] The terminology 'impairment grounds' is used in this article to refer to the differently worded statutory formulations which cover discriminatory conduct based on actual and imputed HIV/AIDS status. See definitions of disability/impairment in: DDA (Cth) ss 4(1)(c), (d), (j), (k); EOA (Vic) ss 4(1)(a), (f); ADA (NSW) ss 4(1), 49A(b), (d); ADA (Qld) ss 4(e), 8(c); EOA (SA) ss 5(1)(a), (c), 66(a); EOA (WA) ss 4(1)(a), (e); DA (ACT) ss 4(1)(e), 7(2)(c); ADA (NT) ss 4(1)(b), (c), 20(2)(a).

[84] Other grounds which might be used by lesbian or gay complainants in relation to oppression associated with their sexuality include, for example:

- homosexual and HIV/AIDS vilification: ADA (NSW) ss 49ZT, 49ZXB;
- sex: SDA (Cth) s 5, EOA (Vic) s 4(1)(a);

The problems and limitations are explored in a broadly chronological sequence, commencing with the processes involved in naming an experience as a wrong, followed by the processes involved in deciding whether to lodge a complaint under the legislation. Finally, the main procedural impediments that arise after a complaint has been lodged are examined.

A *Naming a Wrong*

The initial trigger for all claims for redress lies in naming an experience as a wrong. Before any potential claim under the anti-discrimination legislation can arise, the practice must be perceived as a wrong by the lesbian or gay man who experienced it.[85] Not only must it be perceived as a wrong, but it must be seen as a wrong for which the employer is responsible. It must, for example, not just be seen as 'bad luck' or 'the way things are'.[86]

There is evidence which suggests that a significant amount of workplace conduct that an outside observer might label as oppressive, and which arguably falls within the scope of the legislation, is not perceived as such by the gay man or lesbian involved. GLAD found that gay men in particular were just as likely to see such experiences as 'the way things were' or 'things that happened'. Lesbians, on the other hand, were more likely to name an experience as unfair and discriminatory, a difference GLAD attributed to women's greater awareness of gender oppression.[87]

As well as awareness of gender oppression, other characteristics such as class and family background, racial or ethnic background, age, disability and political consciousness also influence whether a particular experience is perceived as a wrong by the individual concerned. These characteristics construct the person's sense of entitlement to, and expectation of, fair treatment. Given the context of lesbian and gay working lives today it comes as no surprise to find that many gay men and lesbians do not feel that sense of entitlement in their working lives.

It seems probable that some forms of oppression are named as a wrong less frequently than are other types of oppression. A requirement that gay and lesbian workers censor themselves seems less likely to be labelled as a wrong than, for

- definition of 'status': ADA (NSW) s 24, ADA (Qld) s 7(1)(a), EOA (SA) s 29(2), EOA (WA) s 8, DA (ACT) s 7(1)(a), ADA (NT) s 19(1)(b);
- political beliefs or activities: EOA (Vic) s 4(1); see, eg, *Thorne* (1986) EOC ¶ 92-182;
- definition of 'private life': ADA (Qld) s 7(1)(j), EOA (WA) s 53, DA (ACT) s 7(1)(h), ADA (NT) s 19(1)(n).

85 On the subjectivity involved in naming experiences as discrimination or harassment, see Kate Painter, 'Violence and Vulnerability in the Workplace: Psychosocial and Legal Implications' in Davidson and Earnshaw, above n 11, 159, 160-1.

86 These processes have been labelled 'naming' (perceiving that a particular experience was injurious) and 'blaming' (attributing an injury to the fault of another): William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming and Claiming ...' (1981) 15 *Law and Society Review* 631.

87 GLAD, above n 1, 34. The Anti-Discrimination Board of New South Wales found similar apathy amongst people with HIV and AIDS. The Board found that for many of these people discrimination is so extensive that it is simply accepted as part of life: New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 1.

example, a dismissal of, or a refusal to promote, a gay or lesbian worker.[88] This seems probable given that almost all gay and lesbian workers experience some level of enforced self-censorship. Lesbians and gay men may expect and accept the need to censor themselves and, as noted above, see it as 'par for the course'. Oppression in the form of self-censorship is accordingly internalised so that it 'does not happen.'[89]

Even if oppression is recognised and named, the lesbian or gay worker may not view the employer as responsible for it. It may be seen more as a problem of society than the responsibility of an employer. This seems particularly likely in relation to self-censorship which is a feature of many aspects of gay and lesbian lives. As well as at work, the need to censor actions may be felt by gay men and lesbians in restaurants, hotels, on public transport and in relationships with parents and neighbours.

B *Deciding Whether to Lodge a Complaint*

Even where an experience is recognised as a wrong, and a wrong for which the employer is responsible, a lesbian or gay worker may, for a variety of reasons, not lodge a complaint under the legislation.[90] This comes as no surprise. It

88 Overt discrimination such as dismissing a worker on the stated ground that she was seen outside a lesbian nightclub is obvious to both employer and the dismissed worker. Systemic discrimination, on the other hand, is less obvious. The concept of indirect discrimination is not one which seems to have entered popular consciousness as being discriminatory, let alone unlawful: Hunter, above n 29, xxiii.

89 Meanings ascribed to actions are not fixed. They are constructed and negotiated in interactive situations between individuals: Michael Haralambros, *Sociology: Themes and Perspectives* (3rd ed, 1990) 16-8. The meaning ascribed then, by a lesbian or gay man to conduct or practices in the workplace is created, developed and modified by interaction with others such as friends, lovers and co-workers. If most lesbians and gay men experience enforced self-censorship in their working lives, and most heterosexual people take the view that lesbians and gay men should censor their sexuality in public, then concealment is seen as 'natural' and the standard from which unfairness is measured: see Fajer, above n 16, 570-91.

90 The data on complaints lodged under the sexuality and impairment grounds (below) suggests that few complaints are lodged relative to the indications that almost half of all gay and lesbian workers report incidents of unfair treatment at work (GLAD, above n 1, 10) and relative to the large number of complaints made to organisations such as the AIDS Council of New South Wales. In its submission to the 1992 Inquiry into HIV and AIDS Related Discrimination the Council outlined 430 complaints it had received of potentially discriminatory conduct: New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 114; Helen Watchirs, *HIV/AIDS and Anti-Discrimination Legislation* (1991) 15 (paper prepared for the Intergovernmental Committee on AIDS, Legal Working Party).

In 1993-1994, only 55 complaints (representing 3% of all complaints) were lodged under the ADA (NSW) sexuality ground. A further 7 complaints relating to HIV/AIDS were lodged under the impairment ground. In 1992-1993 the figure was 72 complaints in total under the sexuality ground and the impairment ground that related to HIV/AIDS (representing 5% of all complaints): Anti-Discrimination Board of New South Wales, *Annual Report (1993-94)*, above n 15, 24; Anti-Discrimination Board of New South Wales, *Annual Report (1992-93)* 17-20. For earlier years see New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 116; Louise Thornthwaite, 'The Operation of Anti-Discrimination Legislation in New South Wales in Relation to Employment Complaints' (1993) 6(1) *Australian Journal of Labour Law* 31, 36. In South Australia, sexuality complaints accounted for 3% of all complaints lodged in 1992-1993 (approximately 27 complaints). In addition 3 complaints relating to HIV/AIDS were lodged under the impairment ground. In 1991-1992 1% of all complaints were lodged under the sexuality ground (approximately 16 complaints): Commissioner for Equal Opportunity (SA), *Seventeenth Annual Report (1992-93)*, above n 37, 42; Commissioner for Equal Opportunity

reflects the lack of access to the law generally by gay men and lesbians. As with other outsider groups, lesbians and gay men in Australia have generally not used the law as a means of enforcing substantive rights. On the contrary, the law has been, and largely remains, a mechanism of oppression.[91]

That most complaints under the sexuality grounds are lodged by men also comes as no surprise.[92] It reflects the relative positions of men and women in society and their differential access to the law generally.[93] It also seems to indicate that lesbians prefer to bring actions under the sex ground rather than the sexuality ground.[94]

The generally negative relationships between gay men and the law and lesbians and the law provide the context in which anti-discrimination legislation operates: hetero-centricity and a general lack of understanding of gay and lesbian lives.

The administering agencies and tribunals appear to have largely failed to distinguish their services from this negative context.[95] It does not seem that they are, in the minds of potential lesbian and gay complainants, sufficiently different from, and better than, for example, the court system, to make lodging a complaint worthwhile. The perception seems to be that the agencies and tribunals lack an understanding of, or sympathy for, issues relating to lesbian and gay discrimination. This view appears to be a reflection both of the general context of legal regulation affecting gay men and lesbians as well as knowledge of the

(SA), *Sixteenth Annual Report (1991-92)* 27. For statistics on complaints lodged under the sexuality grounds in the ADA (Qld) and DA (ACT), see Human Rights and Equal Opportunity Commission, *Annual Report (1993-94)* 172, 181.

91 For example, sanctions imposed by the criminal law in relation to same-sex sexual activity, differential ages of consent, and the lack of legal status accorded to gay and lesbian relationships generally: see above nn 5, 6.

92 Prior to 1989-1990, men lodged more than 80% of the complaints made under the ADA (NSW) homosexuality ground. From 1990 on, this proportion has decreased to around 66%: Anti-Discrimination Board of New South Wales, *Annual Report (1993-94)*, above n 15, 30; Anti-Discrimination Board of New South Wales, *Annual Report (1992-93)*, above n 90, 26; New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 116. In South Australia over 90% of complaints lodged under the sexuality ground in 1992-1993 were lodged by men: Commissioner for Equal Opportunity (SA), *Seventeenth Annual Report (1992-93)*, above n 37, 42.

93 See, eg, Australian Law Reform Commission, Discussion Paper No 54, above n 6, 49-56; Australian Law Reform Commission, *Justice for Women*, above n 39, 91-157; Australian Law Reform Commission, *Women's Equality*, above n 80, ch 7 (especially para 7.3).

94 At least in New South Wales, lesbians appear to have used the sex discrimination ground in preference to the sexuality ground: Carmel Niland, 'Opening Address: The Silent Twin — Lesbian Discrimination' in Lavender, above n 15, 2; Anti-Discrimination Board of New South Wales, *Annual Report (1984-85)* 120; Anti-Discrimination Board of New South Wales, *Annual Report (1985-86)* 53.

95 The Anti-Discrimination Board of New South Wales has, however, taken a number of steps to reach lesbian and gay communities in New South Wales over the years. These are outlined below. Interestingly, and it would seem unwisely, a number of pamphlets which the Board has produced of relevance to gay men and lesbians refer to the Tribunal as a 'court'. Given the negative views generally held by lesbians and gay men towards the court system, such an association seems unwise: Anti-Discrimination Board of New South Wales, *HIV & AIDS in the Workplace: What You Should Know* (1992) 7; Anti-Discrimination Board of New South Wales, *Factsheet: Discrimination Against People Living with HIV or AIDS* (1992); Anti-Discrimination Board of New South Wales, *Lesbians and Discrimination* (1991); Anti-Discrimination Board of New South Wales, *Factsheet: Discrimination Against Lesbians and Homosexual Men is Often Against the Law* (1991).

actual experiences of the gay men who have pursued complaints under the legislation.

Importantly, unsuccessful complaints under the sexuality and impairment grounds have been widely reported in the gay and lesbian press. The very discouraging 1989 decision of *Ferguson*[96] received extensive media coverage in New South Wales with headlines such as 'Crucial Law Case Lost'[97] and 'Equal Opportunity? Huh!'[98] The decision was widely interpreted as demonstrating an unwillingness on the part of the New South Wales Tribunal to provide equal protection to gay and lesbian complainants.[99] In 1992, the New South Wales Anti-Discrimination Board found that *Ferguson* remained widely cited both by potential complainants, and by organisations working in the area of HIV and AIDS, as a reason for not lodging complaints under the legislation.[100]

The finding of the South Australian Equal Opportunity Tribunal in *Jobling*[101] was the first successful decision in Australia involving a gay man to be widely reported in the gay and lesbian press.[102] The positive impact of this decision may not have been clouded by the final outcome of the complaint, which can hardly be viewed as a success for Jobling. The case was settled before the respondent's appeal to the South Australian Supreme Court concluded, on terms including an undertaking by Jobling not to enforce the Tribunal's award of damages in his favour. This was not widely reported in the gay and lesbian press; nor was the apparent indication by the judge hearing the appeal that he would have ordered a re-hearing had the matter not settled.[103]

If *Jobling* did have a positive impact on perceptions of the agencies and tribunals, this perception appears to have been superseded, at least in Victoria, by the judgment last year in *G v Lincraft*.[104] This decision, the first in Victoria relating to HIV discrimination, received considerable media attention in the Victorian gay and lesbian communities, to the effect that the EOA (Vic) was virtually 'irrelevant' in relation to HIV and AIDS discrimination.[105]

These decisions all involved gay men. Lesbians, perceiving that tribunals are unable or unwilling to understand gay men's lives, may reason that, given the

96 *Ferguson* (1990) EOC ¶ 92-272.

97 *Sydney Star Observer* (Sydney), 22 September 1989

98 *Sydney Star Observer* (Sydney), 17 November 1989.

99 New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 97, 115.

100 Ibid.

101 *Jobling* (1993) EOC ¶ 92-554.

102 See, eg, 'Victory for Gay Teacher', *Melbourne Star Observer* (Melbourne), 26 November 1993; Kenton Penley, 'Landmark Gay Rights' Win: The Jobling Case', *Adelaide Gay Times* (Adelaide), 3 December 1993; Barbara Farrelly, 'Landmark HIV Case: "Vindicated"', *Sydney Star Observer* (Sydney), 26 November 1993.

103 Tim Leach, 'South Australian Discrimination Matter Settled' (1994) 5(1) *HIV/AIDS Legal Link* 5, 6-12.

104 (1994) EOC ¶ 92-572.

105 The reasons given for this view of the EOA (Vic) as irrelevant are not immediately apparent from the media coverage. One factor, however, is clear: the legislative amendments to the EOA (Vic) enabling the Board to award costs against an unsuccessful party. 'HIV Bias Case Lost: System Irrelevant, Say Lawyers', *Melbourne Star Observer* (Melbourne), 7 January 1994; see also 'Discrimination Case Loses Before Board', *Brother Sister* (Melbourne), 14 January 1994.

generally greater invisibility of lesbianism in society, a tribunal may be even less able to comprehend lesbian reality. There has in fact been only one reported decision involving a complainant identified as lesbian. Although this decision, *Thorne*,[106] received a high profile in the gay and lesbian press,[107] its success seems to have largely disappeared from lesbian and gay consciousness. No doubt this is in part due to its age, being pre-*Ferguson*, and in part due to it involving the ground of political activities rather than sexuality.

It can be concluded that the decisions of the tribunals have not generally been perceived by gay and lesbian communities in a positive light. A number of other factors reinforce this negativity. Apart from a number of initiatives by the New South Wales Board,[108] most of which, at least in the early days, related to gay men,[109] no administering agency has engaged in the same level of education and community outreach, as, for example, has been undertaken in relation to Koori communities and non-English-speaking background communities. Although there appears to have been a conciliation officer in New South Wales who specialised in gay and lesbian issues,[110] there have been no formal appointments of conciliation officers or liaison officers for lesbians, gay men and/or people with HIV as there have been to deal with issues relating to race and ethnicity.[111]

106 *Thorne* (1986) EOC ¶ 92-182.

107 See, eg, Kendall Lovett, 'The Alison Thorne Story', *Campaign* (Sydney), January 1987; Chris Dobney, 'Thorne Wins 3-Year Battle to Teach', *Outrage* (Melbourne), December 1986.

108 The main projects of the Anti-Discrimination Board of New South Wales in relation to lesbian and gay discrimination are its 1982 inquiry which resulted in a 650 page report, *Discrimination and Homosexuality* (1982) (which was mostly about gay men); the 1987 Lesbian Discrimination Forum which published the proceedings *What Is Lesbian Discrimination?*: Lavender, above n 15; the establishment in 1984 of the Gay Consultation, which later split into the Gay Consultation and the Lesbian Consultation, and then combined in October 1992 into the Lesbian and Gay Consultation; the establishment in the mid 1980s of a Police Gay Liaison Group (later renamed the Police Gay and Lesbian Consultation); the 1992 inquiry and report, New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10. The Board's most recent ex-President, Steve Mark, chaired the Streetwatch Implementation Advisory Committee (a committee established to examine the Gay and Lesbian Rights Lobby): Gary Cox, *Streetwatch Report: A Study into Violence Against Lesbians and Gay Men* (1990); *Report of the Streetwatch Implementation Advisory Committee* (1992).

109 Carmel Niland, former President of the New South Wales Board from 1982-1988, explained in 1987 about the lack of lesbian complainants: 'I thought that because we had a Gay Police Liaison Group and because we had a Gay Consultation, the Board was doing the right thing and the answers would emerge and the lesbians would come to us when they were ready. Now why I thought that when that strategy had never worked with any other disadvantaged group, I don't know. With any other ground we have had to reach out to the disadvantaged group and assist them, in culturally appropriate ways, to approach us. And when they have approached us we have had to assist them further to articulate what their discrimination was in legal terms': Niland, above n 94, 2.

110 According to one commentator, the Anti-Discrimination Board of New South Wales has had a conciliation officer specialising in discrimination against 'gays' (presumably including lesbians): Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 162. This suggestion is supported by two other commentators: Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (1992) 269. This specialisation does not, however, appear to have been a formal appointment, nor does it appear to have been publicised by the New South Wales Board. It is unlikely, therefore, to have positively affected the confidence of lesbian and gay communities in the New South Wales legislation.

111 For example, the positions of conciliation officer (Aboriginal) and investigation/education officer (Aboriginal) exist in NSW: Anti-Discrimination Board of New South Wales, *Annual Report (1993-94)*, above n 15, Appendix ii; Victoria has the positions of Koori outreach project officer, Koori conciliator and Koori investigator: Equal Opportunity Commission Victoria, *An-*

One of the most important reasons, if not the main reason, for the relative lack of recourse to the sexuality and impairment grounds is that to make a claim, a lesbian or gay man must 'out' themselves. They must identify themselves as lesbian, gay or HIV positive in order to claim under these grounds.[112] Not only must they identify themselves to their employer, and so be identified presumably to the harasser or discriminator, and probably co-workers as well, they must also identify themselves to the staff of the administering agencies and possibly later the tribunal. Should the complaint proceed to adjudication then complainants may feel that they are 'outing' themselves to a much wider range of people including, for example, potential employers, neighbours, their child's teacher, and relatives.[113] A tribunal decision seems likely to attract media attention, certainly within the gay and lesbian press and possibly within mainstream media as well.[114]

Being identified and being visible as lesbian or gay is a matter of degree; there are degrees of knowing on the part of others. In one sense others — such as the harasser, co-workers, management, neighbours and relatives — may know or suspect a gay man or lesbian's sexuality. But something more happens when they are confronted with that sexuality as a fact. Their relationship with that gay man or lesbian is likely to change. Being a gay man or a lesbian is one thing; being a gay man or a lesbian who positively proclaims his or her sexuality and asserts a right to fair treatment is quite another. The implicit pact of tolerance on condition that sexuality be kept hidden is broken and the lesbian or gay man is revealed to be not only lesbian or gay, but publicly so. A line has been crossed from being 'privately' gay or lesbian to being 'out'. The risk in crossing this line

nual Report (1993-94) 29. Victoria used to also have a designated position of ethnic liaison officer: Commissioner for Equal Opportunity (Vic), *Annual Report (1991-92)* ii.

112 Although most of the statutes which have sexuality grounds and impairment grounds cover imputed sexuality and imputed HIV status, as a practical matter by claiming under such a ground a person effectively identifies themself either as lesbian, gay or HIV positive: Anti-Discrimination Board of New South Wales *Annual Report (1983-84)* 108. This fundamental problem seems to be directly reflected in the apparent preference by lesbians for lodging complaints under a sex ground rather than a sexuality ground: Carmel Niland, above n 94, 2; Anti-Discrimination Board of New South Wales *Annual Report (1984-85)*, above n 94, 120; Anti-Discrimination Board of New South Wales, *Annual Report (1985-86)*, above n 94, 53.

113 Most of the statutes provide that a hearing may be directed to be held in private and that the public identification of a person appearing before a tribunal may be prevented: DDA (Cth) ss 86, 87; EOA (Vic) ss 46(3B), 46(3C); ADA (NSW) s 110A; ADA (Qld) ADA ss 191, 203; EOA (SA) s 23(4); EOA (WA) ss 121, 122; DA (ACT) s 88; ADA (NT) s 100. There is of course no certainty in obtaining such directions. A number of complainants under the sexuality and impairment grounds have, however, had the benefit of such orders: *City of Perth v DL, Acting as Representative of All Members of People Living with AIDS (WA) Inc* (1992) EOC ¶ 92-466; *City of Perth & Ors v DL (Representing the Members of People Living with AIDS (WA) Inc & Ors)* (1994) EOC ¶ 92-634; *G v Lincraft* (1994) EOC ¶ 92-572.

114 See, eg, *Jobling* (1993) EOC ¶ 92-554 where it is recorded that the complainant was interviewed for ABC Television's '7.30 Report' after the alleged discriminatory incident (at 79,764); Steve Dow, 'Anger at Pre-Surgery AIDS Test Order', *Age* (Melbourne), 2 March 1995; 'Gay Super Furore', *Age* (Melbourne), 8 March 1995. In the words of one analyst

> we know that in homosexuality complaints, many of those making the complaint withdraw when they realise that the process of having a complaint investigated, conciliated or heard by the Equal Opportunity Tribunal will involve constant discussion and (at the Tribunal level) possible public focussing on their sexuality.

Lavender, above n 15, 24.

is, of course, that the lesbian or gay man may become a greater target for ostracism, violence and harassment by a potentially wider group of people. The fear of reprisal is well founded.[115]

The necessity to make a choice to positively identify with an oppressed group in society in order to lodge a complaint under a sexuality or impairment ground is not a limitation encountered by most members of other outsider groups. As described above, most gay men and lesbians feel that they have a choice as to whether to identify their sexuality or not. Staying 'in the closet' may be perceived as a viable, and in some instances the only realistic, choice. People in other outsider groups generally do not have this choice. Their difference is mostly apparent to the rest of the world. Having a choice explains why lodging a complaint under a sexuality or impairment ground may be a step of enormous personal significance for a gay man or lesbian. Like all steps to personal liberation, it may be both difficult and empowering at the same time.

Importantly, self-censorship by gay men and lesbians in a workplace does not only render them invisible to the heterosexual workforce, it may render them invisible to each other as well. That gay and lesbian workers may not be able to identify each other, or feel that they have identified each other but not feel free to acknowledge that common identity, seriously impedes their empowerment and the likelihood of them taking action to redress discrimination, either individually or as a group.

Of course much depends on the lesbian or gay man involved, their level of personal empowerment; how open they are about sexuality at work and elsewhere; how much support is likely to be provided to them by co-workers, management and their union; and on the importance to them of maintaining a heterosexual facade. A 'closeted' HIV positive gay man who is, for example, seeking custody of a child may decide against lodging a complaint under the legislation lest his sexuality and HIV status be discovered in the custody proceedings.

These are the more general factors that may lead a gay man or a lesbian to decide against lodging a complaint under the legislation. A successful complaint may, in any case, be seen as likely to be a pyrrhic victory only. In the words of David, a gay primary school teacher:

> People are reluctant to initiate case proceedings because even if the law supports your side, and it may not, the staff and community would probably make your life so difficult that it would be impossible to function in a professional

[115] Although the statutes containing a sexuality ground proscribe victimisation (DDA s 42; EOA (Vic) s 18(1); ADA (NSW) s 50; ADA (Qld) s 129; EOA (SA) s 86; DA (ACT) s 68; ADA (NT) s 23), such conduct appears to be increasing, particularly in Victoria: see Equal Opportunity Commission Victoria, *Annual Report (1993-94)*, above n 111, 12; Commissioner for Equal Opportunity (Vic), *Annual Report (1992-93)* 12; Commissioner for Equal Opportunity (Vic), *Annual Report (1988-89)* 16; Anti-Discrimination Board of New South Wales, *Annual Report (1993-94)*, above n 15, 23; Anti-Discrimination Board of New South Wales, *Annual Report (1992-93)*, above n 90, 17; Anti-Discrimination Board of New South Wales, *Annual Report (1990-91)* 19; Commissioner for Equal Opportunity (SA), *Seventeenth Annual Report (1992-93)*, above n 37, 33; Commissioner for Equal Opportunity (SA), *Sixteenth Annual Report (1991-92)*, above n 90, 27.

> capacity. There is a widespread perception of insecurity that is very disempowering.[116]

Lodging a complaint will not, in the short term, change the attitudes which caused the discrimination in the first place, and seems likely as a practical matter to mean that the complainant must find another job (the search for which would undoubtedly be hindered by any publicity the complaint received). Current high levels of unemployment compound this problem.

Knowledge of the legislation, especially its scope and procedural aspects, is likely to discourage, rather than encourage, lesbian and gay complainants. Knowledge of such matters as the widely-worded and value-laden exemptions to some of the sexuality grounds, the likely time frame involved in pursuing a complaint to its conclusion, and the potential for a respondent to appeal to a Supreme Court,[117] is likely to dissuade a potential gay or lesbian complainant. The more detailed the knowledge and understanding of the legislative schemes, the greater this discouragement is likely to be. Importantly, such knowledge would seem to be relatively accessible to gay men and lesbians.[118]

C *Lodging a Complaint and The Processes That Follow*

Having decided to lodge a complaint under the legislation, a gay or lesbian worker will then be faced with a number of matters which significantly reduce the effectiveness of the legislation to redress the wrong against them. These procedural impediments largely reflect those encountered generally by complainants in lodging complaints and in following them through to a resolution. A number of commentators have analysed these obstacles in detail.[119] Space does

116 Philps, above n 3, 25.

117 Not only is the Australian legal system characterised by systemic gender bias, but courts have been reluctant to move beyond a narrow interpretation of the anti-discrimination legislation before them: see, eg, the Report by the Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (1994) 72-4; Australian Law Reform Commission, *Women's Equality,* above n 80, ch 2. They have been described by one commentator as 'hostile and uncomprehending' in response to adventurous tribunal decisions: Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110, 199. Neither gender bias nor a narrow view of the legislation augurs well for gay men or lesbians faced with a court appeal.

118 A number of lawyers advertise in the gay and lesbian press. In addition, several legal services and community groups have been established in recent years, including the HIV/AIDS Legal Centres established in both Melbourne and Sydney in the past 18 months; the NSW Disability Discrimination Advocacy Service launched in November 1993; the Australian Council for Lesbian and Gay Rights; the Gay and Lesbian Rights Lobby Inc (NSW) and GLAD. None of these groups however have anything like the capacity offered by the American Lambda Legal Defence and Education Fund Inc, a national lesbian and gay rights public interest law firm located in New York.

119 The major analyses include Hunter, above n 29; Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia,* above n 110; Astor and Chinkin, above n 110, 261-76; Margaret Thornton, 'The Equivocations of Conciliation: The Resolution of Discrimination Complaints' (1989) 52 *Modern Law Review* 733; Margaret Thornton, 'Anti-Discrimination Remedies' (1983) 9 *Adelaide Law Review* 235; Thornthwaite, above n 90; Gretchen Poiner and Sue Wills, *The Gifthorse: A Critical Look at Equal Employment Opportunity in Australia* (1991); Margot Stubbs, 'Feminism and Legal Positivism' in D Kelly Weisberg (ed), *Feminist Legal Theory: Foundations* (1993) 454. Informative UK and USA analyses include Bob Hepple and Erika Szyszczak (eds), *Discrimination: The Limits of the Law* (1992); Laurence Lustgarten 'Racial Inequality and the Limits of the Law' (1986) 49 *Modern Law Review* 68; Katherine O'Donovan

not permit a detailed analysis of them here, much of which would in any case be largely repetitive of this earlier work. Rather, the remainder of this article examines the major ways in which these procedural impediments particularly affect gay men and lesbians seeking redress under the legislation.

One of the notable features of the legislation is the individualistic focus of its procedures. They are constructed on the paradigm of an incident causing harm to an individual complainant. These processes make it difficult to give legal expression to the concept of group harm and disadvantage implicit in indirect discrimination. An example of a potentially indirectly-discriminatory criterion under the ground of sexuality, is a promotion prerequisite imposed on the entire workforce to the effect that workers conform to the prevailing workplace culture, or, that they get along well with clients and co-workers. Given the prevailing heterosexism of most workplace cultures and indeed Australian society generally, these requirements themselves may indirectly discriminate against gay men and lesbians. They are even more likely to be indirectly discriminatory when the prevailing workplace culture is, for example, conservative and one which emphasises 'family values'.

This individualistic focus is also limiting in relation to complaints of direct discrimination. The legislation constructs, and the processes reinforce, discriminatory conduct as the aberrant experience of one person rather than as a manifestation of systemic oppression and exclusion.

The difficulties in 'fitting' complaints of group harm within the legislation are seen at a number of stages. In terms of lodging complaints, most of the statutes remain less than accommodating of representative complaints.[120] Although such complaints have been successfully employed in two cases brought under the sexuality and impairment grounds,[121] establishing the validity of such complaints has generally been fraught with uncertainty and difficulty for complainants.[122] In addition to restrictions at the point of lodgment, a number of statutes restrict the remedies available in relation to representative complaints.[123]

and Erika Szyszczak, *Equality and Sex Discrimination Law* (1988); Nicola Lacey, 'Legislation Against Sex Discrimination: Questions From a Feminist Perspective' (1987) 14 *Journal of Law and Society* 411; David Pannick, *Sex Discrimination Law* (1985).

120 EOA (Vic) s 44; see also Scrutiny of Acts and Regulations Committee (Vic), above n 25, para 7.12; ADA (Qld) ss 134, 146-52, 179, 194-200; EOA (SA) s 93(1); EOA (WA) ss 83(1), 108, 114-7; DA (ACT) ss 70(1)-(3), 75, 77; ADA (NT) ss 60-62. Recent amendments to the SDA, the DDA and the ADA (NSW), have, however, significantly freed up the complaint lodging processes in these statutes to accommodate representative claims: SDA s 69; DDA s 89; ADA (NSW) s 88 (which took effect from 8 August 1994 and which allows for complaints to be lodged by 'representative bodies').

121 *Pearce (on behalf of Gay Solidarity Group) v Glebe Administration Board & Anor* (1985) EOC ¶ 92-131; *City of Perth v DL, Acting as Representative of All Members of People Living with AIDS (WA) Inc* (1992) EOC ¶ 92-466, and the appeal in *City of Perth & Ors v DL (Representing the Members of People Living with AIDS (WA) Inc & Ors)* (1994) EOC ¶ 92-634. In the latter case, two complaints were initially ordered to be heard jointly and then later transformed to a representative complaint.

122 See, eg, the different views expressed in *Qantas Airways v Squires* (1984) EOC ¶ 92-167 and *Pearce (on behalf of Gay Solidarity Group) v Glebe Administration Board & Anor* (1985) EOC ¶ 92-131. See also *Leves v Haines* (1986) EOC ¶ 92-102 and Hunter, above n 29, 250-4.

123 Under the ADA (NSW), EOA (WA) and DA (ACT) an order for damages is not available in relation to a representative complaint: ADA (NSW) s 113(1)(b)(i); EOA (WA) s 127(b)(i); DA

Once a complaint is accepted by the relevant administering agency, it proceeds to investigation/conciliation. This process may decontextualise the particular incident which is the subject of the complaint. There is a risk that the respondent's behaviour may be reduced to a one-off incident unconnected to oppressive cultural forces. It may, for example, be reduced to a concern that a lesbian employee is too 'aggressive' or does not dress 'properly', or that a gay employee is not 'business like'. That such incidents are a manifestation of oppressive cultural stereotypes may be obscured in the course of conciliation negotiations. Whether or not they are obscured would seem to depend largely on the role taken by the conciliator and his or her level of awareness of such oppressive cultural forces.[124]

Moreover, negotiation involves compromise, most particularly by the complainant.[125] The give-and-take of conciliation requires that each party take into account the other's position and concerns. It suggests, for example, that a lesbian complainant look at the way she dresses and relates to people in the workplace and that she take into account her employer's concerns over these matters. It assumes some level of validity in her employer's position. This in itself is problematic and may end up reinforcing self-censorship as a 'reasonable' resolution.

The confidentiality of conciliation conferences is problematic in a number of respects.[126] Not only does confidentiality render it difficult to assess how representative complaints and other claims involving group harm are conciliated,[127] it also obscures differences in power between a complainant and the respondent employer.[128] Differences in bargaining power generally between employers and individual employees have long been recognised. Employers have greater economic power, greater access to relevant information, and a 'persuasive facade of legitimacy',[129] all of which are likely to be magnified in an economy such as Australia's with its current high levels of unemployment.

This power imbalance may be even greater in relation to lesbian and gay complainants who suffer the additional stigma attached to their sexuality, who

(ACT) s 90(2)(b)(iii). Individuals may, however, lodge individual complaints in relation to the conduct complained of in the representative complaint: Hunter, above n 29, 269. Under the EOA (Vic) there is no provision for the respondent to pay damages to anyone other than the complainant: EOA (Vic) s 46(2)(b). On orders under the EOA (Vic) in relation to group harm generally, see *Sinnappan & Foley v State of Victoria & Ors* (Supreme Court of Victoria, Appeal Division, Brooking, J D Phillips and Hansen JJ, 17 February 1995).

124 In relation to the roles taken by conciliators generally, see Astor and Chinkin, above n 110, 269-72; Hunter, above n 29, 263-4; Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110, 160-2; David Bryson, 'Mediator and Advocate: Conciliating Human Rights Complaints' (1990) 1 *Australian Dispute Resolution Journal* 136; Gregory Tillett, 'The Resolution of AIDS-Related Disputes' (1990) 1 *Australian Dispute Resolution Journal* 12.

125 Hunter, above n 29, 262; Astor and Chinkin, above n 110, 276.

126 Conciliation conferences are confidential: DDA s 75(2); EOA (Vic) s 42(3); ADA (NSW) s 94(2); ADA (Qld) ss 161, 183; EOA (SA) s 95(7); EOA (WA) s 88(2); DA (ACT) s 81(3); ADA (NT) s 79(3).

127 In relation to the conciliation of representative complaints and complaints of indirect discrimination generally, see Hunter, above n29, 262.

128 See Astor and Chinkin, above n 110, 262-4, 272-4.

129 Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110, 153.

may not have the support of co-workers, and who may be very anxious to avoid a public hearing of their complaint. The likelihood of publicity should the complaint proceed to adjudication acts as a powerful incentive to a gay or lesbian complainant to either settle or withdraw the complaint. The power differential in relation to lesbian complainants may be further magnified by the subordinate position of women in the paid workforce generally. The role taken by the conciliator seems important in determining whether these differences in power are ameliorated or not.

The confidentiality of conciliation prevents public scrutiny of discrimination cases. In so doing, it precludes public education about the discrimination and harassment actually suffered by gay men and lesbians in the workplace. Confidentiality also significantly impedes the empowerment of gay men and lesbians themselves. Potential gay and lesbian complainants cannot examine records of conciliations for the purposes of developing strategy and solidifying support for legislative reform and wider action. No guidance can be gained as to how to frame complaints or as to settlements.[130]

Insufficient funding of administering agencies is an issue of concern for all complainants. Insufficient funding tends to advantage respondents over complainants.[131] Resources are a crucial ingredient in the range and quality of community outreach programs of an agency, the level of help given to potential complainants in framing their complaint, the time afforded by a conciliator to a complaint, and the role taken by the conciliator in the negotiations. Importantly, community outreach programs, so necessary for the gay and lesbian communities, seem likely to be one of the first services cut in response to a funding shortage. Margaret Thornton has asserted that the financial pressures on the agencies have encouraged a focus on complaints of direct discrimination, rather than the more complicated and time-consuming complaints of indirect discrimination.[132] The fact that a number of the agencies have had no real increase in funding over recent years[133] despite a significant increase in workload,[134] is a

[130] Administering agencies have attempted to ameliorate this problem by including case studies in their annual reports. However these appear to have had little impact. They are neither widely read nor very detailed. In relation to these problems generally, see Hunter, above n 29, 260-1; Astor and Chinkin, above n 110, 274-5; Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110, 150-1.

[131] Marc Galanter, writing in the American context, describes how the 'chronic overload' of agencies disadvantages claimants: Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95, 121-2.

[132] Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110, 159.

[133] The New South Wales Board, did, however, receive an increase in funding in the last financial year. Anti-Discrimination Board of New South Wales *Annual Report (1993-94)*, above n 15, 9-10. Although the Victorian Commission's funding has not increased substantially in recent years, the Commission has received a 'short term backlog project allocation' to finance the clearing of the accumulated backlog of complaints: Equal Opportunity Commission Victoria *Annual Report (1993-94)*, above n 111, 30.

[134] In 1993-94, for example, the New South Wales Board took 17% more telephone inquiries and 23% more written complaints than it did the previous year: Anti-Discrimination Board of New South Wales, *Annual Report (1993-94)*, above n 15, 13, 17. In 1993/94, the Victorian Commission received 43% more complaints than were received the previous year: Equal Opportunity Commission Victoria, *Annual Report (1993-94)*, above n 111, 11; see also Commissioner for Equal Opportunity (SA), *Seventeenth Annual Report (1992-93)*, above n 37, 6-7. In relation to

matter that directly impacts upon their ability to facilitate the enforcement of the legislation by complainants.

In addition, insufficient funding causes delay.[135] The potential for a complaint to become protracted is an issue of real importance for all complainants, and particularly those who are HIV positive.[136] Not only does it prolong the stress and anxiety involved in claiming under the legislation — a factor which may directly influence the complainant's health[137] and in turn, whether the complaint is pursued or not — it increases the risk of victimisation where the employment relationship is on-going. Circumstances do not stand still. If a situation has developed in which relationships in the workplace have become intolerable, then a speedy resolution is required. Most administering agencies have, in recognition of these problems, established fast-track procedures.[138] Nonetheless, delay remains a frequently-cited reason for not pursuing complaints, especially by people with HIV.[139]

The vast majority of complaints do not proceed beyond conciliation.[140] They may be settled, withdrawn or simply lapse.[141] The few that do proceed face daunting obstacles. Although originally established with the intention of offering an informal, low cost and less intimidating forum than the court system, tribunals have in fact experienced the 'encroachment of formalism' into their proc-

the number of inquiries and complaints handled by the administering agencies in Queensland, the Australian Capital Territory and the Northern Territory: see Human Rights and Equal Opportunity Commission, *Annual Report (1993-94)*, above n 90, 172, 180-1, 186-7; Human Rights and Equal Opportunity Commission, *Annual Report (1992-93)* 192, 204-5.

135 Delay is reflected in the length of proceedings overall. Four years elapsed between the incident complained of and the Tribunal's decision in *Ferguson* (1990) EOC ¶ 92-272. In both *Jobling* (1993) EOC ¶ 92-554 and *G v Lincraft* (1994) EOC ¶ 92-572 the resolution of the complainants' cases came approximately two years after the conduct complained of. Complaints lodged in Victoria have often, in the past, taken 12 months or more from the date of lodgement until the completion of conciliation. Scrutiny of Acts and Regulations Committee (Vic), above n 25, 74-84; Equal Opportunity Commission Victoria, *Annual Report (1993-94)*, above n 111, 20. Note, however, the recent increase in funding to the Victorian Commission to enable it to clear a backlog of some 555 complaint files. In addition, the EOA (Vic) was amended in March 1994 to provide for expedited complaints on the application of the respondent (EOA (Vic) ss 44B, 45AB) as well as the imposition of time limits on the Commission (see, eg, EOA (Vic) ss 45(1), 45(5A), 45(5C), 45(5D)).

136 Scrutiny of Acts and Regulations Committee (Vic), above n 25, 78; New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 93.

137 The level of psychological distress experienced by people with HIV might directly influence the outcome of the virus: Anna Stallard, 'HIV Positive Workers and Workers with AIDS: Psychosocial and Counselling Issues' in Davidson and Earnshaw, above n 11, 119, 123-5.

138 Watchirs, above n 90, 29.

139 New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 93.

140 More than 80% of complaints do not proceed to adjudication: Commissioner for Equal Opportunity (Vic), *Annual Report (1992-93)*, above n 115, 22; Commissioner for Equal Opportunity (Vic), *Annual Report (1991-92)*, above n 111, 52; Anti-Discrimination Board of New South Wales, *Annual Report (1992-93)*, above n 90, 16; Anti-Discrimination Board of New South Wales, *Annual Report (1991-92)*, above n 31, 15.

141 There is evidence that complaints under the ground of homosexuality in the ADA (NSW) have been less likely to proceed beyond conciliation than have complaints under other grounds: Lavender, above n 15, 24; Anti-Discrimination Board of New South Wales, *Annual Report (1993-94)*, above n 15, 21; Anti-Discrimination Board of New South Wales, *Annual Report (1992-93)*, above n 90, 16; see also, Thornthwaite, above n 90, 43.

esses and decisions.[142] This formalism has a number of different facets, the consequences of which render the tribunals less accessible to complainants and more amenable to the interests of respondents.[143]

Formalism has sprung from a number of different sources. The presence of lawyers and, importantly, the spectre of an appeal to the state Supreme Court, appear to have a powerfully 'legalising' influence on tribunals.[144] Although leave is required for legal representation,[145] in practice it has not been denied.[146] The presence of lawyers appears to have had the effect of increasing, rather than decreasing, differences in power between a complainant and respondent.[147] Lawyers bring adversarialism, the consequences of which are manifold and can be seen, for example, in the tendency for an 'offensively aggressive and hectoring tone in cross-examination',[148] in technical arguments over jurisdiction, and in tactics that may be aimed at delaying a complaint.

Legal representation is not equally available to complainants and respondents. The greater economic power of respondents, the single largest category of which appear to be private sector corporations,[149] enables them to engage counsel. Such representation is beyond the means of most complainants.[150] This is particularly so if the complainant is suffering financial hardship either as a direct consequence of the discriminatory action — if they had been dismissed, for example, or as a consequence of medical and other expenses of having HIV/AIDS. Moreover, few other avenues for attaining representation are open to a complainant.[151]

142 Australian Law Reform Commission, *Justice for Women*, above n 39, 39; Margot Stubbs, above n 119, 468 (citing the Anti-Discrimination Board of New South Wales, *Annual Report (1983-84)*); see also Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110, 162-6. As to the influence of formalism on conciliation, see Astor and Chinkin, above n 110, 268-71.

143 Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110, ch 6.

144 As to the impact of this right of appeal on the preparedness of complainants to bring complaints and on the processes of tribunals (and conciliation), see ibid 198-206.

145 DDA s 85; EOA (Vic) s 52; ADA (NSW) s 101; ADA (Qld) s 187; EOA (SA) s 24(4); EOA (WA) s 112; DA (ACT) s 84; ADA (NT) s 95.

146 Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110, 174.

147 Ibid 163-6, 179; see also Galanter, above n 131, 114-19.

148 Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110, 173.

149 Rosemary Hunter and Alice Leonard, 'The Outcomes of Conciliation in Sex Discrimination Cases', Centre for Employment and Labour Relations Law, Working Paper No 8 (August 1995) 5.

150 Apart from under the EOA (Vic), the parties usually bear their own costs in relation to complaints brought under anti-discrimination statutes. Only in exceptional circumstances is a party required to pay the other's costs: Hunter, above n 29, 275-7. The EOA (Vic) was amended in this respect from 1 March 1994: EOA (Vic) s 47; *Sinnappan & Anor v State of Victoria (No 2)* (1994) EOC ¶ 92-658, 77, 477 (and the authorities cited therein). As to the other jurisdictions, see ADA (NSW) ss 111(2), 114; ADA (Qld) s 213; EOA (SA) s 26; EOA (WA) ss 125(2), 128.

151 Legal aid is generally not available to complainants: Thornton, 'The Seductive Allure of EEO', above n 41, 218-9; 'HIV Bias Case Lost: System Irrelevant, Says Lawyers [*sic*]', *Melbourne Star Observer* (Melbourne), 7 January 1994; see Australian Law Reform Commission, *Justice for Women*, above n 39, 91-109. Community legal centres, HIV/AIDS legal centres, women's legal resources groups, the NSW Disability Discrimination Advocacy Service and other groups are unable to provide the range and scale of services sought by complainants. In this respect it is interesting to note that a new fund has recently been set up in Victoria by the Victorian Women's Trust to assist complainants, primarily women, to lodge complaints under the EOA (Vic). The

Given such financial constraints on complainants it is perhaps not surprising to discover that the complainant in one of the more recent decisions under a sexuality and impairment ground, Jobling,[152] received assistance under the EOA (SA) in the form of legal representation by both a Queen's Counsel and a member of the Legal Section of the Commission.[153] Apart from the EOA (WA), the other statutes do not make provision for such assistance.[154]

It is apparent then, that in many instances gay and lesbian workers face prohibitive impediments in enforcing the substantive rights they have under the legislation. These problems are encountered at every step, from identifying a harmful experience as a wrong for which their employer is responsible, to lodging a complaint and pursuing it through to conciliation and, less frequently, adjudication.

IV CONCLUSION AND STRATEGY FOR THE FUTURE

This article reveals the Australian anti-discrimination jurisdictions to be inadequate in a number of respects to redress the harassment and unfair treatment experienced by gay and lesbian workers. Deficiencies exist both in the scope of the various statutory schemes, and in the processes established by the legislation to resolve complaints.

Although deficient, some of the statutory schemes do offer the potential to provide a source of vindication for individual gay men and lesbians. This is important for the individual, as well as for the wider project of lesbian and gay activism. In terms of this wider agenda, knowledge within gay and lesbian communities of complaints that have been lodged has the potential to build community amongst lesbians and gay men and empower individuals to critically appraise their own experiences in the workforce.

Importantly, adjudication provides a forum through which the stories of gay men and lesbians may themselves enter public discourse and challenge commonly-held views and assumptions about gay men and lesbians.[155] A successful public hearing of a complaint sends a message, not only to gay men and lesbians, but to the wider community as well, that gay and lesbian oppression exists and is challengeable.

Using anti-discrimination law is not, however, unproblematic. It is far from clear whether law in general, and anti-discrimination law in particular, has the

fund is also open to people with HIV/AIDS: 'Fund to Assist EO Cases', *Melbourne Star Observer* (Melbourne), 4 February 1994.

152 *Jobling* (1993) EOC ¶ 92-554.

153 The assistance was provided pursuant to a request under the EOA (SA) s 95(9): Commissioner for Equal Opportunity (SA), *Seventeenth Annual Report (1992-93)*, above n 37, 63.

154 EOA (WA) s 93(2); DDA s 106.

155 As to the importance of law as a site of cultural intervention, see Wayne Morgan, 'Identifying Evil For What it is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *MULR* 740. Fajer, writing in the American context, emphasises the power of legal discourse in a progressive agenda. He speaks of the need for gay and lesbian litigation strategies to create empathy and to attack myths about lesbians and gay men. He emphasises the role of personal narratives, or storytelling, in this strategy: Fajer, above n 16, 512-30.

capacity to bring about wide-ranging social transformation.[156] Using law may result in 'domesticating' gay and lesbian experiences 'into narratives constructed by the rules of law rather than ourselves.'[157] The danger is that assimilation will be mistaken for real change, and lesbian and gay energy will be diverted from pursuing a more thorough transformation of society. The assimilationist tendency of anti-discrimination legislation, particularly the concept of direct discrimination, is well recognised.[158]

These concerns should inform strategy in this area. Although anti-discrimination law has a role to play, it should not be engaged unreflectively. It can be but part of a wider strategy of cultural and social intervention into mainstream society. The aim is to challenge heterosexism and gender-role stereotyping. This wider strategy might include non-violent civil disobedience,[159] marches and public rallies, art,[160] other forms of legal action[161] and encouraging gay men and lesbians to identify as gay and lesbian publicly.

A number of reforms would render the anti-discrimination statutes a more powerful tool in this overall strategy. The limitations identified in this article indicate the matters that need to be addressed if the legislation is to be more accessible to lesbians and gay men, and more able to deal adequately with the complaints they bring. A number of reviews and reports in recent years have examined the efficacy of some of the statutes both generally and in relation to sexuality discrimination and HIV/AIDS discrimination.[162] They accordingly

156 In relation to the limits of law generally for gay and lesbian activism, see Mary Coombs, 'Foreword: Gender and Justice' (1992) 46 *University of Miami Law Review* 503, 505-6; Debra Rothberg, 'Symposium: Sex, Politics and the Law: Lesbians and Gay Men take the Offensive' (1986) 14 *Review of Law & Social Change* 891, 892-4. As to the limited potential of Australian anti-discrimination law generally to bring about social change, see Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110; Rosemary Hunter, 'Equal Opportunity Law Reform' (1991) 4 *Australian Journal of Labour Law* 226.

157 Robson, above n 27, 87 writing in relation to lesbians in the USA.

158 Hunter, above n 29, ch 1; Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, above n 110; Poiner and Wills, above n 119, 91-9; Hepple and Szyszczak, above n 119; Lacey, above n 119; see also Robson, above n 27, 87 who views, in the American context, the discourse of discrimination as measuring lesbians, not only against a heterosexual norm, but against each other. This, she finds, results in the dominant culture drawing a distinction between 'good' lesbians (whom she describes as the 'whitest and brightest of us, the ones with the best clothes and accents, the smoothest legs and apolitical pasts') and the 'troublemakers'. Richard Mohr describes this as an 'Uncle Tom' division: Richard Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* (1988) 337.

159 See Mohr, above n 158, 334-7.

160 The Sydney Gay and Lesbian Mardi Gras appears to have had a powerful influence in challenging public attitudes towards gay men and lesbians in New South Wales.

161 Other forms of legal action relating to workplace discrimination of gay men and lesbians might include claims under federal unlawful termination provisions, using anti-discrimination provisions in the Industrial Relations Act 1988 (Cth) to challenge discriminatory provisions in awards and workplace agreements, and strategies such as were used in the *Family Leave Test Case — November 1994* (1994) 57 IR 121.

162 The main general reviews include: Scrutiny of Acts and Regulations Committee (Vic), above n 25; New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Discussion Paper 30 (1993); Law Reform Commission of Victoria, *Review of the Equal Opportunity Act*, above n 25. In relation to the SDA, see Australian Law Reform Commission, *Justice for Women*, above n 39, 33-88; Sex Discrimination Commissioner, *Report on Review of Permanent Exemptions Under the Sex Discrimination Act 1984* (1992); House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way to Equal: Report of the*

inform an understanding of reform proposals in relation to many of the inadequacies identified in this article.

A number of substantive deficiencies in the legislation require amendment. Most obvious is the need for proscribed sexuality grounds to be available in all states and territories. The desirability of clarifying the coverage of the impairment grounds in the EOA (WA) and EOA (SA) is also apparent.[163] In addition, a number of exemptions restrict the scope of the legislation. Those examined reflect the prejudices that the legislation is ostensibly intended to address. The exemptions relating to working with children reflect misinformed assumptions about gay men and lesbians and child abuse and proseltysing, and their inclusion gives credibility to those myths. The exemption relating to dress and appearance in the EOA (SA), and proposed for the EOA (Vic), sends a clear message that gay men and lesbians should keep their sexuality hidden. These exemptions must be repealed if the legislation is to provide, and be seen to provide, a real avenue of redress for lesbian and gay workers.[164]

Many procedural matters require attention if the legislation is to provide more than hollow rights to gay and lesbian employees. Administering agencies must take cognisance of the negative perceptions of the legislation within gay and lesbian communities and must critically assess the reasons for those perceptions.[165] It is clear that benefit would be gained from the implementation of education programs for agency staff and tribunal members on the discrimination faced by lesbians and gay men in Australian society. The appointment of gay and lesbian conciliation officers and public relations officers would go a long way to improving the perception of the services offered to lesbian and gay communities.[166]

Increased funding to the agencies, and to the community and specialist legal centres which provide advice to potential gay and lesbian complainants, would enable greater access to the legislation by gay and lesbian workers. Legislative amendments to better accommodate representative complaints and complaints involving group harm, both at the point of lodgement and in the scope of the remedies available, would also increase access by gay men and lesbians.[167]

Inquiry into Equal Opportunity and Equal Status For Women in Australia (1992); Attorney-General, *Proposals to Amend the Sex Discrimination Act 1984* (1993); Sex Discrimination Commissioner, *Sex Discrimination Act 1984: Future Directions and Strategies* (1992). More specifically in relation to sexuality and/or HIV, see: New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 85-100; GLAD, above n 1, 31-2; Streetwatch Implementation Advisory Committee, above n 8; Lavender, above n 15.

163 Department of Community Services and Health, above n 10, para 7.1; New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 98; GLAD, above n 1, 6.

164 These exemptions may have the effect of placing Australia in contravention of its obligations under Art 26 of the International Covenant on Civil and Political Rights.

165 GLAD has recommended that the Victorian Government provide it with funding to enable it to extend its survey, conduct research into enforcement practices, and carry out education programs in relation to the EOA (Vic): GLAD, above n 1, 31-2.

166 See New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 96-7; Lavender, above n 15, 32-3.

167 See Scrutiny of Acts and Regulations Committee (Vic), above n 25, 92-3; New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10, 88-9.

Proposals to empower administering agencies to investigate systemic discrimination without a complaint being lodged, provide the potential to effectively sidestep the reluctance of gay men and lesbians to lodge complaints.[168] The practical ability of an agency to initiate such investigations would seem to depend largely on its levels of funding.

In relation to the limitations arising from the confidentiality of conciliation, one suggestion is for the administering agencies to keep a public register containing non-identifying information about settlements reached through conciliation.[169] This may ameliorate some of the problems faced by potential gay and lesbian complainants. It may also allow for some public airing of the experiences of gay men and lesbians at work. Of course, much would depend on the detail and quality of the information recorded.

These proposals for amending the legislation and other matters such as increased funding are aimed at making the legislative schemes more reflective of the needs of gay men and lesbians. However, the implementation of such proposals is not of itself enough. This is because workplace oppression cannot be separated from hostile cultural attitudes towards gay men and lesbians generally. Until these prejudices are overtaken, harassment and discrimination, both within workplaces and outside them, will continue. This is the task of the gay and lesbian movements: to challenge socially-constructed views of gender and sexuality.

ADDENDUM: THE VICTORIAN EQUAL OPPORTUNITY ACT 1995

The new Victorian Equal Opportunity Act 1995 (Vic) ('Act') alters the position of lesbian and gay workers and anti-discrimination law in Victoria. The new Act, expected to commence in early 1996, repeals the 1984 Act of the same title and replaces it with a scheme that departs from the previous one in a number of fundamental respects.

This note highlights the main ways in which the new Act will impact on the rights of gay and lesbian workers in Victoria.[170]

A *'Lawful Sexual Activity'*

The new Victorian Act contains a 'lawful sexual activity' ground, the stated purpose of which is 'to protect homosexuals, lesbians and heterosexuals or people perceived to fall into a particular category from discriminatory actions'.[171] The Act defines this new attribute to mean 'engaging in, not engaging

168 See Australian Law Reform Commission, *Justice for Women*, above n 39, 53; New South Wales Anti-Discrimination Board, *Discrimination — The Other Epidemic*, above n 10.

169 Australian Law Reform Commission, *Justice for Women*, above n 39, 83.

170 See also, Miranda Stewart, 'Equal Opportunity: Except for you ... and you ... and you ...' (1995) 20 *Alternative Law Journal* 196.

171 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1251. Transgender and bisexual people were not referred to by the Attorney-General.

in or refusing to engage in a lawful sexual activity'.[172]

A number of concerns surround the wording of this new ground, not the least of which is the ambiguity of the formulation. For example:

1 By what criteria is it to be determined whether a particular activity is, or is not, 'sexual'?
2 Is the 'lawfulness' of activity always clear? Are the crimes of offensive behaviour and gross indecency enforced differentially against gay men and lesbians? Does the ground of 'lawful sexual activity' provide protection to gay men who are dismissed because they face criminal charges arising out of sexual activity that occurs at a 'beat'?
3 Does the ground require gay and lesbian complainants to give evidence of the sexual activity that they have engaged in?

In addition to these uncertainties, the wording of the ground is also problematic in the messages that it contains about gay men and lesbians. The failure to use the words 'homosexuality' and 'lesbianism' maintains a legislative silence about gay and lesbian identity. The 'lawful sexual activity' formulation recognises lesbian and gay existence only in terms of a sexual activity, that is, something that people do, rather than who they are in terms of identity and community. Another concern is that, given the widely-held perception that the 'lawful sexual activity' ground is the gay and lesbian ground, the inclusion of the word 'lawful' infers that there is something inherently unlawful about same-sex sexual activity.

Compounding these problems in the wording of the ground itself are the numerous and widely worded exemptions, at least some of which appear to be based on stereotypical views and myths about lesbians and gay men. It appears that these exemptions were originally intended to apply to the lawful sexual activity ground only,[173] but were later extended to apply to all grounds in an attempt to disguise their prejudiced basis. It is likely that because they appear to be based on myths and prejudice against gay men and lesbians, they will be argued more frequently in relation to the 'lawful sexual activity' ground than any other ground.

B *Standards of Dress, Appearance and Behaviour*

This exemption allows employers to 'set and enforce standards of dress, appearance and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment.'[174] This is similar to the appearance or dress exemption contained in the Equal Opportunity Act 1984 (SA).[175]

Although the Second Reading Speech emphasises that section 24 of the Victorian Act 'contains a very important safeguard in that the standards set and enforced by the employer have to be reasonable in the circumstances of the

172 Equal Opportunity Act 1995 (Vic) s 4.

173 See, eg, Shane Green, 'Gay Law: Kennett Set to Try Again', *Age* (Melbourne), 25 January 1995; Mark Forbes, 'Law Reforms to Tackle Prejudice', *Age* (Melbourne), 23 April 1995.

174 Equal Opportunity Act 1995 (Vic) s 24.

175 Equal Opportunity Act 1984 (SA) s 29(4). See above nn 74-82 and accompanying text.

employment',[176] this may be cold comfort for lesbian and gay complainants. Many workplaces institutionalise heterosexuality and as such position gay and lesbian sexuality as 'other'.[177] The application of a 'reasonableness' standard to such a workplace culture might leave lesbian and gay workers being required to suppress their identity as lesbian or gay. Such workers may be required to censor their clothing, hair style, accessories and perhaps even speech 'for the good of the employer's business'.

C *Working With Children*

The Act exempts discrimination by an employer where:

(a) the employment involves the care, instruction or supervision of children (people under the age of 18 years[178]); and
(b) the employer genuinely believes that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children; and
(c) having regard to all the relevant circumstances, including, if applicable, the conduct of the employee or the prospective employee, the employer has a rational basis for that belief.[179]

A similar provision, though applying exclusively to sexuality discrimination, is found in both the Queensland and Northern Territory statutes.[180] The Victorian exemption is, however, broader than the provision in these two jurisdictions. They apply where the discrimination is 'reasonably necessary' to protect children. Section 25 of the Victorian Act does not require that the discrimination be 'reasonably necessary' to protect children as such. Rather, it requires that the employer 'genuinely believes that the discrimination is necessary' and that he or she has a 'rational basis for that belief'.

The meaning of these formulations is far from clear. Kevin O'Connor, as Acting Human Rights Commissioner, has described these provisions as creating 'a test which is both vague and allows the introduction of irrelevant information. There is no requirement to prove that the belief is reasonable or even whether there is any actual risk.'[181]

D *Religious Beliefs and Principles*

The new Act contains a widely-worded provision which is unique in equal opportunity law in Australian jurisdictions. Its potential impact is wide, not only for gay men and lesbians but for all people contemplating lodging a complaint

176 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1252.

177 See, eg, Cynthia Cockburn, *In the Way of Women: Men's Resistance to Sex Equality in Organisations* (1991); Clare Burton, *The Promise and The Price: The Struggle for Equal Opportunity in Women's Employment* (1991).

178 Equal Opportunity Act 1995 (Vic) s 4.

179 Ibid s 25(1).

180 Anti-Discrimination Act 1991 (Qld) s 28; Anti-Discrimination Act 1992 (NT) s 37. See above nn 60-73 and accompanying text.

181 Kevin O'Connor, letter to GLAD, 2 August 1995.

under the Act. It exempts discrimination by a person against another person 'if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles'.[182] This is considerably wider than the common exemption in relation to the practices of religious bodies (including schools).[183]

The provision refers to the discriminator's 'genuine religious beliefs or principles' and as such appears to require only that the religious principle relied on really does come from the stated religion.[184] It does not appear to require that the belief be one that is held by the leadership of that religion, or even most adherents to that religion. In addition, the meaning of 'religious' is not defined, or at least not defined in a way that sheds light on what constitutes a 'religion' for the purposes of the Act.[185]

E *Special Complaints*

The Act contains a number of new provisions relating to enforcement. The most notable of these is a procedure by which 'special complaints' may by-pass the Anti-Discrimination Tribunal (and in some situations conciliation) to be heard directly by the Supreme Court. 'Special complaints' are:

1 those which 'raise an issue of important public policy';[186]
2 those for which 'the resolution ... may have significant social, economic or financial effects on the community or a section of it';[187] or
3 those 'the subject matter of which involves issues of a particular complexity and the resolution of which may establish important precedents in the interpretation and application' of the Act.[188]

It seems probable that the first few complaints lodged under the ground of 'lawful sexual activity' will fall within the meaning of 'special complaint'. Given the ambiguity in the formulation of the ground, early decisions relating to 'lawful sexual activity' complaints are likely to involve 'issues of a particular complexity ... the resolution of which may establish important precedents in the interpretation and application' of the Act.[189]

The prospect of a complaint being heard in the Supreme Court would be likely to act as a powerful disincentive to a lesbian or a gay man contemplating lodging a complaint under the Act. Although the new statute makes provision for the payment of the complainant's costs should the complaint be referred to the court,

182 Equal Opportunity Act 1995 (Vic) s 77.

183 Ibid ss 75 and 76. See also the Sex Discrimination Act 1984 (Cth) ss 37 and 38; Anti-Discrimination Act 1977 (NSW) s 56; Anti-Discrimination Act 1991 (Qld) s 29; Equal Opportunity Act 1984 (SA) s 50; Equal Opportunity Act 1984 (WA) ss 66(1), 72, and 73; Discrimination Act 1991 (ACT) ss 32, 33, 44, and 46; Anti-Discrimination Act 1992 (NT) s 51.

184 R Allen (ed), *The Concise Oxford Dictionary of Current English* (8th ed, 1990) 492.

185 The definition of 'religious belief or activity' contained in s 4 of the Equal Opportunity Act 1995 (Vic) is unhelpful in this respect.

186 Equal Opportunity Act 1995 (Vic) s 125(a).

187 Ibid s 125(b).

188 Ibid s 125(c).

189 Ibid.

it seems unlikely that a costs order would cover all the complainant's expenses.[190]

F *Conclusion*

Although the new Victorian Equal Opportunity Act appears to be a step forward for lesbians and gay men in Victoria, the terms on which the purported protection is offered is inadequate. Not only does the wording of the 'lawful sexual activity' ground contain powerfully negative messages about lesbians and gay men, the exemptions are likely to substantially curtail the protection afforded by the new ground. The possibility of the complaint being heard in the Supreme Court rather than the tribunal may further act to dissuade gay men and lesbians from lodging complaints.

[190] The Act requires that the party who sought the referral must pay 'all costs relating to the referral of the complaint to the Court': ibid ss 127(2)(b) and 127(3). See also s 129.