

4 *improving the law*



*we seek to eliminate discrimination in
NSW through legal & policy initiatives*

Improving the law

1999/2000 was another busy year for the Legal and Policy Branch and other staff involved in legal and policy activities. The Branch continued to provide legal advice on complaints, responded to requests for information and advice from people outside the Board and processed applications for exemptions from the Anti-Discrimination Act. In addition, staff:

- prepared submissions regarding changes to the Anti-Discrimination Act and other laws and policies
- participated in a variety of committees aimed at eliminating discriminatory practices in the wider community
- produced several publications
- undertook work relating to discrimination issues in the industrial relations arena, including pay equity, and work and family issues
- participated in the Board's regular consultations with the community.

Below is a summary of some of the highlights of the year.

Proposed changes to the Anti-Discrimination Act

Carers' responsibilities

The *Anti-Discrimination (Carers' Responsibilities) Act 2000* (NSW) was passed by Parliament on 31 May 2000. In general, this amendment makes it unlawful for an employer to discriminate, directly or indirectly, against an employee or an applicant for employment on the ground of the person's responsibilities as a carer. The amendment is not yet in force and is expected to be operational early in 2001.

Law Reform Commission Review

The NSW Law Reform Commission (LRC) released its *Report on the Review of the Anti-Discrimination Act 1977 (NSW)* in December 1999. Set over two volumes, the report includes a draft Bill aimed at implementing the 161 recommendations. The Board held briefings in March 2000 with community organisations, employer groups and various services about the recommendations of the report.

The LRC recommends significant changes to the *Anti-Discrimination Act 1977 (NSW)* including a new approach to discrimination and the extension of the Act to cover new grounds. The Board is examining closely the recommendations in the report and the draft Bill and will make a considered submission to the Attorney in the near future.

Administrative Decisions Tribunal legislation

Section 126 of the *Administrative Decisions Tribunal Act 1977* generally precluded publication of anything that could identify anyone connected with a case in the Administrative Decisions Tribunal either before or after a decision was handed down. The Board requested an amendment to the legislation because of the difficulties caused in being unable to identify the names and circumstances of parties for education purposes. The section has now been amended to overcome this problem, but the Tribunal can make a suppression order if appropriate.

Industrial relations initiatives

The *Industrial Relations Act 1996 (NSW)* requires the Industrial Relations Commission to take into account the principles of the Anti-Discrimination Act when exercising its functions. In 1999/2000, there were a number of requests for the President to intervene in award review proceedings and other cases. The Industrial Relations Commission also referred people to the Board for advice during

proceedings. Although this is a very positive development, the Board's ability to take up its role fully in the industrial relations area continues to be limited by our lack of resources.

Equal Remuneration Principle State Case

The Industrial Relations Commission handed down its decision in the Equal Remuneration Principle Case on 30 June 2000. The President of the Anti-Discrimination Board intervened in this case and urged the adoption by the Commission of an Equal Remuneration Principle. The President made a submission to the Commission that proof of discrimination should not be required in order to show that men and women were not receiving equal remuneration for work of equal or comparable value.

In its decision, the Commission ordered a new equal remuneration principle to address undervaluation of work on a gender basis. The Commission accepted the submission that while any principle should address pay inequity caused by sex discrimination, proof of sex discrimination should not be required in any case.

This decision follows the Pay Equity Inquiry conducted in 1998 which found evidence of gender based pay inequity in certain female dominated industries and occupations in NSW and recommended that the Commission establish a principle to facilitate applications for equal remuneration.

Review of the Principles for Approval of Enterprise Agreements

The Industrial Relations Commission is reviewing the Principles for Approval of Enterprise Agreements. The President will assist the Industrial Relations Commission to consider whether the current principles are operating to help ensure that enterprise agreements do not discriminate in their terms or effects. The review should also consider whether the principles ensure that the process

of negotiating enterprise agreements does not disadvantage women, people from non-English speaking backgrounds, people with disabilities and others.

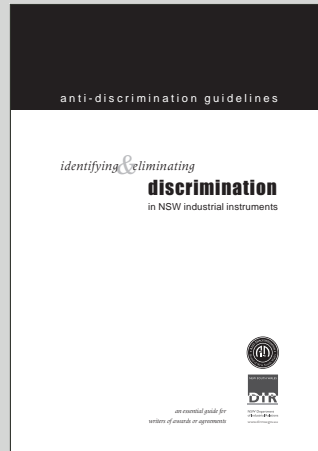
Salaried Senior Medical Practitioners Award

The President is intervening in the review of this award in relation to the definition of 'specialist' because it may be indirectly discriminatory in its operation on the ground of race. The President is providing assistance to the Commission and the parties both in relation to identifying issues of discrimination which may arise under the award and in developing non-discriminatory alternatives.

Catholic Personal Carers Leave Clause

The President of the Anti-Discrimination Board has intervened in an application by the Catholic Commission for Employment Relations (CCER) for variation of certain awards. The CCER seeks to vary certain awards in relation to the insertion of a Catholic Personal Carers Leave clause into those awards. Unlike the standard Personal Carers Leave clause in most other NSW awards which expressly refers to leave being provided in relation to an employee's carer responsibilities for a de facto or same sex partner, the Catholic Personal Carers Leave clause makes provision for such leave to be provided where there are circumstances of 'pressing domestic necessity'.

The President's view is that the proposed clause may raise issues of discrimination on the grounds of marital status or homosexuality. An issue which has arisen is the extent to which exceptions to the Anti-Discrimination Act may be applicable to proceedings under the Industrial Relations Act, such as those relating to religious bodies.



Award guidelines

Identifying and eliminating discrimination from industrial awards and agreements, was published jointly with the NSW Department of Industrial Relations. It aims to ensure that discrimination issues are considered by employees, employers, unions and employer organisations when industrial instruments are made, varied or under review.

The guidelines:

- outline obligations under industrial and anti-discrimination legislation in NSW
- help employers, employees and their representatives identify discriminatory provisions in industrial instruments
- help correct discriminatory provisions in awards
- provide model discrimination and harassment clauses.

These guidelines focus on providing information about the NSW jurisdiction while including information about federal laws. The guidelines are intended to provide an enhanced understanding of the interaction between federal and State jurisdictions.

While these guidelines are intended to be a resource for parties involved in the review of industrial instruments, it is especially important that employers understand the requirements of anti-discrimination legislation and are fully aware of their workplace responsibilities.

Submissions

In 1999/2000, Legal and Policy Branch prepared various submissions, including submissions on:

- the review of the *Property Relationships Act 1984* conducted by the Law Reform Commission
- the review of the *Anti-Discrimination Act 1977* conducted by the Law Reform Commission
- the review of the *Public Health Act* conducted by the Department of Health
- discrimination implications of transport concessions.

FOI requests

In 1999/2000, the Board received six Freedom of Information requests seeking access to Board files. One request was withdrawn by the applicant and in another case there were no documents to match the request. Access was provided in relation to the other four requests.

Below: Doris Martin, Administrative Assistant in Legal and Policy Branch.



Talks & conference presentations

Staff from Legal and Policy Branch prepared and delivered a number of papers about discrimination law for legal professionals and others working in the area. Examples include:

- a paper on criminal and civil acts of discrimination for a conference on hate crimes and discrimination
- a paper on discrimination law in practice delivered to Australian Lawyers for Human Rights and NSW Young Lawyers
- a paper on pregnancy discrimination delivered at the National Discrimination Legal Officers Conference.

External involvements

The Board participates in a number of committees and working parties to monitor and try to reduce the impact of discrimination on our community. Committees which Board staff participated in throughout the year included:

- **Law Society's Human Rights Committee**
This committee has drafted submissions on cloning and human tissues, sexual assault in the prison system, the review of the *Property Relationships Act 1984* and the Anti-Discrimination Bill 1999.
- **Accessible Transport Forum**
This is an intergovernmental committee which advises the Minister for Transport on accessibility issues for people with disabilities.
- **Women's Advisory Network (Department of Corrective Services)**
The Board participated in this committee, which advises the Commissioner for Corrective Services on issues affecting women in custody.
- **NSW Government Pay Equity Working Party**
This working party met in relation to the Equal Remuneration Principle State Case.

- **Industrial Relations Commission Users Group**

This group of users of the Industrial Relations Commission, such as unions, community legal centres and peak employer groups, is consulted about its views and recommendations on procedural matters in the Industrial Relations Commission.

- **Office of the Director of Equal Opportunity in Public Employment Committees**

The Board participated in committees established by the Office examining aspects of EEO in the NSW public sector.

- **Olympic Co-ordinating Authority Access Committee**

This committee was set up by the Olympic Co-ordinating Authority to advise it on access and disability issues in relation to all major Olympic venues and facilities.

- **Department of Fair Trading Accommodation Executive Committee**

This Committee is developing and then implementing a proposal for a joint project between the Board and the Department of Fair Trading to help eliminate discrimination against Aboriginal people and Torres Strait Islanders in the real estate industry.

- **Department of Women Transgender Working Party**

This Committee is looking at cross government policy and procedural change necessary to ensure discrimination against transgender people is removed from public sector employment and service provision.

- **Pay Equity Strategy Steering Committee**

This Committee is developing the government's strategy to achieve equitable pay for women through a variety of means.

- **Attorney General's Department Ethnic Affairs Policy Statement Committee**

- **Attorney General's Department Disability Committee**

The President's involvement

The President of the Board was involved in a number of committees and working parties established among agency chief executive officers throughout the State public sector:

- Office of the Director of Equal Opportunity in Public Employment Climate Survey Steering Committee
- Department of Corrective Services: Anti-Violence Committee
- Attorney General's Disability Advisory Committee
- EEO Advisory Committee
- Industrial Relations Consultative Committee
- Ombudsman's Network Group
- State Rail Authority Training Committee
- Premier's Council on Women
- Local Government Aboriginal & Torres Strait Islander Network
- Premier's Youth Advisory Committee
- Department of Industrial Relations Users Group.

The President also presented a number of papers at conferences during 1999/2000, including:

- *The Wiles of the Stranger: Hepatitis and discrimination* — Second Australasian Conference on Hepatitis C, New Zealand
- *Recent Developments in Discrimination: The total workplace — A human rights perspective* — Employment and Industrial Law Specialists Conference
- *Leadership in the School Culture* — Principals' Conference, Department of Education and Training
- *Making Rights Real: Justice for everyone* — Intellectual Disability and the Law Conference
- *Telling Truths: The Robert Nestsdale Oration* — Young Liberal Movement of NSW
- *Representing the Public Interest* — 5th World Conference on Injury Prevention, New Delhi, India
- *Better Representative, Better Representation* — Australasian Legal Education Forum.

Consultations

The Board organises a number of regular consultations with various groups within the community. The consultations organised in 1999/2000 included:

Women's Consultation

In recognition of the discrimination and harassment that women experience, the Board decided to convene a women's consultation in 1995. The consultation met four times during 1999/2000 and focused on gender discrimination and human rights in NSW as they affect women, including:

- the Anti-Discrimination Act and law reform
- the Board's internal procedures, policies and education programs
- substantial issues of discrimination facing women.

What was achieved over the year?

This year:

- participants were briefed on the Board's Access & Equity Plan and the Equal Remuneration Principle State Case
- discussions were held on the NSW Law Reform Commission's report on the Anti-Discrimination Act and concerns of women
- a presentation was given by the Privacy Commission on the use of surveillance cameras, especially in employment, and implications for women
- a joint consultation was held with the Board's Indigenous Advisory Committee on issues of particular relevance to Indigenous elders as part of the International Year of Older People.

Who participates

The Board's Women's Consultation includes representation from the Women's Refuge Working Party, Aboriginal Women's Legal Centre, NSW Working Women's Centre,

Disability Discrimination Legal Centre, Older Women's Network, Australian Federation of Business & Professional Women — NSW, CRC Justice Support, Coalition of Activist Lesbians, Gay & Lesbian Rights Lobby, AIDS Council of NSW, Women's Electoral Lobby, People With Disabilities — NSW, NSW Council of Social Services, Immigrant Women's Speakout, Rural Women's Network, Women's Health Information Resource & Crisis Centre Association, Association of Non-English Speaking Background Women of Australia, Sex Workers Outreach Project, Tenants' Union, Women's Legal Resource Centre, Women's Health in Industry, NSW Labor Council, Women's Information & Referral Service, Department for Women and Australian Consumers Association.

Gay and Lesbian Consultation

The Board has convened consultations with gay and lesbian communities for well over 10 years. The consultation includes members from a wide range of gay and lesbian community organisations, plus representatives from the Police Service and other key NSW government departments, parliamentary offices and unions, and individuals.

What were the major achievements?

The consultation met three times during 1999/2000 and discussed:

- the Law Reform Commission's report on the Anti-Discrimination Act and the concerns of many members of the gay and lesbian community about the proposed change to expand the current ground of homosexuality to include all forms of sexuality
- the new Property Relationships Act and issues of concern that are still outstanding as far as gay and lesbian community members are concerned, eg the need to cohabit for the law to take effect
- school education and continuing problems in relation to homophobia in schools.

Who participates?

Anti-Violence Project, Gay and Lesbian Rights Lobby, 2010 (gay and lesbian youth refuge), Gender Centre, Country Network, ACON, Sydney Bisexual Network, Lesbian and Gay Solidarity, Lesbians on the Loose, Sydney Bi-Youth, Police Consultant to Gay and Lesbian Communities and several Police Liaison Officers with special responsibility for dealing with gay and lesbian issues, Sydney Star Observer, Office of Tanya Plibersek MP, union representatives, Vincare, Community Support Network, InterSection, SPAIDS, South Sydney Council, Order of Perpetual Indulgence, People with Disabilities, Matrix Guild, Coalition of Activist Lesbians, HACC, Access Plus, People Living with HIV and AIDS, Gay and Lesbian Counselling Service, several individual participants and representatives from various government departments.

Transgender Consultation

The Board has held a regular consultation with members of the transgender community since the Anti-Discrimination Act was amended in 1996 to include transgender as a ground of discrimination. The consultation met twice in 1999/2000 and discussed:

- how to ensure that government agencies implement appropriate employment and service delivery policies for transgenders
- removing the current legal distinction in the Anti-Discrimination Act between 'recognised transgenders' and those who don't fit this narrow definition, and the fact that the Law Reform Commission's report into the Anti-Discrimination Act did not propose removing this distinction.

Indigenous Advisory Committee

Details of this committee are outlined on page 31.

Below: Staff from the Board giving out information at one of the many stalls we attend.



Exemptions

There are two types of exemptions available under the Anti-Discrimination Act — s 126 and s 126A.

Section 126A exemptions

This exemption is required when an employer or service provider wishes to run a special needs program or activity that would be discriminatory on a ground covered by the Anti-Discrimination Act. To apply for an exemption for a special needs program or activity, a person must apply to the Attorney General.

Section 126 exemptions

These are needed when an organisation seeks to redress past disadvantage or discrimination experienced by a particular group on any of the grounds covered by the Anti-Discrimination Act. To gain this exemption, the applicant should write to the President of the Anti-Discrimination Board setting out the nature of the exemption sought and arguments in support of it. The Statutory Board decides whether to recommend to the Attorney General that an exemption be granted. In making their recommendation, the Board takes into account the purpose of the Anti-Discrimination Act as legislation designed to promote equality of opportunity. The initial period of exemption can be for up to ten years with the possibility of further renewal for another ten years. Exemptions are granted under this provision when, for example, a job is designated for a person of a particular race or gender.

Exemptions granted in 1999/2000 under section 126A of the Anti-Discrimination Act

Department or organisation	Special needs program or activity	Period of exemption
Adult and Community Education — Byron Bay Inc and Jutta Kasper	Music course for women only	06.07.99 to indefinitely
Caringbah Women's Health Information Centre	Health Services for women only	16.03.00 to indefinitely
Department of Education and Training — TAFE	Aboriginal Cultural Site Conservation Courses for Indigenous persons	5 years from 05.10.99
Dubbo Emergency Accommodation Project Inc	Women's refuge	04.01.00 to indefinitely
Icebox Nightclub	To run special nights for lesbians only	01.11.99 for 10 years
Women's Housing Company Ltd	Accommodation services for single women	23.09.99 to indefinitely

**Exemptions granted in 1999/2000 under section 126
of the Anti-Discrimination Act**

Applicant	Program	Sections	Date granted	Expiry
AIDS Council of NSW	To provide additional sick leave for employees with HIV	49D & 51	4.1.00	31.12.00
Brain Injury Association of NSW	To designate position of self-advocacy worker for person with a brain injury	49D & 51	7.1.00 (5 years)	6.1.05
Horwath Recruitment & Training P/L and Holden Ltd	To recruit women only for sales franchisees consultants in the motor vehicle industry	25 & 51	3.4.00 (2 years)	2.4.02
Local Government & Shires Association & others	To give workers over 45 years of age with 2 years continuous service 1 week extra notice on termination	age, sex & disability in employment provisions of ADA	22.11.99	21.11.04 (5 years)
New England Area Health Service	Designate one position of Aboriginal Health Education officer for an indigenous male, and another for an indigenous female	25 & 51	05.06.00 (10 years)	5.05.10
National Aboriginal Islander and Skills Development Assoc	Designate various positions for Aboriginal persons	8 & 51	26.04.00 (10 years)	26.04.10
NSW Aboriginal Housing Office	Designate the position of Regional Services Co-ordinator as position for an Aboriginal person	8 & 51	19.7.99 (10 years)	19.7.09
Randwick City Council	Designate the position of Public Relations Officer/Events Co-ordinator for an Indigenous person	8 & 51	19.7.99 (5 years)	18.7.04
Shellharbour City Council	Designate position of trainee horticulturalist as a position for Indigenous person	8 & 51	10.4.00 (5 years)	9.4.05
South Eastern Area Health Service	Designate position of trainee clerical assistant as a position for person with HIV disability	49D & 51	19.7.99 (2 years)	18.7.02
State Rail Authority of NSW	Implement employment quota strategy to increase proportion of women employees in Operations Division	Pt 3 Div 2 Sex discrim in work & s 51 Conditions apply (conditions amended 21.2.00)	26.7.99 (2 years)	25.7.01
Summerland Security Service	Designate position of security guard for Aboriginal person	8 & 51	26.04.00 (10 years)	26.04.10
Wesley Mission Homeless Persons — Edward Eagar Lodge	To permit the lodge to refuse to accommodate non-recognised transgender persons in the section of their preferred gender	38M & 38N	25.10.99 (5 years)	24.10.04