REPORT OF THE

STANDING COMMITTEE ON LEGISLATION

IN RELATION TO

Acts Amendment (Sexuality Discrimination) Bill 1997

Presented by the Hon Bruce Donaldson (Chairman)

Report 45

STANDING COMMITTEE ON LEGISLATION

Terms of Reference:

1 There is hereby appointed a standing committee to be known as the *Legislation Committee.*

2 The Committee consists of 5 members.

3 A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice.

4 A referral under clause 3 includes a recommittal.

5 The functions of the Committee are to consider and report on

(a) Bills referred under this order;

(b) what written laws of the State and spent or obsolete Acts of Parliament might be repealed from time to time;

(c) what amendments of a technical or drafting nature might be made to the statute book;

(d) the form and availability of written laws and their publication.

Members at the time of this inquiry:

Hon Bruce Donaldson MLC (Chairman)

Hon Bill Stretch MLC (Deputy Chairman)

Hon John Cowdell MLC

Hon Derrick Tomlinson MLC

Hon Giz Watson MLC

Staff at the time of this inquiry:

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CHAPTER 1

EXECUTIVE SUMMARY & RECOMMENDATIONS

1.1 EXECUTIVE SUMMARY

The *Acts Amendment (Sexuality Discrimination) Bill 1997* ("**Bill**") introduces a number of amendments to the *Equal Opportunity Act 1984* ("**EO Act**") and the *Criminal Code* and repeals the *Law Reform (Decriminalisation of Sodomy) Act 1989*. The Bill was introduced into the Legislative Council in September 1997, passed first and second reading and was referred to this Committee for consideration and report in November 1997.

The major amendment to the EO Act is the insertion of a new Part IIB which prohibits discrimination on the grounds of sexuality and transgender identity. The new Part is broadly similar to existing Parts of the EO Act which prohibit discrimination on grounds such as sex, race and religious conviction, but differs in detail from existing Parts.

A large part of the Committee's inquiry was devoted to consideration of proposals for exemptions from having to comply with the proposed new Part IIB of the EO Act in particular fields of activity. The fields of most interest were insurance, superannuation, adoption and reproductive technology.

Insurance and superannuation

Insurance and superannuation providers are currently not prevented in Western Australia from discriminating against a person on the basis that they are homosexual or in a same sex relationship. The Bill will alter this position by prohibiting discrimination in provision of "services", which include insurance and superannuation.

This aspect of the Bill is welcomed by homosexual rights organisations, who refer to insurance and superannuation as a "black spot" for anti-homosexual discrimination. However, it is strongly opposed by insurance and superannuation providers, primarily on the basis that they should be allowed to offer services on conditions which reflect risks identified by actuarial or statistical analysis. In response, it is argued that the Bill will not prevent insurance providers obtaining medical and behavioural information and using the information to set conditions which appropriately reflect risk.

The second argument put forward by insurance providers is that other jurisdictions offer an exemption allowing them to discriminate. This is, however, only true in some jurisdictions. Similarly, in the EO Act an exemption is provided for some grounds but not all. Australia's approach to discrimination in insurance and superannuation is far from uniform.

On balance, the majority of the Committee is not convinced that an exemption in favour of insurance and superannuation providers is justified. In the Committee's view, the possible marginal improvement in accuracy of assessment of insurance risk does not outweigh the

advantages of promoting the Bill's general intention of prohibiting discrimination on the grounds of sexuality and transgender identity.

The minority cannot support the weakening of the right of an insurance, assurance or superannuation provider to assess its liability on the basis of its own policy criteria and methodology. In the minority view, the right of an insurance body to discriminate is essential if it is to match acceptable risk to acceptable premiums for the vast majority of the insuring public.

An additional issue arising in relation to superannuation is that proposed Part IIB of the EO Act takes an approach different to existing Parts. The Committee considers that inclusion of a specific #35ZF dealing with superannuation schemes and provident funds has the potential to cause confusion and is unnecessary as #35Z covers these services. #35ZF should be deleted from the Bill.

Adoption

The Adoption Services section of the Department of Family and Children's Services suggests that the Bill adds confusion to the area of adoption, contrary to the Bill's proponent's claim that the Bill does not affect adoption.

It is uncertain whether the EO Act affects the *Adoption Act 1991* at all, as it is unclear whether adoption involves a "service" as defined by the EO Act. The Bill does not add to the uncertainty.

The *Adoption Act* deals separately with adoption by couples (the great majority of adoptions) and by individuals. It is currently impossible for a **same sex couple** to have a child placed in their care with a view to adoption, or to adopt a child. The Bill does not affect this position.

The Bill could, however, have one effect on the Adoption Act. If the EO Act affects adoption, the Bill adds the grounds of sexuality and transgender identity to the existing grounds in relation to which an adoption applications committee is prohibited from discriminating, when making decisions about **individual** applicants for adoption. The Committee observes that the Bill would therefore have to be amended to give effect to Hon Helen Hodgson's assurance that in regard to adoption "*the status quo will stand*".

Reproductive technology

The Reproductive Technology Council suggested that the Bill adds confusion to the area of reproductive technology, contrary to the Bill's proponent's claim that the Bill does not affect reproductive technology.

The *Human Reproductive Technology Act 1991* deals separately with in vitro fertilisation ("IVF") and artificial insemination.

Looking first at IVF, under the *Human Reproductive Technology Act 1991* it is not possible for a **lesbian couple** to access IVF procedures. The Bill does not affect this position.

However, the Bill will alter the laws governing access to artificial insemination by prohibiting a provider of artificial insemination services from refusing access to those services to a **woman** on the ground that she is a lesbian or is in a same sex relationship. Hon Helen Hodgson in her second reading speech states that in regard to artificial insemination "*the status quo will stand*". The Committee observes that the Bill would have to be amended to give effect to Hon Helen Hodgson's assurance.

Recognition of same sex relationships

Most participants in the debate regard the Bill's recognition of a same sex relationship as a form of de facto relationship as being something of a social milestone, whether they approve or disapprove of the recognition.

However, looking at the practical effect of this aspect of the Bill, existing distinctions between homosexual and heterosexual relationships remain as they are currently, except for the specific purposes of the EO Act.

It is consistent with the intention of the Bill that a same sex relationship should be capable of recognition as a de facto relationship in the same way as a heterosexual relationship.

Uniform age of consent

Currently the age of consent for male to male sexual activity in Western Australia is 21, while for heterosexual activity the age of consent is 16. The Bill removes the distinction, providing for a uniform age of consent of 16. It also extends the operation of the *Criminal Code* by recognising sexual offences arising from female to female sexual activity. Both these outcomes are consistent with the intention of the Bill to provide equal treatment for heterosexual and homosexual activity.

The Commonwealth *Human Rights (Sexual Conduct) Act 1994* prohibits arbitrary interference with private and consensual sexual activity between persons over 18 years of age. The Committee was of the opinion that the inconsistency of the *Criminal Code* with the Commonwealth *Human Rights (Sexual Conduct) Act 1994* should be removed by amendment of the relevant sections of the *Criminal Code.*

A minority of Committee members takes the view that the inconsistency with Commonwealth legislation would best be overcome by adoption of the Bill's proposed uniform age of consent of 16. However, the minority recognises that the important principle of equality and a uniform age of consent could be established with a uniform age of 17 or 18.

The majority does not agree. They acknowledge the need to establish consistency with Commonwealth law but do not accept there is a compelling reason to lower the age of consent for male to male sexual activity to make it consistent with the age for lawful consensual heterosexual intercourse.

Repeal of *Law Reform (Decriminalisation of Sodomy) Act 1989*

The Bill in repealing this Act will remove the Preamble to the *Law Reform (Decriminalisation of Sodomy) Act 1989* from Western Australia's statute book.

The Committee is divided on this issue. The minority believes that the Preamble and other provisions of the *Law Reform (Decriminalisation of Sodomy) Act 1989* serve as both an impediment to adequate school sex education and as an incitement to community hatred.

The majority of the Committee does not agree that the growing acceptance of homosexuality extends as far as condoning male to male or female to female sexual activity. For that reason, the symbolic statement of Parliament's disapproval of homosexual activity that is contained in the Preamble should remain part of Western Australian law.

Drafting of the Bill

The Committee reviewed the drafting of the Bill in detail and proposes a number of changes to the drafting. These are set out in full in Appendix A, in a form suitable to be moved as amendments to the Bill in Committee stage in the House.

1.2 LIST OF RECOMMENDATIONS

Recommendations are grouped as they appear in the text at the page number indicated.

page 30:

Recommendation 1: that proposed new section 35ZF of the *Equal Opportunity Act 1984* be deleted from the Bill.

page 72:

Recommendation 2: that references in proposed new section 35O of the *Equal Opportunity Act 1984* to "presumed sexuality" be deleted, and consequential changes made.

Recommendation 3: that references in proposed new section 35P of the *Equal Opportunity Act 1984* to "presumed transgender" be deleted, and consequential changes made.

page 73:

Recommendation 4: that the House consider whether proposed new sections 35O(3) and 35P(3) of the *Equal Opportunity Act 1984* should be deleted.

Recommendation 5: that if proposed new section 35O(3) of the *Equal Opportunity Act 1984* remains in the Bill, paragraphs (b) and (c) be deleted.

page 74:

Recommendation 6: that in clause 6(a) of the Bill, the first line of the definition of "transgender" be amended to read as follows:

> ***" "transgender identity" means the quality of being a person of one sex who -".***

Recommendation 7: that the term "transgender identity" be used in place of the term "transgender" throughout the Bill's proposed amendments to the *Equal Opportunity Act 1984*, and consequential changes made.

page 74:

Recommendation 8: that in proposed new sections 35Q(3) and 35S(2) of the *Equal Opportunity Act 1984*, the words "or transgender identity" are inserted after the word "sexuality".

page 75:

Recommendation 9: that proposed new section 35ZE of the *Equal Opportunity Act 1984* be amended by replacing the words "persons who are not of the sexuality or transgender identity of that other person" with the words "persons who are not of the sexuality of that other person or are not of transgender identity".

page 76:

Recommendation 10: that for consistency with the existing Parts of the *Equal Opportunity Act 1984* and to correct minor difficulties with the drafting of the Bill, the House make the minor drafting changes set out in paragraph [14.7] to the Bill's proposed amendments to the *Equal Opportunity Act 1984*.

page 76:

Recommendation 11: that the House consider whether the Bill should amend section 191 of the *Criminal Code* in a manner similar to the Bill's proposed amendments to section 192 of the *Criminal Code*.

page 77:

Recommendation 12: that to correct minor difficulties with the drafting of the Bill, the House make the technical drafting changes set out in paragraph [14.9] to the Bill's proposed amendments to the *Criminal Code*.

CHAPTER 2

REFERRAL OF THE BILL TO THE COMMITTEE

The Bill's long title is as follows:

> "*A Bill for AN ACT to amend the* Equal Opportunity Act 1984, The Criminal Code *and* Law Reform (Decriminalisation of Sodomy) Act 1989 *and for related purposes.*"

The Bill was introduced and read a first time in the Legislative Council on a motion of Hon Helen Hodgson MLC, on 17 September 1997.[1]

Following debate on 17 September and 19 November 1997, the Bill was read a second time on 19 November 1997.[2]

The Bill was referred to the Legislation Committee on 19 November 1997 on a motion by Hon N.D.Griffiths MLC.[3] No reporting date was fixed. The Committee commenced consideration of the Bill on 26 November 1997.

Parliament was prorogued on 7 August 1998, upon which the Bill (and consequently the referral to this Committee) lapsed.

Subsequent to the resumption of Parliament on 11 August 1998 the Bill was restored to the Notice Paper of the Legislative Council on a motion of the Leader of the House, Hon N.F. Moore MLC, on 13 August 1998.[4]

The Bill was referred to the Committee again on a motion of the Leader of the House, on 9 September 1998.[5]

[1]Hansard, Legislative Council 17/9/1997, p6303
[2]Hansard, Legislative Council 19/11/1997, p8164
[3]Hansard, Legislative Council 19/11/1997, p8167
[4]Hansard, Legislative Council 13/8/1998, p161
[5]Hansard, Legislative Council 9/9/1998, p1015

CHAPTER 3

PROCEDURE OF THE COMMITTEE

Parliamentary proceedings are such that it is not the role of a Committee to bring into question the policy or principle of a Bill referred to it for consideration after the second reading. The policy of the Bill is taken to have been settled by the House upon passage of the second reading and is therefore not the focus of the Committee's proceedings.

The role of the Committee is two-fold:

- to comment on whether the *Bill* is consistent with claims made concerning it in the second reading debate, particularly by the Honourable Member promoting the Bill; and

- to consider matters of detail such as the feasibility or clarity of particular clauses.

Some members of the Committee opposed the second reading of the Bill and continue to oppose the general policy and principle of the Bill. These members support the work done by the Committee in the course of this inquiry, within its limited terms of reference (as discussed in this Chapter).

Most of the Committee findings in this Report are consensus positions which all members could accommodate even though they held divergent opinions on the general principles of the Bill adopted by the Legislative Council at the second reading.

Three matters - whether insurance and superannuation providers should be exempt from the new Part IIB of the *Equal Opportunity Act 1984*, whether there should be a uniform minimum age for consensual heterosexual and homosexual sexual activity and whether to repeal the *Law Reform (Decriminalisation of Sodomy) Act 1989* - produced differing opinions. Rather than produce dissenting reports, the members of the Committee agreed that their opinions should be discussed at appropriate places in the Report.

Assisting the Committee's deliberations was the wide range of views in expressed in the course of the Legislative Council's debate on the Bill. Because the debate was so thorough, the Committee considered that it would be of limited assistance to invite submissions on the Bill from the general public.

The Committee instead identified a list of specific questions which it considered required detailed attention. These were circulated to persons whom the Committee regarded as well placed to give the Bill detailed consideration. A list of persons invited to make a submission is set out at Appendix B. Most of these took the opportunity to make a submission and a number of other submissions were also received. The Committee thanks the individuals and organisations who prepared a submission. A list of submissions is set out at Appendix C, Part 1.

Witnesses were invited to appear before the Committee to give specialist advice on adoption, reproductive technology, insurance and superannuation. The Committee thanks the witnesses for offering their time and expertise. A list of witnesses who appeared before the Committee is set out at Appendix C, Part 2.

CHAPTER 4

OVERVIEW OF THE BILL

This Chapter is an overview of the provisions of the Bill, divided into:

- proposed amendments to the *Equal Opportunity Act 1984* ("**EO Act**");
- proposed amendments to the Western Australian *Criminal Code*; and
- repeal of the *Law Reform (Decriminalisation of Sodomy) Act 1989*.

Throughout this Report, the term "homosexual" is used for brevity to refer to all the categories of persons most affected by the Bill's proposed amendments to the EO Act, ie bisexual, male homosexual and lesbian. Similarly, the term "sexuality" is used to refer to sexuality and transgender identity, except where specific issues arise in relation to transgender identity.

Evidence, the Committee's findings and the Committee's recommendations on each of the issues raised in the course of the inquiry are set out in Chapter 5 and the chapters following.

4.1 PROPOSED AMENDMENTS TO THE *EQUAL OPPORTUNITY ACT 1984*

4.1.1 How the Bill fits in to the *Equal Opportunity Act 1984*

The bulk of the amendments made by the Bill are to the EO Act. That Act currently offers certain protections against discrimination on the following grounds:

- sex, marital status and pregnancy;
- family responsibility and family status;
- race;
- religious or political conviction;
- impairment; and
- age.

The Bill adds to this list of protected areas in the two ways discussed in paragraphs [4.1.2] and [4.1.3].

4.1.2 Proposed Part IIB of the *Equal Opportunity Act 1984*

The major addition made by the Bill to the EO Act is the introduction under clause 8 of the Bill of a new Part IIB of the Act, set out in 3 Divisions as follows.

Division 1, headed "**General**", introduces and defines two new grounds on which discrimination will be prohibited in defined circumstances. The new grounds are:

- **sexuality**, defined under section 6 of the Bill to mean "*the quality of being self- identified as bisexual, heterosexual, homosexual or lesbian*"; and

- **transgender identity**, "*transgender*" being defined under section 6 of the Bill to mean a person of one sex who assumes any of the characteristics of, identifies as, lives or seeks to live as a member of the opposite sex or attempts to be or identifies as a transsexual.

The Bill provides that it is discrimination for the purposes of the EO Act if:

- a person treats another person less favourably than would otherwise be the case, on the ground of the person's sexuality, presumed sexuality, transgender or presumed transgender, or a characteristic that appertains generally to or is generally imputed to persons of that sexuality or transgender (#35O(1) and #35P(1))[6]; or

- a person unreasonably requires another person to comply with a requirement with which a substantially higher proportion of persons who are not of that person's sexuality or transgender are able to comply (#35O(2) and #35P(2)).

Division 2 is headed "*Discrimination in Work*". It sets out circumstances relating to work in which discrimination on the ground of sexuality or transgender identity (as defined by Division 1) is unlawful. The work situations dealt with are:

- discrimination against applicants and employees (#35Q)
- discrimination against commission agents (#35R)
- discrimination against contract workers (#35S)
- discrimination by partnerships (#35T)
- discrimination by professional or trade organisations (#35U)
- discrimination by qualifying bodies in relation to a person's ability to carry on a business, profession, trade or occupation (#35V); and
- discrimination by employment agencies (#35W).

Division 3 is headed "*Discrimination in other areas*". It sets out further circumstances in which discrimination on the ground of sexuality or transgender identity (as defined by Division 1) is unlawful. The circumstances relate to:

[6]For reasons of brevity, the symbol "#" is used to signify a new section which, if the Bill becomes law, will be added to an existing Act. This should not be confused with a clause of the Bill.

- education (#35X)
- access to places and vehicles (#35Y)
- provision of goods, services and facilities (#35Z)
- provision of accommodation (#35ZA)
- membership of a club or incorporated association (#35ZB)
- participation in a sporting activity (#35ZC)
- disposal of an interest in land (#35ZD)
- application forms (#35ZE); and
- superannuation schemes and provident funds (#35ZF).

4.1.3 Additional protection - expanded definition of "de facto spouse"

Apart from the introduction of the new Part IIB discussed above, the other significant amendment to the EO Act proposed under the Bill, at clause 6(b), is to include a same sex domestic partner as a "de facto spouse" for the purposes of the definition of that term at section 4 of the EO Act.

This has the effect of bringing same sex relationships within the scope of existing Part II of the EO Act, which deals with discrimination on the ground of marital status. The protections currently accorded by Part II to de facto partners, divorced and separated persons will, under the Bill, be extended to same sex de facto partners.

4.2 PROPOSED AMENDMENTS TO THE *CRIMINAL CODE*

The second piece of existing legislation affected by the Bill is the *Criminal Code*. Clauses 13 to 18 of the Bill set out a number of amendments to the *Criminal Code*, with two separate but related results:

- sexual activity between males will no longer be treated differently to sexual activity between a male and a female for criminal purposes (Criminal Code sections 186, 322A); and

- women will become subject to certain laws relating to sexual activity which currently apply only to men (Criminal Code sections 184, 186, 192, 195).

4.3 PROPOSED REPEAL OF *LAW REFORM (DECRIMINALISATION OF SODOMY) ACT 1989*

The third piece of existing legislation affected by the Bill is the *Law Reform (Decriminalisation of Sodomy) Act 1989* ("**Decriminalisation Act**"). Clause 19 of the Bill repeals the Decriminalisation Act.

The bulk of the Decriminalisation Act is concerned with amendments to the Criminal Code. Under section 37(1)(a) of the *Interpretation Act 1984*, the sections of the Criminal Code which

were affected by the Decriminalisation Act will not be affected by the Bill and will remain in their present form.

However, there are two sections of the Decriminalisation Act which are not merely amendments to the Criminal Code. Sections 23 and 24 have independent operation and will therefore be repealed by the Bill.

These provisions prohibit encouragement or promotion of homosexual behaviour, both generally and with particular reference to schools.

CHAPTER 5

EXCLUSIONS UNDER THE BILL

5.1 WHY EXCLUSIONS ARE IMPORTANT

In the course of debate on the Bill in the Legislative Council as it related to the EO Act, two main themes emerged. The first was the **general policy question** of whether the Bill should proceed at all; that is, whether it is appropriate for the EO Act to be extended to offer protection against discrimination on the grounds of sexuality and transgender identity. This question was resolved in the affirmative when the second reading of the Bill was agreed to. It is not the Committee's role to re-open the issue for discussion.

The second theme is the **detailed practical question** of what exclusions to the operation of the Bill are appropriate. The EO Act currently sets out a wide range of exclusions to the prohibitions of discrimination on the various grounds covered by the Act. Discrimination is therefore permitted in certain circumstances, despite the general policy of the EO Act that discrimination should be prohibited. The exact form of the exclusions is a critical detail of the Bill.

The Committee has devoted a large part of the inquiry to consideration of the detailed practical question of what exclusions should be available under the Bill.

5.2 HOW EXCLUSIONS WORK UNDER THE BILL

The key statement of the second reading debate in relation to exclusions is Hon Helen Hodgson's comment that:

> "*Exclusions to having to comply with the [new] provisions are . . . identical to other grounds of discrimination .*"[7]

This comment is problematic. The EO Act sets out exclusions in two different ways, which need to be considered separately in light of Hon Helen Hodgson's comment.

- The "*General Exceptions to this Act*" are set out in Part VI and **relate equally to all prohibitions**, under all grounds covered by the EO Act. They provide that charities, voluntary bodies and religious bodies are effectively exempt, when undertaking certain defined activities, from having to comply with the Act. The provisions of the Bill are subject to these general exceptions in exactly the same way as the existing provisions of the EO Act are subject to them. The general exceptions will not be affected in any way by the Bill. Accordingly, Hon Helen Hodgson's comment is correct with respect to these exclusions.

[7]Hansard, Legislative Council 17/9/1997, p6304

- The EO Act also includes a wide variety of exclusions to having to comply with **particular provisions**. Hon Helen Hodgson's comment cannot be correct with respect to this second class of exclusion, as each ground of discrimination has its own unique set of exclusions. Some exclusions apply to most grounds and are more or less consistent across the EO Act. Others are carefully tailored for a particular ground. This is to be expected given the very different considerations applying to discrimination on the ground of, say, age as opposed to race.

  The Bill contains a number of exclusions which fall into this category, ie which apply specifically to permit behaviour which is otherwise prohibited under the Bill.

5.3 GENERAL COMMENTS ON EXCLUSIONS

The Committee wishes to note a number of general comments made by witnesses about exclusions.

Gay and Lesbian Equality (WA) ("**GALE**") accepts the appropriateness of exclusions applying in the arrangement of personal and domestic affairs. However it makes the general comment that it opposes:

> "*any exemptions that may pander to homophobic stereotypes, such as exemptions relating to employment of persons (teachers, etc) responsible for the care of children*"[8].

GALE notes that this type of exemption has been included in equal opportunity laws in other States. However, the Bill does not include any such exclusions and therefore should not create difficulties for GALE in this regard.

Like Hon Helen Hodgson, GALE advocates that the same level of exclusion be offered in respect of sexuality as in respect of other grounds. As discussed above, the exclusions for various grounds vary considerably, making this a difficult proposition to put into practice.

Dr Vivienne Cass differs from most witnesses in that she opposes exclusions generally, although conceding the political need for the exclusions set out in proposed new sections 35Q(3), 35S(2) and 35ZA(3)(a)(1).[9]

The Australian Family Association does not comment on the issue of what exclusions should apply, presumably because it believes that the legislation is flawed at a more fundamental level and should not proceed. Essentially its basis for this view is that:

> "*Western Australians should be entitled to hold and, within the limits of a civilised society act on, negative assessments of homosexual behaviours.*"[10]

[8]Submission No.5
[9]Submission No.3
[10]Submission No.12

5.4 ISSUES FOR THE COMMITTEE

An important task for the Committee was to consider whether the exclusions under the Bill are appropriate. Accordingly, the Committee invited concerned organisations to comment:

- first, on whether any of the specific exclusions proposed by the Bill **should not** be available; and

- secondly, whether any additional exclusions **not** included in the Bill **should** be available. Proposed additional exclusions might be, but need not be, based on exclusions already available in the EO Act for other grounds.

It was strongly argued both in the second reading debate and by some witnesses to this inquiry that the exclusions proposed under the Bill are not broad enough and that additional exclusions are warranted. In particular, it was argued that the Bill should be amended to provide exclusions in favour of:

- insurance providers;
- superannuation providers;
- adoption services; and
- reproductive technology providers.

These matters are separately dealt with in the following chapters. In addition, a number of less significant exclusions and proposed exclusions were discussed in the course of the inquiry and are briefly dealt with in Chapter 9.

COMMITTEE FINDINGS ON EXCLUSIONS UNDER THE BILL

The Committee considers that there is no difficulty as a matter of general principle with the Bill containing appropriate exclusions, allowing discrimination on the grounds of sexuality and transgender identity in specified circumstances.

The Committee supports the distinction between private and public spheres underlying many of the exclusions under the Bill and the EO Act generally. The justification for many exclusions in the Act and the Bill is that a person should be entitled to discriminate according to their personal views in the conduct of their private affairs. Drawing the line between private and public spheres can be difficult in particular cases, but guidance may be found in the treatment of existing grounds under the EO Act.

However insurance, superannuation, adoption and reproductive technology are matters falling essentially in the public sphere. Advocates of exclusions which would allow discrimination in these areas cannot rely on the "private sphere" argument but must find different justification if the proposed exclusions are to be allowed.

CHAPTER 6

PROPOSED EXCLUSION - INSURANCE & SUPERANNUATION

6.1 INTRODUCTION

#35Z of the EO Act under the Bill makes it unlawful for persons providing **goods or services** to discriminate on the basis of sexuality or transgender identity. Existing section 20 of the EO Act provides the equivalent protection in respect of marital status, which under the Bill will include having a same sex de facto partner. The term "services" is broadly defined under section 4 of the EO Act, with the result that these provisions have a significant impact on the activities of, among others:

- State government departments and public authorities;
- members of any profession or trade; and
- banking and insurance organisations.

Although the second reading debate makes it clear that there is considerable opposition to providers of services being subject to the Bill, the protections offered by these provisions are central to the objects of the Bill, as they are to each of the existing parts of the EO Act. As the provision has been accepted by the Council, the Committee does not intend to question whether #35Z is appropriate per se.

However two particular types of services, **insurance** services and **superannuation** services, require particular consideration. Some, but not all, existing Parts of the EO Act contain a partial exception to the prohibition of discrimination in respect of insurance and superannuation services. This means that, for those grounds where there is such an exception, certain types of discrimination are permitted in the terms and conditions of insurance and superannuation policies.

An important question for the Committee's consideration is whether such an exception to the general prohibition of discrimination should be allowed in respect of #35Z and #35ZF, and section 20 as it will operate under the Bill. **Insurance** services are considered in [6.2] and **superannuation** services in [6.3].

6.2 INSURANCE SERVICES

6.2.1 Introduction

Insurance services will potentially be affected by two elements of the Bill. It will be unlawful to refuse to provide insurance and similar services to a person:

- on the ground of **sexuality**, under proposed new section 35Z; or
- on the ground of **marital status**, under section 20,

or to discriminate on either ground in provision of the services.

At a practical level, it appears this aspect of the Bill will affect the provision of insurance most significantly in the following 2 ways.

- Insurance companies are currently allowed by State law to refuse to offer policies to homosexual men, or to offer such policies on less favourable terms and conditions. The Bill will not prevent an insurance company discriminating on **health** grounds in the same way as at present, for example where it identifies an individual as being positive for HIV/AIDS. However it will prevent such discrimination being made on the basis of **sexuality** per se.

- When an insurance provider determines who should receive a payment on the death of an insured person in a same sex relationship, it will have to give the same weight to the interests of a person in a same sex relationship with the deceased as it would to a person in a de facto heterosexual relationship. The Bill will not **require** an insurance provider to make payments to a person in a same sex relationship, but will require that that person be treated in the same way as a person in a de facto heterosexual relationship.

Importantly, as far as the Committee is aware, insurers do not object to the Bill's approach on the second of these matters. Insurers do not seek a total exemption from sections 20 and 35Z, but only a partial exemption (similar to those currently in place for the grounds of sex, race and impairment) enabling them to discriminate where there is an actuarial or statistical basis for doing so. When determining who should be paid death benefits on the death of an insured, it seems improbable that an insurer would seek to discriminate on an actuarial or statistical basis. Accordingly, discrimination in this area will, it may be assumed, essentially be prevented by the Bill even if the exception sought is allowed.

Therefore the question for the Committee's consideration is not whether insurers should be exempt from the Bill, but whether they should be allowed to discriminate on the grounds of sexuality or transgender identity on an actuarial or statistical basis. Arguments which have been raised against and for allowing this partial exception are considered in the following two sections.

6.2.2 Arguments AGAINST an exception for insurers

Insurance is currently a "black spot"

GALE informed the Committee that provision of insurance services is:

> *"close to the top of the list of discrimination 'black spots' for gay male, lesbian and transgender identified people. Discrimination, when it occurs*

> *in these areas, is likely to have a major deleterious financial impact on the discriminated person.*"[11]

GALE gives as examples:

- a same-sex person who survives his or her partner being denied death benefits payable on an employee insurance policy (whether funded by the employee or employer), in circumstances where the death benefits would routinely be paid to a de facto partner of the opposite sex;

- insurers basing health insurance premiums on information about sexuality, as opposed to identified health risks.

GALE is positive about the provisions of the Bill which address these issues:

> "*In summary, we believe that the effect of the new clauses 35Z and 35ZF, combined with the inclusive definition of de facto spouse, will be to ensure that the benefits of insurance and superannuation services are provided on an equal footing to all persons regardless of sexuality or transgender identity.*"[12]

Similarly, A J Hosken does not think that superannuation and insurance providers should be granted any exclusion from having to comply with the proposed new sections, rejecting any argument that such an exclusion might be justified on an actuarial or statistical basis.[13]

The case for giving insurers special dispensation is not made out

The central argument that insurers should be subject to the Bill is that they should not be granted special dispensation where other providers of services are not, unless there is a clear differential in respect of insurance risks for a particular ground. The argument is that insurers have rightly been granted special dispensation where such clear differential exists, ie on the grounds of sex, age and impairment, but there is no such differential for sexuality and transgender identity. Sexuality and transgender identity should therefore be treated like race, political conviction and so on, where no special dispensation is available to insurers.

Insurers are not prevented from discriminating based on health

The Bill will not prevent insurers discriminating between persons on the ground of health. An insurer will be able to refuse to offer services, or services on different conditions, to a person who has an HIV/AIDS condition.

[11]Submission No.5

[12]Submission No.5

[13]Submission No.1

Nor will the Bill prevent an insurance provider asking specific behavioural questions of an applicant and relying on the answers to these questions to set out terms and conditions for insurance which discriminate on the basis of medical risks revealed by the answers. For example, an insurer can continue to ask whether a person engages in sexual activity which from a medical viewpoint involves a high risk of contracting HIV/AIDS. The insurer will be able to discriminate in terms of the person's medical risk profile based on behavioural information. If appropriately framed, such discrimination will not amount to discrimination on the basis of a person's sexuality.

As an example of the kind of questions organisations ask about behaviour, the Red Cross, before accepting a blood donation, requires the prospective donor to complete a statutory declaration which includes the following questions:[14]

- To the best of your knowledge have you . . . ever thought you could be infected with HIV or have AIDS?

- In the last 12 months have you engaged in sexual activity with someone you might think would answer "yes" to [the above question]?

- Within the last 12 months have you . . . had male to male sex?

- Within the last 12 months have you . . . been a male or female sex worker?

- Within the last 12 months have you . . . engaged in sexual activity with a male or female sex worker?

It is argued that it is appropriate for an insurer to draw conclusions about insurance risks when it has behavioural information of this level of detail, but it is inappropriate to draw conclusions based merely on information about sexuality and an assumption about links between HIV/AIDS and sexuality.

This argument does not deny that there might be an actuarial or statistical link between a person's sexuality and the insurance risks they carry. Rather, it is suggested that a reasonably accurate risk analysis can be undertaken by the insurer on the basis of medical and behavioural information, and that only a marginal improvement in the analysis is achieved by obtaining information about sexuality per se. The contention is that the degree of improvement is insufficient to justify the exemption sought.

[14]Donations of blood are governed by human tissue legislation in each State and Territory, which over-ride otherwise applicable equal opportunity laws. The Red Cross questions are used here as examples of behavioural questions, not as examples of questions necessarily complying with relevant equal opportunity laws.

Even if there were an actuarial basis for discrimination, discrimination is socially unacceptable

A further argument considered by the Committee is that it does not necessarily follow that wherever an actuarial or statistical basis for discrimination exists discrimination should be allowed. It might be that the social unacceptability of discrimination on certain grounds is of greater weight than actuarial or statistical considerations.

The clearest example within the EO Act of social considerations over-riding acknowledged statistical differentials between groups occurs in relation to the ground of **race**. The EO Act does not permit insurers an exception which would allow them to discriminate on the ground of race, even though there would undoubtedly be an actuarial basis for differentiating between races in calculating some insurance risks. For example, there is evidence indicating that Aboriginal people have a genetic predisposition to diabetes. Discrimination would therefore be justified on an actuarial basis. Nevertheless, the EO Act does not provide an exception which would permit such discrimination.

6.2.3 Arguments FOR an exception for insurance

The Investment and Financial Services Association Ltd ("IFSA") thinks insurance providers have good reason to seek an exclusion allowing them to discriminate on the basis of sexuality where this is justified on statistical or actuarial grounds. IFSA makes a number of related points in support of its case, considered in turn.[15]

More information about the insured means more accurate insurance premiums

IFSA develops this argument point by point as follows.

- When deciding whether to offer life insurance cover, insurers consider the circumstances of the individual applicant and the likelihood that the applicant will make a claim, after which the insurer seeks to offer terms which reflect the cost of providing the insurance.

- Policy holders are unwilling to cross subsidise other policy holders by paying a higher premium than their life circumstances warrant.

- As it is impractical to assess every individual applicant, insurers "pool" risks based on statistics relating to the information provided by the applicant. The skill of the insurer in determining the risks determines the viability of the insurer's business.

- 80% of HIV infections in Australia have occurred in homosexual or bisexual men. The Committee notes, however, that no evidence was produced to justify this claim and queries whether the figure can be relied on.

[15]Submission No.14

- In assessing an individual's risk, the insurer must take into account both existing and future risks, meaning that information about current medical conditions at the time the insurance commences is only part of what is required.

To summarise, IFSA believes that there should be an exclusion allowing insurers to discriminate, because this will lead to more accurate allocation of risk and therefore better provision of insurance services generally. That is, it believes that a person's sexuality creates a differential for the purposes of insurance provision, in the same way as a person's sex, disability or age.

The Bill is inconsistent with Federal law

IFSA next raises the spectre of Federal-State inconsistency. IFSA cites the Commonwealth *Disability Discrimination Act 1992* in support of its argument. Under that Act:

- discrimination on the ground of disability is generally prohibited, in a manner similar to the EO Act; but

- there is an exclusion which allows insurers to discriminate on the ground of disability where the discrimination is reasonable and done on a statistical or actuarial basis.

It not clear why these provisions are said by IFSA to be inconsistent with the Bill. The Bill does not deal with **disability**, but with **sexuality**. If there were a Commonwealth law prohibiting discrimination on the ground of sexuality, the question of inconsistency might arise. This is, however, not the case.

The Committee assumes that what IFSA means is that it would like to see a similar exclusion made in favour of insurers for the ground of sexuality as is made for disability under Commonwealth law (and similarly for "impairment" under the EO Act).

The Bill goes further than other State laws

IFSA's next concern is that the Bill goes further than other State laws in prohibiting discrimination on the ground of sexuality with respect to insurance. IFSA argues that if Western Australia adopts a different regime to that applying in the other States, significant costs will be unnecessarily incurred in preparing insurance contracts unique to Western Australia.

IFSA suggests in correspondence to the Committee that all other States offer an exemption to insurers allowing them to discriminate on the ground of sexuality where the discrimination is justified on an actuarial or statistical basis. It also suggests that if the Bill is enacted in its current form it would be unique in requiring insurers to prepare new contracts.

The Committee has reviewed laws applying in other jurisdictions which prohibit discrimination on the ground of sexuality and finds that each of the claims made by IFSA requires some qualification, as follows.

- First, other jurisdictions take differing approaches to the exception proposed in favour of insurers. Some jurisdictions such as the Northern Territory provide the blanket exemption urged by IFSA, some such as Queensland provide a more limited exemption and some such as South Australia and New South Wales provide no exemption.[16]

- Secondly, across Australian jurisdictions there is a wide variety of exemptions to the wide variety of grounds on which discrimination is prohibited. Despite this, when requested by the Committee to provide examples of insurance forms which differ from State to State, IFSA stated that no such differing examples are available. This tends to undermine the argument that wherever States differ in their approach to discrimination in insurance, a different insurance form is required.

The Committee finds that IFSA cannot rely on the argument that the Bill will create unique problems for insurers.

Only a partial exemption is sought

An important consideration in favour of the exemption sought by IFSA is that even if the exemption sought by IFSA is included in the Bill, the Bill will go at least some of the way towards offering the protections sought by GALE and others. To allow the exemption would by no means completely undermine the intention of the Bill to offer protection to homosexual and transgender persons in relation to insurance.

COMMITTEE FINDINGS ON INSURANCE

If the Bill becomes law in its present form, insurance providers will be prohibited from discriminating on the grounds of sexuality or transgender identity, whether by refusing to provide insurance or in the terms on which they offer insurance.

[16]The Committee entered into extensive correspondence with IFSA on this matter. IFSA reiterates in the last of its three submissions its claim that "*There is no evidence apparent to us of State laws not providing an exemption*" and "*There is no difference in essence between the law in different States.*" Confusion on IFSA's part appears to have arisen on at least two fronts in this complex area of the law. First, IFSA cites in support of its case section 49 of the South Australian *Equal Opportunity Act 1984*. However, the section provides an exemption in favour of insurers in relation to **sex**, not **sexuality**. Secondly, IFSA correctly identifies that Part 3 of the New South Wales *Anti-Discrimination Act 1977* provides an exemption in favour of insurers. However, Part 3 relates to **sex discrimination**, not **homosexuality discrimination**. Homosexuality discrimination is covered in Part 4C, which contains no such exemption.

Insurance providers are seeking an exemption from the Bill which would enable them to continue, as at present, to discriminate on the grounds of sexuality or transgender identity if they so wished. Under the EO Act at present, insurers are allowed to discriminate on the grounds of sex, marital status and pregnancy; impairment; age. They are not allowed to discriminate on the grounds of family responsibility and status; race; religious or political conviction.

In the Committee's view, good cause needs to be shown why an exemption should be permitted in favour of insurers, given that all other providers of services will be prohibited from discriminating on the grounds of sexuality and transgender identity.

The Committee notes in favour of IFSA's arguments the fact that IFSA is seeking only a partial exemption, as discrimination would still have to be justified on an actuarial or statistical basis. This means that if IFSA's proposal were accepted, an insurance provider would be able to discriminate only to a limited extent.

The Committee also accepts that information about a person's sexual behaviour might enable a more accurate assessment of insurance risk to occur by enabling the insurer to form a more complete picture of all risks associated with the insured. IFSA's argument is that homosexual males are a higher insurance risk because they are more likely than other people to engage in unsafe sex practices.

However, this argument is not compelling for the reason that the Bill does not prevent the insurer obtaining medical information about the insured. The most relevant information for the insurer is information about the person's health. The insurer can continue to obtain this by requiring the insured to undergo appropriate medical tests, which would reveal, for example, whether the applicant is HIV positive. Further, the insurer's ability to ask behavioural questions, such as those asked by the Red Cross about whether a person engages in unsafe sexual practices, is not affected by the Bill.

Therefore the primary sources of information, ie medical and behavioural information, remain available to insurers. The Bill does not prevent insurance providers from continuing to discriminate on the basis of behaviour which gives rise to increased medical risk. It is only the secondary or indicative source of information, ie information about a person's sexuality, whose use is restricted by the Bill.

This means that the exemption requested would give insurers at best only a marginal improvement in accuracy of risk assessment. In this respect the grounds of sexuality and transgender identity may be contrasted with the grounds of sex, age and impairment, for which the EO Act does include the exemption under discussion. For each of these grounds, there are clear differences in insurance risks.

The Committee does not give significant weight to IFSA's arguments about possible inconsistency between the Bill and similar laws of other jurisdictions. As with many questions under the various anti-discrimination laws around the country, a variety of approaches has been taken by different jurisdictions to the question of insurance. The Committee considers that as no single approach has found uniform acceptance in Australian jurisdictions, Western Australia should consider the issue on its merits rather than by comparison with other States.

On balance, the majority of the Committee is not convinced that an exemption is justified. In the Committee's view, the possible marginal improvement in accuracy of assessment of insurance risk does not outweigh the advantages of promoting the Bill's general intention of prohibiting discrimination on the grounds of sexuality and transgender identity. The majority of the Committee finds that insurers are able to determine insurance risks adequately on an actuarial or statistical basis, by using medical and behavioural information which the Bill does not prevent the insurer from obtaining.

The minority cannot support the weakening of the right of an insurance, assurance or superannuation provider to assess its liability on the basis of its own policy criteria and methodology. Whereas a signed medical declaration is a reasonable starting point from which to assess current risk, it is essential that the insurer retains the right to exercise prudential judgment of future potential liability **before** accepting fiscal responsibility for the insured, or to refuse prudential cover.

In the minority view, the right of an insurance body to discriminate is essential if it is to match acceptable risk to acceptable premiums for the vast majority of the insuring public.

It should also be noted that some companies at times offer prudential cover to persons without requiring medical examinations, and minimal or no formal assessment.

The majority of the Committee does not support the addition of an exclusion under the Bill which would allow insurers to discriminate on the grounds of sexuality or transgender identity on an actuarial or statistical basis.

6.3 SUPERANNUATION SCHEMES AND PROVIDENT FUNDS

6.3.1 Introduction

Recent court decisions indicate that superannuation schemes and provident funds are a "service" for the purposes of section 4 of the EO Act[17]. Accordingly they will be affected by #35Z of the Bill in a similar manner to insurance services, discussed above. For convenience, superannuation schemes and provident funds will be referred to as "superannuation" in this section.

In addition, #35ZF of the Bill augments #35Z, prohibiting discrimination specifically in regard to superannuation. There are no exemptions from these provisions. #35ZF is unique in the EO Act in **first** specifying that discrimination in relation to superannuation is prohibited but **secondly** not allowing discrimination on a statistical or actuarial basis. For other grounds under the EO Act, either there is no specific provision relating to superannuation (ie the general prohibition of discrimination in provision of services is regarded as adequate) or there is a specific provision which, however, permits discrimination on a statistical or actuarial basis.

[17] Australian Education Union v The Human Rights & Equal Opportunity Commission & Anor [1997] 1288 FCA

The question for the Committee is whether the Bill's treatment of superannuation is appropriate. Sections [6.3.2] and [6.3.3] respectively set out arguments raised by IFSA against the Bill's treatment of superannuation, and counter-arguments to these. In [6.3.4] the Committee considers a number of options available for treatment of superannuation, including the option proposed in the Bill.

Most of the considerations discussed above in relation to insurance apply to some degree also to superannuation. In this section only matters relating specifically to superannuation are discussed, but all relevant matters have been considered by the Committee in reaching its findings.

6.3.2 Arguments FOR an exclusion for superannuation

IFSA suggests there are three shortcomings in the Bill's treatment of superannuation. These are considered in turn.

The Bill will have no effect on superannuation

First, IFSA believes that the Bill "*will have no effect in this area*"[18] because of the Commonwealth *Superannuation Industry Supervision Act 1993.*

This is a surprising claim. If IFSA is correct, none of the provisions of the EO Act have any effect in relation to superannuation. The interaction between superannuation and equal opportunity laws has been the subject of several recent High Court decisions, none of which suggest that a State equal opportunity law has no effect on superannuation.

Possibly what IFSA intends to convey is that the Bill will not **guarantee** that payments will be made to same sex partners of a deceased superannuation account holder in all cases. This would be a correct statement, as the Bill will not over-ride a Commonwealth law (or, generally speaking, a State law) which prevents such payment. Further, the EO Act will not be the only issue for consideration by superannuation fund trustees when they determine how payments should be made. However, these considerations do not justify the claim that the Bill will have no effect. To simplify, the Bill will have the effect that where neither Commonwealth nor State legislation prevents a payment, payment will have to be made to a same sex partner in circumstances where payment would be made to a heterosexual partner.

The Bill will cause legal disputation

Secondly, IFSA believes that the Bill "*has the potential to cause legal disputation*"[19]. This is presumably because there is some interaction between the Commonwealth *Superannuation Industry Supervision Act 1993* and the Bill. It can be problematic to determine exactly what the extent of inconsistency between Commonwealth-State laws is in a given case.

[18]Submission No.14
[19]Submission No.14

It is not clear whether IFSA believes that the Bill's potential to cause disputation is any greater than the existing grounds under the EO Act, or any other State equal opportunity law which purports to affect superannuation. Given that there is a wide range of provisions at State level which already interact with Commonwealth superannuation laws, the fact that the provisions of the Bill will do the same does not appear of great moment.

Discrimination on an actuarial basis should be permitted

IFSA believes that if superannuation is not excluded altogether from having to comply with the Bill, there should at least be an exclusion allowing providers of superannuation to discriminate where this is justified on a statistical or actuarial basis, as it also proposes for insurance.

IFSA does not explain why a superannuation provider might wish to provide superannuation services (as opposed to associated insurance services) to homosexual men and lesbians on different terms to other persons.

6.3.3 Arguments AGAINST an exclusion for superannuation

Dr Vivienne Cass has the following concerns with the current treatment of same sex relationships by superannuation trustees.[20]

- Some superannuation funds allow a person to nominate a same sex partner as a beneficiary, but there is considerable anxiety amongst homosexuals as to how binding this would be if family members challenge payment to the nominee.

- Where no beneficiary is named, the superannuation trustees are unlikely to turn to a same sex partner as the first choice beneficiary, as would happen in a heterosexual relationship.

- Where no beneficiary is named, trustees might not accept the claim of the partner regardless of the merits of the case.

IFSA accepts that on principle same sex partners should be treated in the same way as heterosexual partners in determining payment of superannuation benefits. However, it notes that under the Commonwealth *Superannuation Industry Supervision Act 1993*, superannuation funds can only pay benefits to a same sex partner where the partner is financially dependent on the fund member at time of death. Because of section 109 of the Federal Constitution, this restriction will over-ride the Bill to the extent of any inconsistency.

The Bill appears to adequately cater for the concerns raised by Dr Cass.

6.3.4 Options for treatment of superannuation by the Bill

[20]Submission No.3

Three different approaches to superannuation are currently evident in respect of various grounds under the EO Act. The Bill has a different approach to any of these. This multiplicity of approaches clearly has the potential to cause difficulties for superannuation providers.

The Committee also appreciates the difficulties faced by superannuation providers in complying with both State and Federal law and is of the view that potential for inconsistency should be minimised, as far as is consistent with the intention of the Bill.

Taking these considerations into account, the Committee has considered five options for dealing with superannuation. From the most restrictive for superannuation providers (the Bill) to the least restrictive (IFSA's preferred option), the options are as follows, with the Committee's comments on each.

1. *That there be a general prohibition of discrimination in provision of services, backed up by a specific prohibition of discrimination in relation to superannuation.*

   This is the proposal under the Bill, set out in #35Z and #35ZF. No other ground under the EO Act takes this approach and the Committee is not aware of any other jurisdiction which does so.

   This approach creates immediate difficulties by virtue of its being different to provisions relating to superannuation under all the other grounds dealt with in the EO Act. Further, having two different but similar provisions in a Bill is generally undesirable. There are therefore clear advantages in deleting one of the provisions.

   The Committee believes the intention of the Bill will be as effectively carried out if #35ZF is deleted, as in option 2.

2. *That there be a general prohibition of discrimination in provision of services, without a specific section dealing with superannuation.*

   This is the approach taken in the EO Act to pregnancy, family responsibility and status, race, religion and politics. It is also the approach taken in NSW. To effect this option, #35ZF would be deleted from the Bill, so that protection for homosexuals in relation to superannuation is provided only by #35Z, the general section prohibiting discrimination in provision of services.

   The Committee sees much to commend in this option. The intention of the Bill is still carried out by #35Z, which will prohibit discrimination in respect of services, including superannuation schemes and provident funds. Superannuation services would be treated in the same way as insurance, banking, finance and like services.

The advantage of this option over option 1 is that it avoids the potential difficulties raised by having a novel section which deals with superannuation in a manner different from how other grounds deal with superannuation.

The Committee therefore recommends this option.

3. *That discrimination is prohibited except where it is permitted under Commonwealth law.*

This approach is taken in some other jurisdictions such as Victoria and the ACT. It effectively removes what IFSA regards as a key concern, the potential for inconsistency with Commonwealth law.

The Committee agrees that there is a real advantage in State legislation not running the risk of inconsistency with Commonwealth law. However, as noted above, the risk of inconsistency with Commonwealth superannuation laws is not unique to the Bill or even the EO Act. It arises in respect of all grounds under all anti-discrimination legislation throughout Australia. The Committee therefore concludes that the superannuation industry should be well equipped to deal with the potential for inconsistency such as the Bill raises.

A difficulty with this option is that the Commonwealth does not have laws relating to discrimination on the grounds of sexuality and transgender identity. This approach effectively therefore removes altogether the prohibition of such discrimination. This is not in keeping with the intention of the Bill to protect homosexual and transgender persons from discrimination in provision of services. For this reason the Committee does not recommend this option.

4. *That the #35ZF prohibition of discrimination be subject to an exclusion allowing discrimination where justified on an actuarial or statistical basis*

This partial exemption is IFSA's second preference. This is the approach taken in the EO Act to discrimination on the grounds of impairment and age.

IFSA does not make clear whether there is any actuarial or statistical basis on which superannuation providers (as opposed to insurance providers) would, if permitted, discriminate between persons of different sexuality.
The Committee considers that this option is closer to the intention of the Bill than IFSA's preferred option of blanket exclusion, discussed below. Nevertheless, in the absence of clear justification for the proposed partial exemption, the Committee does not recommend this option.

5. *That superannuation providers be allowed a blanket exclusion*

This is IFSA's preferred position. It would mean that superannuation providers are not prohibited to any extent from discriminating on the grounds of sexuality or transgender identity.

This is the approach taken in the EO Act to discrimination on the grounds of sex and marital status. That is, currently the EO Act allows superannuation providers to discriminate between men and women, and between married and non married persons. Under this option, the same latitude would be given to discriminate between homosexual and heterosexual persons, and between same sex and heterosexual couples.
The Committee considers that this option is not consistent with the intention of the Bill. In the absence of clear justification for the proposed blanket exemption, the Committee therefore does not recommend this option.

COMMITTEE FINDINGS ON SUPERANNUATION

Although it appears that superannuation providers would like to see an exemption included in the Bill allowing them to discriminate on the basis of sexuality, it is not clear how they would, if allowed, wish to discriminate. This situation may be contrasted with that applying to insurance, where IFSA mounts a good argument as to the advantages of allowing insurance providers to discriminate on the basis of sexuality.

The majority of the Committee finds that there is no clear case for introducing an exemption from the provisions of the Bill in favour of superannuation providers. Although the Bill will interact to a degree with Commonwealth laws relating to superannuation, this is already the case in regard to a range of other grounds in Western Australia and other jurisdictions. Ultimately, Commonwealth law will prevail in the event of a conflict of laws.

The minority of the Committee takes the same view on superannuation as it does on insurance (discussed in the Committee's findings at [6.2]), essentially that the provider of the service should be allowed to discriminate in order to allocate risk appropriately.

At the same time, the drafting of the Bill is confusing in that it approaches superannuation differently to all of the current grounds under the EO Act. The grounds under the EO Act which do not allow a specific exemption in favour of superannuation providers also do not have a specific section dealing with superannuation, relying instead on the general prohibition of discrimination in provision of services.

Therefore the Committee considers that inclusion of a specific #35ZF dealing with superannuation schemes and provident funds has the potential to cause confusion and is unnecessary as #35Z covers these services. #35ZF should be deleted from the Bill.

Recommendation 1: that proposed new section 35ZF of the *Equal Opportunity Act 1984* be deleted from the Bill.

CHAPTER 7

PROPOSED EXCLUSION - ADOPTION

7.1 INTRODUCTION: ADOPTION AND REPRODUCTIVE TECHNOLOGY

This Chapter deals with adoption and the following Chapter deals with reproductive technology. Although the law dealing with adoption differs considerably from that dealing with reproductive technology, the laws are similar in that they both specifically exclude homosexuals to a degree, raising potential conflicts with the Bill. In the parliamentary debate all speakers spoke of the two issues together.

Hon Peter Foss in the second reading debate on 19/11/97 quoted as follows from a letter written by the Australian Family Association:

> "[T]*his bill does not contain an exemption for adoption and reproductive technology so that it could result in homosexual couples demanding access on the same terms as* [text missing, presumably: *married couples. Homosexual] partnerships lack the complementarity of the two sexes present in marriage, and so can never provide a child with two parents - a father and mother.*"

Hon B.M Scott on the same day added the following comment:

> "*. . . my biggest fear is that if this Bill is passed, it will lead to adoption or parenting under artificial insemination being allowed for same sex partners. People could argue that people of the same sex make good parents. I do not deny that. However, . . . [a]llowing homosexual couples the right to adopt and to go into the IVF program or have artificial insemination will discriminate against the rights of children to know their origins and to have access to their mother and father.*"

In response Hon Helen Hodgson stated on the same day that:

> "*The Attorney General also raised the issue of adoption and reproductive technology. My Bill is totally silent on that matter. That means the status quo will stand. The status quo is that provisions in the Adoption Act and the Human Reproductive Technology Act deal with some of these matters. . . . It is my understanding that the Equal Opportunity Act contains a provision that where there is a specific statutory provision to the contrary, that specific statutory provision will override the Equal Opportunity Act. That general rider will ensure that other relevant Acts are not affected in any way.*"
>
> "*. . . [W]here provisions under other legislation already deal with a matter, that matter is not impacted on in any way by the Bill that is before the*

House. The Human Reproductive Technology Act . . . requires a couple to have been in a heterosexual relationship for a certain period before they undertake in vitro fertilisation. This Bill will not impact on that in any way. In the same way, other forms of fertility treatment are available to lesbians, because they cannot be discriminated against on the basis of being single women. What I seek to introduce will not impact on the law in that area. Those arguments must be followed through to verify that there is no impact in the areas of IVF, fertility treatment or adoption.

The only issue is that requirements exist under the Adoption Act for adoptions other than consent adoptions, and those are not impacted on in any way by this Bill. If members go through the Bill carefully and follow through the way sections in the Equal Opportunity Act interact with other legislation, they will find their concerns in that area are dealt with."

To summarise, Hons Peter Foss and B.M. Scott express a concern that the Bill introduces changes giving homosexuals the same rights as married couples in relation to both adoption and reproductive technology. Hon Helen Hodgson's response is that this will not be the case because the relevant Acts excluding homosexuals will continue to operate unaffected by the Bill.

To foreshadow the Committee's findings, neither of these views is altogether accurate. The impact of the Bill in these areas can be summarised as follows.

- Current laws place specific restrictions on the ability of homosexuals to adopt and to access reproductive technology. These restrictions will continue to operate unaffected by the Bill. On this score Hon Helen Hodgson is correct and the fears of the other members are unfounded.

- Despite the specific restrictions noted, in limited circumstances it is currently possible for homosexuals to adopt and to take advantage of reproductive technology. As these opportunities already exist, the Bill will not open up any new avenues to adoption or reproductive technology. On this score also Hon Helen Hodgson is correct.

- Persons working in the fields of reproductive technology and adoption are probably subject to the EO Act at least to some extent. In the same way as these persons are currently prohibited from discriminating on the existing grounds under the EO Act, the Bill will prohibit them from discriminating on the ground of sexuality. (The prohibition will only have an impact in the limited circumstances where homosexuals can adopt and take advantage of reproductive technology.) Hon Helen Hodgson is therefore not correct when she says that the Bill has no impact on operations in the fields of adoption and reproductive technology.

7.2 DOES THE *EQUAL OPPORTUNITY ACT* APPLY TO THE *ADOPTION ACT*?

Before looking at how the EO Act might affect the different means by which a child may be adopted in Western Australia, it is necessary to consider the threshold question of whether the EO Act has any application whatsoever to adoption in WA.

The sections of the EO Act which require consideration in this regard are those prohibiting discrimination, on each of the various grounds, in provision of "services", defined in section 4(1) to include "*services of the kind provided by a government, a government or public authority or a local government body*".

There would appear to be a good argument that the service of placing a child with a view to adoption on the basis of an assessment by an adoption application committee under section 13 of the *Adoption Act 1994* ("**Adoption Act**") falls within the definition and is covered by the EO Act. However because "services" is such a vague term the argument is by no means conclusive. Ms Tara Gupta, the Director, Legal Services, Family and Children's Services, explains the issue as follows:

> "*It is uncertain whether a court would deem the decision [of an adoption applications committee] in this circumstance to be a "service". Until recently the word "service" has been given a very broad and flexible interpretation. However, its scope was somewhat narrowed as a result of the recent High Court decision in regard to the Perth City Council.*[21] *In that case, the High Court held that the refusal of planning approval for a drop-in centre for people with HIV/AIDS did not constitute a refusal to provide services within the meaning of section 4 of the Equal Opportunity Act.*
>
> *In its recent review of the New South Wales adoption legislation, the New South Wales Law Reform Commission discussed the relationship between adoption laws and antidiscrimination laws. The review refers to various arguments. The first is that a failure to supply a service on a prohibited ground could be discriminatory to relinquishing and adopting parents. A second interpretation is that adoption is a service provided to children rather than a service provided to adults. A third interpretation is that adoption should not be seen as a service at all.*
>
> *In addition, the first recommendation of the Adoption Legislative Review Committee states that section 3 of our Adoption Act should be amended to include a statement reinforcing the notion that adoption is a service for the child. That issue was not particularly addressed in the review process.*
>
> *It would be correct to say that there is insufficient judicial or legislative guidance to conclude whether a court would be likely to find adoption to be a service in respect of the decision of the adoptions applications committee to approve a person for adoptive parenthood. It is unclear at present*

[21] I W v City of Perth & Ors

whether adoption falls within the definition of "service" in the Equal Opportunity Act."[22]

To summarise, there is a degree of uncertainty as to whether the EO Act applies to the *Adoption Act*.

This uncertainty exists at present and is neither increased nor decreased by the Bill. If decisions by adoption applications committees and other activities under the *Adoption Act*:

- **are not services** for the purposes of the EO Act, then Hon Helen Hodgson is correct in saying that the Bill will have no effect on adoption in this State;

- **are services**, the EO Act applies to adoption and the interaction of the two Acts requires further consideration.

For discussion purposes, in the rest of this section it is assumed that the EO Act has application to the *Adoption Act*.

7.3 BILL'S EFFECT ON THE CURRENT ADOPTION REGIME

Under section 68 of WA's Adoption Act, an application to adopt a child may be made by **two persons jointly** or by an **individual**. Adoption by a homosexual couple is considered in section [7.3.1], and adoption by an individual homosexual person in section [7.3.2].

7.3.1 Can a same sex *couple* adopt a child?

Adoption orders are made by the Family Court. Joint applicants to adopt a child may be:

- persons who have had the child placed in their care with a view to adoption, following an assessment of the joint applicants by an adoption applications committee to determine suitability for placement; or

- persons who have been the carers of the child for at least 3 years.

Dealing first with the category of **joint applicants who have had the child placed in their care**, there are a number of restrictions on who can apply for assessment for suitability. Sections 38 and 39 read in part as follows.

"***Application to be a prospective adoptive parent***

38. *(1) A person who wishes to adopt a child is to apply to the Director-General to be assessed for suitability for adoptive parenthood.*

[22]Ms Tara Gupta, 15/4/1998, transcript of evidence, p22

(2) An application under subsection (1) may be made by one person, or by 2 persons jointly.

Criteria for application

***39.** (1) A person cannot apply under section 38 (1) unless at the time of the application, he or she —*

. . . (d) if applying as a joint applicant, has been married to the other applicant for at least 3 years.

. . . (3) For the purposes of subsection (1) (d), where the joint applicants are cohabiting with each other in a heterosexual relationship, as each other's spouses, although not actually married to each other, and have been so cohabiting for a continuous period of not less than 3 years, the period of the cohabitation may be included when calculating the period mentioned in subsection (1) (d)."

It can be seen that joint applicants for assessment must be married or in a heterosexual relationship. A homosexual couple under current law clearly cannot apply to adopt a child.

These provisions will come into conflict with proposed new section 35Z under the Bill and section 20 of the EO Act as amended by the Bill. Ms Gupta believes the outcome of the conflict is uncertain:

> "*Assuming that [a decision by an adoption applications committee] was considered to be a service within that Act, the issue arises as to what would happen if this Bill came into effect without this issue being addressed. That could well lead to uncertainty. . .*
> *The Act provides that the Equal Opportunity Act specifically binds the Crown. Therefore, it could be argued that the effect of the Bill would be to prevent the Adoptions Application Committee from treating the application of joint homosexual applicants or an individual homosexual applicant any less favourably on the grounds of sexuality than the application of joint heterosexual applicants or an individual heterosexual applicant.*
>
> *On the other hand, section 39(3) of the Adoption Act is very specific in that it specifies heterosexual couples. Therefore, it could be argued that, even though this legislation would come into effect later, because it is general and the early legislation - the Adoption Act - is specific, the specific provision would still apply. It could well be argued that the provision preventing homosexual couples from jointly adopting would stand despite this Bill.* "[23]

[23]Ms Tara Gupta, 15/4/1998, transcript of evidence, p23

This claim of uncertainty is difficult to justify, for two reasons. First, section 69 of the EO Act provides that an act is not unlawful for the purposes of the EO Act if it was done in order to comply with a requirement of another Act. This provides Adoption Services with a clear exemption from the operation of the EO Act when it refuses to allow a same sex couple to access adoption-related services. Secondly, to resolve inconsistencies between laws, a general maxim applied by a court is that general provisions do not derogate from specific provisions. That is, provisions in an Act dealing specifically with the matter at hand (in this case, adoption under the *Adoption Act*) will over-ride provisions in a more general Act (in this case the *EO Act*).

It is therefore not possible under the Bill for a homosexual couple to have a child placed in their care with a view to adoption.

Turning to the second category of joint applicants to adopt, **existing "carers"** who have not gone through the assessment process, section 67(2) provides that persons may obtain a Family Court order to jointly adopt a child **if they are married to each other but not otherwise**. The section is not affected by or in conflict with the EO Act, as the EO Act does not apply to the Family Court. It is therefore not possible for a same sex couple to adopt a child even where the couple are the existing carers of the child.

A number of witnesses, recognising this, suggested that the Adoption Act should be amended to allow homosexual couples to have a child placed in their care with a view to adoption, and to adopt a child.

7.3.2 Can a homosexual *individual* adopt a child?

The other type of adoption is adoption by an individual. The Committee understands from Adoption Services, the responsible agency within the Department of Family and Children's Services, that only a small minority of applicants are individuals.[24]

By contrast to the provisions governing who may be joint applicants, there is no explicit barrier in the legislation which would prevent a homosexual individual applicant being granted an adoption order by the Family Court, either following a placement of the child with a view to adoption, or as the child's carer.

As with a joint application, an individual seeking the placement of a child with a view to adoption must apply to and be assessed by an adoption applications committee. Sections 38 and 39 of the Adoption Act set out a number of criteria the adoption applications committee must consider when deciding whether the applicant is suitable for adoptive parenthood.

According to Adoption Services, a homosexual individual applicant is treated no differently from a heterosexual individual applicant. At the same time, the adoption applications committee assessing the application has a broad discretion as to what

[24]Mr Ken Monson, 15/4/1998, transcript of evidence, p25

matters it can take into account in its consideration of an application. Mr Kenneth Monson of Adoption Services made the following comments to the Committee concerning whether sexuality is taken into account:

> "*Mr MONSON: Regarding the assessment aspects, at this point the issue of sexuality does not come into an assessment except that all social variables and personal factors are assessed. Obviously if there is something bizarre about a person's sexuality one may need to consider a bizarre aspect, but certainly homosexuality is not an issue looked at in terms of the assessment process.*
>
> *If the new anti-discrimination Act* [ie the Bill] *came in, I would wonder whether that would preclude us from consideration of sexuality as distinct from homosexuality. At the moment we can make assessments based on sexuality if we thought it was essential, necessary or part of the social picture or personal development of a person. If the Act precluded that, it may be precluding single parenthood. Parenting can be anything from a whole range of factors and we are not saying that homosexuality is the issue we would be looking at; it would be a sexuality issue. Hopefully if there was an Act, that would not preclude us from that normal examination of a range of social and personal factors that make up parenting."*[25]

Ms Gupta also claims the Bill will lead to confusion in respect of individual applications:

> *"There could be issues to resolve were this Bill to come into effect in respect of a single homosexual applicant. It could be argued that the operation of the Adoption Act in relation to this Bill could have the effect whereby the Bill would prohibit homosexuality being taken into account in any way in respect of the application of a single applicant. At the moment the law is silent on that issue. As we have already discussed, that would be a matter of the adoptions applications committee's taking into account all factors before it. Therefore, unless the Legislature puts its mind to the issue of the relationship between these two pieces of legislation it is likely to lead to considerable uncertainty and confusion."*[26]

Legally, the situation is that if the decision is a service, the EO Act applies to the decision and an adoption applications committee is prohibited from discriminating on any of the protected grounds under the EO Act. If, as the Department suggests, an adoption applications committee looks at "all social and personal variables", it is required to do so without contravening the EO Act. The adoption applications committee might be in contravention of the EO Act if an applicant is rejected on the ground, say, that they have particular religious or political convictions, or are of a particular nationality.

[25]Mr Ken Monson, 15/4/1998, transcript of evidence, p25
[26]Ms Tara Gupta, 15/4/1998, transcript of evidence, p23

COMMITTEE FINDINGS ON ADOPTION BY HOMOSEXUAL COUPLES AND INDIVIDUALS

The Department of Family and Children's Services appears to be chiefly concerned not about the Bill in itself, but about the possibility that the EO Act could apply to decisions of adoption applications committees and other matters relating to adoption by an individual.
The Bill does not make it any more or less likely that the EO Act will apply to decisions of an adoption applications committee.

The existing uncertainty about the relationship between the EO Act and the Adoption Act stems from the definition of "services", which is already present in the EO Act. Most of the evidence from the Department related not to the grounds of sexuality and transgender identity, but to the Department's concern that adoption should not be subject to the EO Act, and was therefore not directly relevant to this inquiry. The Department suggests that their concerns would be met if adoption and related services were expressly excluded from the definition of "services". However, this possibility is outside the ambit of the Bill and therefore outside the Committee's terms of reference.

The suggestion from the Department that the Bill adds an entire novel area of confusion cannot be sustained.

It is not possible at present for a same sex couple to have a child placed in their care with a view to adoption, or to adopt a child. The Committee notes the concerns of homosexual **couples** that discrimination remains in the area of adoption. However, the Bill clearly does not, and is not intended to, address this area. Concerns that the Bill might enable a same sex couple to adopt a child are unfounded.

This is not to say that the Bill will have no effect on adoption. Currently, a homosexual **individual** is not prevented from adopting, but at the same time an adoption applications committee is not prohibited from discriminating against a homosexual applicant. The significance of the Bill is that it could add the grounds of sexuality and transgender identity to the existing grounds in relation to which an adoption applications committee is prohibited from discriminating, when making decisions about individual applicants for adoption.

Hon Helen Hodgson in her second reading speech states that in regard to adoption "*the status quo will stand*". **The Committee observes that the Bill would have to be amended to give effect to Hon Helen Hodgson's assurance.**

If Parliament wishes to alter the law applying to homosexual couples or individuals adopting, this should be done by way of amendment to the *Adoption Act* itself.

CHAPTER 8

PROPOSED EXCLUSION - REPRODUCTIVE TECHNOLOGY

8.1 INTRODUCTION: REPRODUCTIVE TECHNOLOGY

Western Australia's *Human Reproductive Technology Act 1991* ("**HRT Act**") deals, in significantly different ways, with two types of reproductive technology: **in vitro fertilisation** ("**IVF**") and **artificial insemination**.

Much confusion is evident both in the parliamentary debates and amongst witnesses before the Committee as to:

- the different laws applying to the two types of reproductive technology;
- the difference between marital status and sexuality;
- the interaction between State and Commonwealth laws; and
- how the Bill will affect all of these matters.

Concerns raised in the second reading debate and the responses to those concerns are the same as those raised in relation to adoption, set out in section [7.1]. In addition, other concerns were raised by witnesses expert in reproductive technology.

Concerns relating to IVF are considered in section [8.2] and concerns relating to artificial insemination are considered in section [8.3].

8.2 DISCRIMINATION IN ACCESS TO IVF

8.2.1 Introduction

In their appearance before the Committee, Dr Sandy Webb and Professor Con Michael of the Reproductive Technology Council expressed concerns about the potential for the Bill to conflict with both Federal laws and other State laws.
The key section of the HRT Act dealing with who can access IVF procedures is section 23, which reads in part as follows.

> *"**When procedures may be carried out***
> *23. An in vitro fertilisation procedure may be carried out where —*
>
> *. . . (c) the persons seeking to be treated as members of a couple are —*
>
> *(i) married to each other; or*

(ii) are co-habiting in a heterosexual relationship as husband and wife and have done so for periods aggregating at least 5 years, during the immediately preceding 6 years;

. . . but not otherwise."

This provision clearly discriminates both on the ground of marital status (ie a single woman, unlike a married woman, cannot obtain IVF) and sexuality (a woman in a lesbian relationship for 5 of 6 years, unlike a woman in a similar heterosexual relationship, cannot obtain IVF).

The following comments made by Professor Michael provide a useful illustration of the difficulty of working in an area where State and Commonwealth laws interact:

> "*Our Human Reproductive Technology Act does not allow practitioners to undertake any sophisticated infertility treatment on women who are lesbians. However, if they refuse - this is the dilemma the medical profession are in - they can then be liable under the sexual discrimination clauses in the Equal Opportunity Act. There is no consistency. There is no clear legal advice. I defy any lawyer to give advice when two pieces of legislation are contradictory.*"[27]

Professor Michael is correct to the extent that he is saying that IVF treatment is not available to persons who are not in a heterosexual relationship. However, contrary to his interpretation of the law:

- discrimination against lesbians is not prohibited by either the EO Act or any Commonwealth law;
- an IVF practitioner in Western Australia can (and in fact under State law is required to) refuse IVF treatment to a woman on the ground that she is a lesbian, without fear of breaching either a State or Commonwealth law; and
- the limitation in section 23 of the HRT Act that prevents persons who are not in a heterosexual relationship from obtaining access to IVF is not inconsistent with any law, either State or Commonwealth.

A question for the Committee is whether the Bill raises any inconsistency with Commonwealth or other Western Australian laws, as claimed by the Reproductive Technology Council.

8.2.2 Potential conflict with Commonwealth IVF law

Looking first at **marital status**, the Commonwealth *Sexual Discrimination Act 1984* prohibits discrimination on the ground of marital status. Because Commonwealth law over-rides State law where there is an inconsistency, a State eligibility test for IVF

[27]Professor Con Michael, 15/4/1998, transcript of evidence, p5

which discriminates on the ground of marital status is potentially invalid. South Australian and Victorian laws which discriminate on the ground of marital status in setting out the eligibility tests for IVF have in recent years been ruled invalid[28]. There is therefore a real risk that section 23 of the HRT Act is also invalid.[29]

Dr Webb and Professor Michael are concerned about the possibility that the Bill might raise additional inconsistencies between State and Federal law. However the Bill, as a State law, cannot affect the definition of marital status under the Commonwealth *Sexual Discrimination Act 1984*. There is no possibility that the Bill will increase the degree of inconsistency between the Commonwealth *Sexual Discrimination Act 1984* and the HRT Act.

While the Committee appreciates that inconsistency between Federal and State laws is a legitimate concern, the potential for inconsistency lies between the Commonwealth *Sexual Discrimination Act 1984* and the HRT Act. The issue of inconsistency between these laws is not relevant to the Bill, the EO Act or this inquiry. The matter is discussed here only because Dr Webb and Professor Michael devoted a large part of their evidence to this matter.

Turning to the issue of **sexuality**, there is no Commonwealth prohibition of discrimination on the ground of sexuality. A State eligibility test for IVF which discriminates on the ground of sexuality, as section 23 of the HRT Act does, is not inconsistent with any Commonwealth law. No case has been brought challenging the validity of such a law in any jurisdiction.

COMMITTEE FINDINGS ON INCONSISTENCY WITH COMMONWEALTH IVF LAW

The Bill is not inconsistent with any Commonwealth law relating to IVF technology and is not relevant to the question of whether the *Human Reproductive Technology Act 1991* is inconsistent with any Commonwealth law.

8.2.3 Potential conflict with Western Australian IVF laws

Turning to the question of possible inconsistency between the Bill and other Western Australian laws, there are two ways in which inconsistency might be thought to arise between the Bill and the HRT Act.

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[28]Pearce v South Australian Health Commission & ors (Supreme Court of South Australia); MW, DD, TA and AB v The Royal Women's Hospital & ors (Human Rights and Equal Opportunity Commission)

[29]It should be noted that the South Australian and Victorian laws prohibited not only single women but also heterosexual de facto couples from using IVF, and were therefore more clearly in conflict with the Commonwealth *Sexual Discrimination Act 1984* than section 23 of the HRT Act. The risk that section 23 of the HRT Act is invalid is lower than in those cases.

First, section 20 of the EO Act prohibits discrimination in provision of services on the ground of marital status. "Services" is defined broadly enough to include IVF procedures. Section 23 of the HRT Act discriminates on the ground of marital status. Therefore it might be thought that section 23 of the HRT Act, which discriminates on the basis of marital status, is in conflict with section 20 of the EO Act, which prohibits such discrimination. The potential conflict is already present in the EO Act. However, the Bill might be thought to exacerbate the conflict by adding same sex relationships as a new type of potentially conflicting marital status.

Second, #35Z of the Bill prohibits discrimination in provision of services on the ground of sexuality. Section 23 of the HRT Act clearly discriminates on the ground of sexuality, raising potential conflict.

However, on examination it is clear that section 23 of the HRT Act operates unaffected by the EO Act and will continue to operate unaffected by the Bill, for two reasons. First, section 69 of the EO Act makes clear that an act is not unlawful for the purposes of the EO Act if it was done in order to comply with a requirement of another Act. This allows IVF providers a clear exemption from the operation of the EO Act when they refuse to allow a same sex couple access to IVF procedures. Secondly, to resolve inconsistencies between laws, a general maxim applied by a court is that general provisions do not derogate from specific provisions. That is, provisions in an Act dealing specifically with the matter at hand (in this case, IVF under the HRT Act) will over-ride provisions in a more general Act (in this case the EO Act)[30].

Some witnesses are of the view that this current situation is unsatisfactory and that the Bill should amend the existing discriminatory provisions under the *Human Reproductive Technology Act 1991* so as to make IVF procedures available to lesbian couples on the same basis as to unmarried heterosexual couples.

COMMITTEE FINDINGS ON INCONSISTENCY WITH WESTERN AUSTRALIAN LAW

Under State law it is not possible for a lesbian couple to access IVF procedures. The Bill does not affect this position. Concerns that the Bill might enable a lesbian couple to access IVF procedures are unfounded.

The Committee notes the concerns of lesbian couples in regard to IVF procedures and agrees that discrimination remains in the area of access to IVF. However, the Bill is clearly not intended to address this area. If changes to the HRT Act to enable lesbian couples to access IVF procedures are to be considered, this should happen in amendments to the HRT Act itself.

[30]Note that the reasons why the Bill does not affect the current inability of a lesbian couple to access IVF technology mirror the reasons why the Bill does not affect the current inability of a homosexual couple to adopt, discussed at [7.3.1].

8.3 DISCRIMINATION IN ACCESS TO ARTIFICIAL INSEMINATION

8.3.1 Introduction

Artificial insemination is treated completely differently to IVF under the HRT Act. The HRT Act does not place any restrictions on availability of artificial insemination. Lesbians, whether individually or as a couple, therefore can and do use artificial insemination procedures to achieve pregnancy.

There are two ways in which the Bill potentially affects the availability of artificial insemination.

First, section 20 of the EO Act prohibits discrimination in provision of services on the ground of **marital status**. "Services" is defined in section 4 of the EO Act broadly enough to include artificial insemination procedures. Under the EO Act at present a practitioner is prohibited from refusing to provide artificial insemination services to a woman on the ground that she is **single**. The Bill will broaden the effect of section 20 by including a lesbian relationship as a type of marital status. A practitioner will therefore also be prohibited from refusing to provide artificial insemination services to a woman on the ground that she is in a **same sex relationship**.

Secondly, but with similar effect, #35Z of the Bill prohibits discrimination in provision of services on the ground of **sexuality**. A practitioner will not be allowed to refuse to provide artificial insemination to a woman on the ground that she is a **lesbian**.

8.3.2 Comments about artificial insemination

Hon Helen Hodgson states in the second reading debate that because discrimination on the ground of marital status is already prohibited under section 20 of the EO Act, thereby giving single women generally access to artificial insemination, the Bill does not affect the availability of artificial insemination procedures.[31]

This is not correct. Section 20 currently prevents a practitioner refusing to offer an artificial insemination procedure to a woman because she is **single**, but it does not prevent a practitioner refusing because she is a **lesbian**. The Bill will alter this position. Under the Bill, section 20 and #35Z of the EO Act will prevent a practitioner refusing to provide artificial insemination services to a woman because she is a lesbian or is in a same sex relationship.

Professor Con Michael makes the following comments:

> "*I feel strongly that if the practitioner does not believe that artificial insemination should be undertaken in a lesbian relationship, the practitioner should be allowed the privilege to back off. This is not allowed under*

[31]Hansard, Legislative Council 19/11/1997, p8163

> *legislation at the moment because the practitioner can be had up for discrimination.*"[32]

The last sentence is not correct. Professor Michael is describing the situation as it would be under the Bill, not as it is at present.

Professor Michael's claim would be correct if it were made in Queensland. Queensland already has a provision equivalent to section 35Z of the EO Act. The Anti-Discrimination Tribunal in Queensland recently held that a refusal by a practitioner to provide artificial insemination to a woman on the ground that she is a lesbian is unlawful.[33] In this respect practitioners are no different to any other providers of services.

Professor Michael seeks an exemption from #35Z and section 20 in favour of artificial insemination providers, arguing that a practitioner should be allowed to refuse to provide artificial insemination services to a woman because she is a lesbian. The question for the Committee is whether such an exemption would be appropriate.

COMMITTEE FINDINGS ON ARTIFICIAL INSEMINATION

The Bill is not inconsistent with any current laws, either State or Commonwealth, in relation to artificial insemination.

The Bill will alter the laws governing access to artificial insemination by prohibiting a provider of artificial insemination services from refusing access to those services to a woman on the ground that she is a lesbian or is in a same sex relationship.

Hon Helen Hodgson in her second reading speech states that in regard to artificial insemination "*the status quo will stand*". **The Committee observes that the Bill would have to be amended to give effect to Hon Helen Hodgson's assurance.**

If Parliament wishes to amend the law applying to human reproductive technology, so as to prohibit a practitioner refusing to provide artificial insemination services to a woman who is a lesbian or is in a same sex relationship, this should be done by way of amendment to the *Human Reproductive Technology Act 1991* itself.

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[32]Professor Con Michael, transcript of evidence, p5

[33]JM and OFG and GK and State of Queensland (Summary of Queensland Anti-Discrimination Tribunal No 838 of 1996)

CHAPTER 9

OTHER EXISTING AND PROPOSED EXCLUSIONS

9.1 INTRODUCTION

Proposed Part IIB of the EO Act as set out in the Bill contains a number of other exclusions which attracted comment from witnesses. In addition, a number of other proposals for exclusions were raised in the course of the inquiry. In this Chapter, these other exclusions and proposed exclusions are briefly discussed in turn.

9.2 EXCLUSIONS ALLOWING DISCRIMINATION BY HOMOSEXUAL ORGANISATIONS: #35ZA(3)(C), #35ZB(3), #35ZC(3) AND #35ZD(2)(B)

9.2.1 Why these exclusions exist

These four exclusions are dealt with as a group because they are all crafted **in favour of** certain organisations catering for homosexual or transgender persons, to enable them to remain exclusive. In this section the Committee considers whether the proposed new sections should remain in the Bill.[34]

For the most part the Bill takes what might be termed a symmetrical approach to both prohibited behaviour and exclusions to prohibitions. That is, the provisions apply equally to discrimination against homosexual persons and against heterosexual persons. For example, under the Bill it is as unlawful for a homosexual employer to refuse employment to a heterosexual person on the ground of their sexuality as it is for a heterosexual employer to refuse employment to a homosexual person.

#35ZA(3)(c), #35ZB(3), #35ZC(3) and #35ZD(2)(b) are exceptions to this general rule. They allow discrimination by particular organisations established to cater for persons of a particular sexuality, respectively a provider of accommodation, an association, a sports organisation and a residential complex. The provisions are drafted in terms which would make it difficult for an organisation to claim it was only for heterosexual persons so as to take advantage of the exclusion.

Clearly the Bill's intention is that homosexual-only organisations should be allowed in certain fields of activity.

9.2.2 Arguments for and against the exclusions

There is some dispute amongst witnesses generally supportive of the Bill as to whether the four exclusions are justified. Mr Michael Bowyer submits that asymmetry should be avoided as it perpetuates the "us vs them" mentality, when the

[34]Note that these proposed new sections are also reviewed at [11.3] below, in regard to the different question of whether they adequately protect transgender persons.

aim of the Bill should be to break down barriers separating homosexual and heterosexual persons.[35] Dr Vivienne Cass' disapproval of exclusions generally indicates that she too does not favour selectively permitting discrimination.[36]

Another difficulty with permitting the four exceptions is that their presence militates against the claim made by the Bill's proponents, including Hon Helen Hodgson, to the effect that the Bill does not grant homosexual organisations special rights. Clearly, the four exceptions in practice favour homosexual organisations over other organisations. To this extent the Bill is inconsistent with Hon Helen Hodgson's statement that the Bill:

> "*. . . does not seek any special consideration for gays, lesbians or transgendered people, but seeks only for them to be treated the same as other members of society.*"[37]

At the same time the Committee considers there are good arguments in favour of the exclusions, as follows.

- Equivalent exceptions apply in respect of almost all the other grounds covered by the EO Act, indicating a generally perceived need for groups protected by the EO Act to retain the ability to set up exclusive organisations in these four fields of activity.

- Other things being equal, the Bill should be as consistent as possible with existing Parts of the EO Act, which as noted have similar exceptions.

- The other exclusions under the Bill will in practice operate for the most part in favour of **heterosexual** persons and organisations. Despite the inclusion of these four exclusions in favour of **homosexual** organisations, the Bill's exclusions on balance favour heterosexual persons and organisations.

- The exceptions are limited in scope, applying to a small number of organisations.

COMMITTEE FINDINGS ON EXCLUSIONS FOR HOMOSEXUAL ORGANISATIONS

The Committee believes that the Bill should as far as practical promote symmetry of rights between homosexual and heterosexual persons. The Committee has reservations about the fact that the proposed new sections discussed in this paragraph grant homosexual organisations special rights not available to heterosexual organisations.

The exclusions are relatively minor and will not in practice have a significant effect on heterosexual persons. Nevertheless they derogate from the claim made by the Bill's

[35]Submission No.9
[36]Submission No.3
[37]Hansard, Legislative Council 17/9/1997, p6304

proponents that the Bill does not offer any special provisions to homosexual persons and organisations.

On the other hand, in the general context of the EO Act the exclusions are unsurprising, being similar to exclusions allowing all groups protected against discrimination to maintain exclusive arrangements in appropriate fields of activity. As a policy matter, the EO Act recognises that organisations operating for the benefit of a particular group protected under the EO Act should be allowed to retain exclusivity.

On balance the benefits of maintaining an approach consistent with that taken to other grounds under the EO Act, by allowing homosexual-only organisations in the areas provided for by #35ZA(3)(c), #35ZB(3), #35ZC(3) and #35ZD(2)(b), outweigh the desirability of avoiding special provisions.

9.3 LIMITATION OF EXCLUSION FOR ACCOMMODATION PROVIDED BY A CHARITY: #35ZA(3)(C)

In addition to the general issues discussed above surrounding the four exclusions in favour of homosexual organisations, the drafting of the exclusion in #35ZA(3)(c) requires separate consideration. Under this exclusion it is lawful to discriminate against a person on the ground of sexuality or transgender identity in respect of accommodation provided by a charitable or voluntary body, **subject to the proviso** that the accommodation must be "*solely for*" persons of a particular sexuality or transgender identity.

The proposed new section as drafted is consistent with the respective equivalent provisions relating to accommodation under other grounds under the EO Act, which also use the expression "*solely for*".

GALE points out that under the proposed new section as currently worded, an organisation providing accommodation solely or principally for, say, war veterans, could nonetheless legitimately claim that they are not in breach of the EO Act if the accommodation were provided "*solely for*" **heterosexual** war veterans. GALE takes the view that this is an unacceptable loophole.[38]

GALE proposes that the loophole should be closed by limiting the exclusion to where the accommodation has as its "*sole or principal object*" the provision of accommodation to persons of a particular sexuality.

The "*sole or principal object*" test proposed by GALE appears in other exclusions under the Bill, namely those relating to membership of an association (#35ZB(3)) and disposal of an interest in land (#35ZD(2)(b)). Existing provisions under the EO Act such as sections 48 and 66M also set out a "*principal object*" test. The "*principal object*" test appears consistent with the Bill's intention and with the objects of the EO Act.

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[38]Submission No.5

It is not clear why the EO Act takes these two different drafting approaches to seemingly similar exclusions.

COMMITTEE FINDINGS ON ACCOMMODATION PROVIDED BY A CHARITY

The Committee sees merit in the suggestion by GALE that #35ZA(3)(c) should be worded more tightly, so as to prevent organisations other than homosexual organisations taking advantage of the provision by claiming to be "*solely for*" heterosexual persons.

This is not an issue which arises solely in relation to the Bill, but is of equal concern in relation to the other grounds under the EO Act whose equivalent provisions use the same problematic "*solely for*" test.

However, it is also important to maintain consistency within the EO Act as far as possible. The Committee thinks it is undesirable to introduce the proposed wording in respect of accommodation under the ground of sexuality, but not in respect of accommodation under other grounds within the EO Act. Even though there are provisions within both the EO Act and the Bill which set out a "*principal object*" test, indicating that there is no inherent difficulty with that approach, these deal not with accommodation provided by a charity but with other matters.

Consideration should be given to amending each section of the EO Act relating to provision of accommodation by a charitable or other voluntary body, by replacing the words "*solely for*" with the words "*with the sole or principal object of providing accommodation for*", or words to similar effect, when a general review of the EO Act is undertaken.

9.4 LIMITATION OF EXCLUSION FOR DISCRIMINATION IN DOMESTIC ACCOMMODATION: #35ZA(3)(A)(I)

Under this exclusion it is lawful to discriminate against a person on the ground of sexuality or transgender identity in respect of accommodation at premises where the provider (or a near relative) resides.

Dr Vivienne Cass has a concern that such an exclusion gives undue power to parents who wish to sever ties with a homosexual child, including, for example, evicting the child from the family home or refusing to allow the child to receive family health benefits.[39]

COMMITTEE FINDINGS ON DOMESTIC ACCOMMODATION

Dr Cass identifies the problem of rejection by family often faced by young persons who feel same-sex attractions. However it does not follow that the appropriate means of dealing with the problem is to make it illegal for families to refuse accommodation on the ground of sexuality.

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[39]Submission No.3

The general policy of the Bill, with which other witnesses such as GALE agree, is clearly that the legislature should not interfere unduly with domestic and personal affairs. This exclusion and a number of others are based on this policy. The Committee agrees with the proponents of the Bill that it would not be appropriate for the Bill to attempt to regulate personal and domestic arrangements.

9.5 LIMITATION OF EXCLUSION FOR DISCRIMINATION IN ACCOMMODATION PROVIDED BY A RELIGIOUS BODY: #35ZA(3)(B)

Under this exclusion it is lawful to discriminate against a person on the ground of sexuality or transgender identity in respect of accommodation provided by a religious body.
GALE accepts that exclusions are justified where they fall within the sphere of private affairs rather than public matters. However GALE contends that this exclusion does not properly fall within the sphere of private affairs, for the reason that religious bodies provide accommodation to the general public, examples being hostels and shelter for the needy.[40]

To remedy this, GALE suggests that the exclusion should be limited to where accommodation is provided "*solely for persons of a particular religious conviction*". It suggests that its proposed version of the exclusion should be acceptable as it would still meet the legitimate need for religious organisations to conduct their internal affairs as they see fit, but prevent them discriminating between members of the public.

Looking at the other grounds covered by the EO Act, the exclusion allowing a religious body to discriminate in the provision of accommodation:

- is available on the grounds of sex, marital status & pregnancy; religious or political conviction; and age; but

- is not available on the grounds of race; and impairment (ie a religious body cannot discriminate on these grounds in providing accommodation).

The proviso suggested by GALE does not apply to any of these grounds.

The proviso suggested by GALE does apply, however, to the very similar exclusion in a number of grounds under the EO Act allowing "*a charitable or other voluntary body*" to discriminate in provision of accommodation (#35ZA(3)(c) discussed above). That is, such a body can only discriminate where the accommodation is provided solely for persons of a particular group. It may be queried why a charitable or voluntary body has only limited ability to exclude persons from accommodation, while a religious body can do so without limitation.

COMMITTEE FINDINGS ON ACCOMMODATION PROVIDED BY A RELIGIOUS BODY

[40]Submission No.5

The Committee sees merit in GALE's contention that the EO Act embodies a general principle that only private arrangements should be protected from compliance with the EO Act. While the line between private and public arrangements is not always easy to draw, GALE makes a good argument that only accommodation exclusively for adherents of the religion falls within the private sphere. It would follow that religious bodies should not be able to discriminate with respect to other accommodation.

However, it is important to maintain consistency between the different Parts of the EO Act. GALE's argument applies equally to all the other grounds on which religious bodies are allowed to discriminate in provision of accommodation. It would be anomalous to remove the right to discriminate on the grounds of sexuality and transgender identity, while retaining it for the grounds of sex, marital status and pregnancy; religious and political conviction; and age. If the proviso suggested by GALE is to be introduced, it should be by way of a general amendment to each of the relevant sections of the EO Act.

When a general review of the EO Act is undertaken the following issues should be considered:

- whether discrimination in provision of accommodation by a religious body should be allowed only where the accommodation is solely for adherents of the particular religion; and

- the inconsistency between the approaches taken to accommodation provided by a religious body on the one hand and accommodation provided by a charity or voluntary organisation on the other.

9.6 PROPOSED EXCLUSION - GENUINE OCCUPATIONAL QUALIFICATION

The Bill does not include an exclusion making it legal to discriminate in employment in relation to a **genuine occupational qualification**. In this regard the Bill is consistent with EO Act provisions relating to family responsibility and status; religion and politics, but differs from provisions relating to the grounds of sex, marital status and pregnancy; race; impairment; and age, which do offer such an exclusion.

GALE is of the view that the Bill's general approach is correct, as there are few jobs where sexuality could be regarded as a genuine occupational qualification. However it proposes that a very limited exclusion similar to that applying to the ground of age under section 66ZQ(c) of the EO Act would be appropriate. Such a provision would permit discrimination in employment which involves provision of **welfare services which can most effectively be provided by persons of a particular sexuality or transgender identity**.

COMMITTEE FINDINGS ON GENUINE OCCUPATIONAL QUALIFICATION

The Committee notes GALE's proposal that a limited exclusion be permitted to allow discrimination in employment where welfare services can be most effectively provided by persons of a particular sexuality or transgender identity.

However, the Committee finds that there is no sound policy basis for allowing discrimination to occur in employment. It is important to maintain the general policy of the Bill that discrimination should not occur in employment. The Committee therefore cannot support GALE's proposal.

9.7 PROPOSED EXCLUSION - SERVICES FOR PERSONS OF A PARTICULAR SEXUALITY

The Bill does not include an exclusion making it legal to discriminate in provision of **services which by nature can only be provided to persons of a particular sexuality**. The only ground under the EO Act where this exclusion is available is that of sex under section 30.

GALE is of the view that the exclusion should apply under the Bill in the same way as it does to services which by their nature can only be provided to persons of a particular gender. It does not however give any examples of services which would fall into this category.[41]

Dr Vivienne Cass disagrees, stating that this exclusion is appropriately included in respect of the ground of gender, but would not be appropriate on the ground of sexuality.[42]

COMMITTEE FINDINGS ON SERVICES FOR PERSONS OF A PARTICULAR SEXUALITY

The Committee considers that it is not clear that there are any services which by nature can only be provided to persons of a particular sexuality. In the absence of clear indication of the need for such an exclusion, it is preferable that the exclusion not be available.

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[41]Submission No.5
[42]Submission No.3

CHAPTER 10

RECOGNITION OF SAME SEX RELATIONSHIPS

10.1 TO WHAT EXTENT DOES THE BILL RECOGNISE SAME SEX RELATIONSHIPS?

The Bill amends the EO Act to include a same sex de facto relationship as a form of marital status for the purpose of existing Part II of the EO Act, which prohibits discrimination on the ground of marital status among others.

A matter discussed at length in the second reading debate was the extent to which this amendment to the EO Act amounts to legislative recognition of same sex relationships and the desirability of the amendment.

Hon Helen Hodgson made the following statement in the second reading debate:

> *"By altering the definition of de facto for the purposes of the Equal Opportunity Act, same sex partners will have protection under the ground of marital status and therefore be given rights to see their partners, to be consulted in medical situations and to access employment benefits available to de facto partners. The recognition of same sex partners does not extend beyond the scope of the Equal Opportunity Act and does not provide recognition of such relationships for any other legal purpose. Only the Federal Government could amend the law to recognise homosexual or lesbian marriages."*[43]

It is correct that Commonwealth law governs marriage and that the Bill is not in any practical sense a move towards legal recognition of same sex marriage.

Currently the law (whether State, Commonwealth or both) recognises **heterosexual de facto** relationships as akin to marriage in some circumstances, including the circumstances covered by existing Part IIB of the EO Act. In contrast, the law currently does not recognise **same sex de facto** relationships in any circumstances. The Bill breaks new ground by recognising **same sex de facto** relationships for the purposes of the EO Act. However, for all other purposes there remains:

- a distinction between heterosexual and same sex de facto relationships; and
- an even greater distinction between marriage and same sex de facto relationships.

Hon Peter Foss quoted in the second reading debate from a letter written by the Australian Family Association ("**AFA**"), as follows:

> "*Hodgson seeks to amend the definition of 'de facto spouse' in the Equal Opportunity Act to include a same sex partner as a "spouse".*

[43]Hansard, Legislative Council 17/9/1997, p6305

> *This would create a significant precedent as no other legislation at either State or Commonwealth level includes such a definition."*[44]

As Hon Peter Foss goes on to note in relation to this comment:

> "*[a]lthough it has been suggested that all we are doing is catching up with the rest of Australia, this Bill is significantly different in that respect.*"

Hon Helen Hodgson is also correct in stating that the Bill's recognition of same sex partners does not extend beyond the scope of the EO Act. Some witnesses such as Mr Michael Bowyer believe this is a shortcoming and that legislation giving rights to persons in a de facto relationship should also be amended to give same sex de facto relationships equal recognition. Examples cited are the *Administration Act 1903, Evidence Act 1906, Stamp Act 1921* and *Inheritance (Family and Dependents Provision) Act 1972*.[45]

Mr Graham Brown of the "Here for Life" Youth Sexuality Project believes that recognising same sex relationships as a type of marital status is important socially and emotionally for young people with same sex attractions but confronted with hostility and prejudice.[46] Dr Vivienne Cass also cites the positive reinforcement which would be provided by legislative recognition of same sex relationships.[47]

The AFA's view of the social and psychological impact of this provision is almost identical to that of those witnesses who favour the Bill. That is, all parties agree that regardless of the practical impact of the Bill's inclusion of same sex relationships as a type of de facto relationship, the inclusion denotes a degree of social recognition of same sex relationships and is thus important in a symbolic and psychological sense.[48]

The AFA does not agree with other witnesses that such recognition **should** be accorded to same sex relationships. It has strong objections to same sex relationships being accorded the type of recognition the Bill offers:

> "*The State has an interest in and a duty to protect the status of marriage as the natural and best context for bearing and raising children. This has been extended in recent years to give increasing recognition to de facto marriages, precisely defined as "marriage-like" although not formally registered.*
>
> *The State has no interest in enhancing and protecting the status of homosexual partnerships, which should remain in the realm of private activity. . . Any move to recognise homosexual partnerships must inevitably lead to a further undermining of the unique legal position of marriage."*[49]

[44]Hansard, Legislative Council 19/11/1997, p8133
[45]Submission No.9
[46]Submission No.2
[47]Submission No.3
[48]Submission No.12
[49]Submission No.12

COMMITTEE FINDINGS ON RECOGNITION OF SAME SEX RELATIONSHIPS

Most participants in the debate regard the Bill's recognition of a same sex relationship as a form of de facto relationship as being something of a social milestone, whether they approve or disapprove of the proposal.

However, looking at the practical effect of this aspect of the Bill, the proposal might more realistically be described as auxiliary to the addition of the new Part IIB. Part IIB protects the individual against discrimination on the ground of sexuality or transgender identity, while the provision under discussion merely augments this protection by extending similar protection to the individual in the context of their being in a same sex relationship.

As Mr Michael Bowyer points out, the proposal falls far short of being an overhaul of the law's treatment of same sex relationships. Existing distinctions between homosexual and heterosexual relationships remain as they are currently, except for the purposes of the EO Act.

It is consistent with the overall intention of the Bill that a same sex relationship should be capable of recognition as a de facto relationship in the same way as a heterosexual relationship. However, it is beyond the scope of this inquiry to consider whether such recognition should extend to legislation other than the EO Act.

The inclusion of same sex relationships as a type of de facto relationship for the purposes of Part II of the Bill is consistent with the general intention of the Bill. It is not suggested that the provision is unclear or difficult to apply.

CHAPTER 11

TRANSGENDER IDENTITY

11.1 INTRODUCTION

Most issues discussed in this Report in relation to the new Part IIB of the EO Act are common to both sexuality and transgender identity. There are however three issues which are particular to the ground of transgender identity and merit separate discussion.

11.2 ACCEPTANCE OF CHANGE OF GENDER

First, the Bill defines transgender identity broadly enough to include both persons who simply identify as a person of the opposite sex to which they were born and persons who have had sex reassignment surgery. However the Gender Council of Australia (WA) Inc suggests that the two types of transgender person should be defined separately. This is because a key concern for the latter category is that they be actually accepted as persons of their new gender.

The Gender Council is aware that this point is one of form rather than substance, as the provisions in their current form operate effectively to protect such persons.

Nevertheless the Gender Council suggests that the Bill should not define a person who has had sex reassignment surgery as a "*person of one sex who . . . assumes any of the characteristics of the opposite sex*", as this means the Bill still regards them as being of their original sex, contrary to their own self-image. The Gender Council's preferred approach is to include as "transgender" a person who has previously been of the opposite sex.

COMMITTEE FINDINGS ON ACCEPTANCE OF CHANGE OF GENDER

The Committee agrees with the principle espoused by the Gender Council that legislation should be drafted not only to have the desired effect but also to reflect in its language the realities of the field in which it operates.

However, the reality is at present that a person who has sex reassignment surgery is not recognised by the *Registration of Births, Deaths and Marriages Act 1961* or for legal purposes generally as thereby becoming of the opposite gender. This situation is accurately reflected in the current drafting of the Bill.

The Committee believes that there would be some merit in making the changes suggested by the Gender Council, but that this should occur in the context of the extension of legal recognition to sex reassignment.

The Committee observes that if sex reassignment becomes fully accepted in future for legal purposes as effecting a change in the gender of the person undergoing the reassignment, the definition of "transgender" in the Bill (or the *Equal Opportunity Act 1984*, as appropriate) should be amended to reflect this.

11.3 TREATMENT OF A PERSON WHO IS BOTH TRANSGENDER AND HOMOSEXUAL

A second claim made by the Gender Council is that the Bill does not fully account for the possibility that a person can be both transgender and homosexual. The Gender Council gives the example of a person born male who identifies not only as transgender but also as lesbian.

The Gender Council does not suggest that the Bill fails generally to protect such a person from discrimination. The Bill's definition of "sexuality" relies on a person's "self-identity" as being of a particular sexuality. Generally speaking, therefore, the Bill offers similar protections to a male-born transgender person who self-identifies as lesbian as it does to other persons who are lesbians as defined by the Bill.

The concern is rather the very specific one that the person could be excluded from the types of activities and organisations permitted, as exclusions to the general rule of non-discrimination, under #35ZA(3)(c), #35ZB(3), #35ZC(3) and #35ZD(2)(b).

Such a person could in practice be excluded from activities permitted under three of these, but not the fourth, as follows.

- #35ZA(3)(c), #35ZB(3) and #35ZD(2)(b) (concerning respectively accommodation, club membership and residential complexes) are simple exemptions from having to comply with the prohibition against discrimination on the grounds of sexuality or transgender identity. Organisations qualifying for the exemption can discriminate with impunity on the grounds of sexuality or transgender identity. An accommodation service, club or residential complex conducted for lesbians can therefore exclude a male-born transgender person who self-identifies as lesbian.

- In contrast, #35ZC(3) allows discrimination to occur where a sporting activity is conducted only for persons of a particular sexuality, **provided that the discrimination is not against persons of that sexuality**. This means that a lesbian sporting club probably cannot exclude anyone who self-identifies as lesbian, so that the Gender Council's concern insofar as it relates to this clause is unfounded.[50]

[50]The other exclusion raised by the Gender Council, #35ZC(3), is also based on existing sections of the EO Act. Interestingly, the equivalent section in relation to the ground of **sex**, section 35, permits male-only or female-only sporting activities where strength, stamina or physique are relevant. Such considerations would appear equally pertinent to transgender identity. It might be thought that #35ZC(3) should be amended to allow a lesbian sports club to exclude a male-born transgender person identifying as a lesbian. Of course, such an amendment would be directly contrary to the approach proposed by the Gender Council.

Summarising the above, it is clear that there are legitimate grounds for the concerns raised by the Gender Council. The general thrust of the Bill is to give transgender persons a similar level of protection as homosexual and lesbian persons. This intention is compromised by #35ZA(3)(c), #35ZB(3) and #35ZD(2)(b).

On the other hand, good arguments can be raised to justify each of these provisions:

- #35ZA(3)(c) is based on existing section 21(3)(c) of the EO Act, which permits accommodation to be offered exclusively to persons of a particular sex. This allows, say, a women's refuge to refuse accommodation to a male-born transgender person. It is at least arguable that this is appropriate. Applying parallel reasoning to #35ZA(3)(c), it appears appropriate that, say, a lesbian-only refuge should be permitted to refuse accommodation to a male-born person.

- #35ZB(3) is based on a number of existing EO Act provisions which allow clubs and associations to be set up exclusively for a particular group protected by the EO Act. Female-born lesbians arguably form such a particular group and therefore should be allowed to exclude male-born persons, even those who identify as lesbian.

- #35ZD(2)(b), like #35ZA(3)(c), is concerned with accommodation and similar arguments apply.

COMMITTEE FINDINGS ON PERSONS WHO ARE BOTH TRANSGENDER AND HOMOSEXUAL

The Committee appreciates the concerns raised by the Gender Council in relation to #35ZA(3)(c), #35ZB(3) and #35ZD(2)(b). The Gender Council proposes narrowing these exclusions so as to prevent an accommodation service, club or residential complex set up for a particular sexuality from excluding some persons who identify as being of that sexuality.

The Committee is not convinced there is a clear case for adopting this proposal. The difficulties that the proposed new sections might cause for transgender persons must be balanced against the interest that sporting organisations and clubs set up for persons of a particular sexuality have in retaining control over their membership. The Bill's intention is clearly to support the establishment of such organisations and clubs. In the Committee's view the proposed new sections under discussion are consistent with that intention.

11.4 *GENDER REASSIGNMENT BILL 1997*

The third issue relating specifically to transgender identity is whether the Bill should deal with transgender identity at all. Hon Peter Foss in the second reading debate on 19/11/1997 stated that:

> *"There is a small problem in that, in the case of transgender, the Bill seeks to deal with a matter that has already passed this House. At an early stage of this session*

> *we passed an amendment to the Equal Opportunity Act dealing with substantially the same issues as this Bill."*

The history of the legislation referred to is that the *Gender Reassignment Bill 1997* was passed by the Council earlier in the 1997 session. This bill was sent to the Assembly but disallowed by the Speaker of the Assembly on the basis that its introduction by the Council was ultra vires the Council's powers under the Western Australian Constitution. The Assembly subsequently introduced the substantially identical *Gender Reassignment Bill (No. 2) 1997* (referred to in this paragraph as the "Gender Bill"). The Gender Bill is still before the Assembly.

Standing Order 170 of the Legislative Council presents a procedural obstacle to dealing with the same subject matter twice. It provides that:

> *" . . . no question or amendment shall be proposed which is the same in substance as any question or amendment which, during the same session, has been resolved in the affirmative or in the negative."*

However the fact that this Bill was read a second time in the Council and referred to the Committee indicates that the President did not regard the Bill as out of order under this Standing Order, presumably because it is not "the same in substance" as the Gender Bill. Other than this, there is no procedural or legal obstacle to two bills dealing with similar subject matter being simultaneously before the Parliament. Of course, if one bill becomes law and thereby affects laws which are also proposed to be affected by another bill, the second bill must be adapted to take account of the amendments.

Turning to the practical question of whether the Bill and the Gender Bill are sufficiently different to warrant separate consideration by Parliament, the following differences between the Gender Bill and the Bill are immediately apparent:

- the *Gender Bill* proposes the establishment of a Gender Reassignment Board to deal with issues relating to gender reassignment;

- the Gender Bill provides legal recognition of a change of gender to a person who has had sex reassignment surgery, whereas the Bill does not affect the legal gender status of such a person; and

- the Gender Bill affects only persons who self-identify as transgender and have had sex reassignment surgery, whereas the Bill deals with all persons who self-identify as transgender.

COMMITTEE FINDINGS ON *GENDER REASSIGNMENT BILL (NO.2) 1997*

The Committee notes that:

- the President of the Legislative Council has not found that there is any procedural obstacle to the Bill being before the House; and

- the Bill is sufficiently different in its scope and intent from the *Gender Reassignment Bill 1997* that it is not inappropriate for the two to be before Parliament simultaneously.

CHAPTER 12

BILL'S AMENDMENTS TO THE CRIMINAL CODE

12.1 INCONSISTENCY WITH COMMONWEALTH LAW

Sections 14 to 18 of the Bill have the principal effect of removing the distinction currently operating in the Criminal Code between male to male sexual activity and other types of sexual activity.

Hon Helen Hodgson stated in the second reading debate that:

> *"The Commonwealth Government has recognised [the right of individuals to be protected against discrimination on the grounds of their sexuality] by enacting the Human Rights (Sexual Conduct) Act, which provides all citizens over the age of 18 with a defence against criminal charges in respect of consensual sex. This inconsistency with federal law makes the current Western Australian legislation vulnerable to a High Court challenge."*[51]

Section 4 of the Commonwealth *Human Rights (Sexual Conduct) Act 1994* reads as follows:

> "***Arbitrary interferences with privacy***
>
> *4.(1) Sexual conduct involving only consenting adults* [defined to mean persons over 18 years] *acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.*"

Article 17 of the *International Covenant on Civil and Political Rights* reads as follows:

> "*Article 17*
>
> *1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks.*"

The Commonwealth legislation was the subject of a High Court decision in the case of *Rodney Croome & anor v The State of Tasmania*, in which the plaintiff succeeded in arguing that Tasmania's criminal law was inconsistent with the Commonwealth Act. S.109 of the

[51]Hansard, Legislative Council 17/9/1997, p6303

Commonwealth Constitution provides that in the event of inconsistency a Commonwealth law prevails. The Tasmanian law was therefore adjudged invalid.[52]
Section 322A of Western Australia's *Criminal Code* reads in part as follows:

> "***Juvenile male: Offences against***
>
> *322A. (1) In this section "juvenile male" means a male person of or over the age of 16 years and under the age of 21 years.*
>
> *(2) A male person who sexually penetrates a juvenile male or who procures or permits a juvenile male to sexually penetrate him is guilty of a crime and is liable to imprisonment for 5 years.*"

Hon Helen Hodgson's argument is that this law is analogous to the previous Tasmanian law which was declared invalid by the High Court, and would therefore be declared invalid in respect of persons aged over 18 in the event a person were charged under WA's law. It should be noted that this argument would be satisfied by lowering the age of consent for male to male sexual activity to 18.

The counter-argument discussed by Hon Peter Foss in his speech in the second reading debate is that the Commonwealth Act prohibits, not all law-making, but only "arbitrary interference" with the right to privacy. The argument is that Western Australia's criminal law, in prohibiting consensual homosexual sex involving an 18, 19 or 20 year old man, is not an arbitrary interference but a matter of public policy.

Hon Peter Foss draws an analogy between WA's laws relating to incest and its laws relating to anal intercourse. Laws relating to incest apply at any age, not only where one of the parties is a young person. It is generally accepted that the incest laws are not an "arbitrary interference" and therefore are not at risk of being invalidated by the Commonwealth law. If the analogy were accepted by a Court considering the question of the validity of WA's laws relating to anal intercourse, section 322A would not be invalidated.

A difficulty with Hon Peter Foss's argument is that generally the law does not treat men aged 18, 19 or 20 differently to other men. In this respect the laws relating to male to male sexual activity are not consistent with other laws relating to age. This tends to strengthen the argument that the selection of the age of 21 as the cut off point for criminality is an "arbitrary interference". In all other States the cut off point is 18 or below, so WA is now the only State which faces this difficulty.

GALE submits that its legal advice is that Western Australia's current laws would be likely to be declared invalid under section 109 of the Constitution if challenged. GALE concedes that if the law were changed to bring the age of consent for homosexual sex back to 18 rather than 21, the risk of invalidity would be removed. Nevertheless it argues that the uniform age should be 16.

[52](1997) 191 CLR 119

Mr Christopher Kendall, law lecturer at Murdoch University, suggests that the rationale for having 21 as the age of consent for male to male sexual activity is based on an unfounded myth:

> "*The Code's discriminatory age provisions do little more than perpetuate the unfounded and highly offensive social stereotype of gay men and lesbians as paedophiles, concerned only with "recruiting" and ultimately corrupting young men and women. . . Sexuality is not contagious but legally sanctioned discrimination most definitely is.*"

GALE makes the point that the claimed difference between male and female maturity during the teenage years, often cited as justification for the present difference in age of consent, is in fact not reflected in current law. The age of consent for males and females engaging in heterosexual sex is 16 in each case.

COMMITTEE FINDINGS ON INCONSISTENCY WITH COMMONWEALTH LAW

The Committee notes that there is a real risk that Western Australia's *Criminal Code* is vulnerable to challenge on the basis asserted by Hon Helen Hodgson. At the same time there is no obligation on Western Australia to repeal or alter the *Criminal Code* so as to remove the risk.

The Committee was unable to reach consensus on this issue. The High Court decision in the Tasmanian case sends a strong message to Western Australia that, if challenged, section 322A of the *Criminal Code* probably would be held inconsistent with Commonwealth law. The Committee was of the opinion that the inconsistency of the *Criminal Code* with the Commonwealth *Human Rights (Sexual Conduct) Act 1994* should be removed by amendment of the relevant sections of the *Criminal Code.*

A minority of Committee members take the view that the inconsistency with Commonwealth legislation would best be overcome by adoption of the Bill's proposed uniform age of consent of 16. However, the minority recognised that the important principle of equality and a uniform age of consent could be established with a uniform age of 17 years or 18 years.

The majority does not agree. They acknowledge the need to establish consistency with Commonwealth law but do not accept there is a compelling reason to lower the age of consent for male to male sexual activity to make it consistent with the age for lawful consensual heterosexual intercourse.

12.2 WHAT IS AN APPROPRIATE AGE OF CONSENT?

All witnesses who approved the introduction of a uniform age of consent accepted the Bill's proposal that the uniform age of consent should be 16.

Some witnesses opposed the lowering of the age of consent for male to male sex at all. For example, the Australian Family Association stated that:

> "*Leaving the legal barrier at 21 years of age is one way in which our community has stated clearly that while private homosexual acts among men aged 21 and over will be tolerated this in no way represents a normalising of homosexual behaviour or its endorsement as an alternative for teenage boys."*

The argument appears to be that it is important to retain a differential between the respective ages at which males can consent to homosexual and heterosexual activity, in order to make clear that society disapproves of the former. No argument is advanced as to why the differential should be 5 years rather than, say, 1 year or 10 years.

A different argument for retaining the current age of consent is proposed by Mr Simon Croft:

> "*Lowering the "Age of Consent" will only ensure transmission of disease associated with the promiscuity of a homosexual lifestyle at an earlier age.*"

The central argument proposed by witnesses for introduction of a uniform age of consent is the equitable one that homosexual persons should have the same sexual rights as other persons.

Other arguments put forward by witnesses for uniformity are that:

- males between 16 and 21 are intimidated by the criminality of homosexuality and therefore less likely to seek information about sexuality and safe sex, leading to higher risk of spread of disease;
- persons responsible for sexual education and information, such as doctors, schools and counsellors are at risk of aiding commission of crime, itself a criminal offence, if they disseminate information about sexuality and safe sex. This leads to higher risk of spread of disease;
- under section 186(1) of the Criminal Code, landlords who know that their tenant engages in male to male sexual activity in the house are at risk of committing a crime, leading to a higher risk of discrimination on the part of landlords;
- young homosexual males are unwilling to seek protection from police in the event of home burglary or violence, out of fear that police investigation of their affairs might lead to charges against them;
- the social and psychological difficulties faced by young homosexual persons "coming out" are exacerbated by the knowledge that sexual activity is illegal for 5 years longer than heterosexual youths; and
- high levels of youth suicide amongst homosexuals, particularly men, can be sourced at least in part to difficulties faced in the coming out process because of social and

family opposition to homosexuality, fuelled by legal recognition of the undesirability of homosexual behaviour.

COMMITTEE FINDINGS ON APPROPRIATE AGE OF CONSENT

The Committee finds that the policy of the Bill is that the age of Consent for male to male sexual activity should be uniform with that for other types of sexual activity. It is not the Committee's role to re-examine that policy.

The Committee notes that concerns were expressed during the second reading debate with respect to adequate protection of youth. No witnesses specifically addressed the issue of whether 16 is appropriate as the uniform age of consent.

If Parliament is concerned with the harm caused by early sexual experience, this may be addressed within the constraints of the Bill.

A uniform age of Consent, higher than 16, could be adopted if Parliament so determined. A uniform age of Consent of 17 has provided an adequate community standard in South Australia for the last 20 years. Some members of the Committee felt that a uniform national age of consent of 18 should apply.

The defence of reasonable mistake with respect to age could be abolished by Parliament if it were felt that availability of the defence had broken down the current legislative constraints.

Under the current law and this Bill an age of consent of 18 applies with respect to sexual activities involving persons in positions of authority. This protection could be made more comprehensive if Parliament so determined.

The lowering of legal age of consent is consistent with the overall intention of the Bill. While a number of witnesses disagree with the lowering of the legal age for male to male sexual activity, it is not suggested by any witnesses that the law is unworkable or will cause practical problems in implementation.

CHAPTER 13

BILL'S REPEAL OF *LAW REFORM (DECRIMINALISATION OF SODOMY) ACT 1989*

Part 4 of the Bill repeals altogether the *Law Reform (Decriminalisation of Sodomy) Act 1989* ("**Decriminalisation Act**").

The Preamble of the Decriminalisation Act reads as follows:

> "*WHEREAS, the Parliament does not believe that sexual acts between consenting adults in private ought to be regulated by the criminal law;*
>
> *AND WHEREAS, the Parliament disapproves of sexual relations between persons of the same sex;*
>
> *AND WHEREAS, the Parliament disapproves of the promotion or encouragement of homosexual behaviour;*
>
> *AND WHEREAS, the Parliament does not by its action in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitude to homosexual behaviour;*
>
> *AND WHEREAS, in particular the Parliament disapproves of persons with care supervision or authority over young persons urging them to adopt homosexuality as a lifestyle and disapproves of instrumentalities of the State so doing:*"

The Preamble was the subject of considerable debate in Parliament at the time of the passage of the Decriminalisation Act. The debate indicates that an arrangement was agreed to, whereby Parliament agreed to decriminalise the previous offence of sodomy on the basis that the Preamble would retain reference to continuing Parliamentary disapproval of homosexual behaviour.

In the course of the debate in 1989 Hon Peter Foss explained his position as follows:

> "*Generally speaking, people do not believe sodomy in private should be prosecuted, yet there would have been a time when community attitudes were very much against sodomy. A person caught sodomising on a ship might have been thrown overboard.*
>
> *Community attitudes do change, irrespective of Acts. Community attitudes have changed. It is not always wrong for community attitudes to change. I am not for one moment suggesting that these two forms of behaviour are in any way equivalent, but it is important that people understand how community attitudes change and the problems which arise from failure to change with them. Not so long ago left handedness was frowned upon. In fact the word "sinister" means left handed, and it used to be thought there was something evil about being left handed. . . This attitude*

continued while I was at school. Left handers were told to write with their right hands. If found writing with their left hands they were punished. Nowadays left handers are not forced to write with their right hands because it has been found that severe psychological problems can be caused as the result of making left handers write with their right hands.

I am not suggesting those two things are in any way similar. What I am saying is that attitudes change. A change in attitude is not necessarily wrong. I am not suggesting for one moment that I adopt any of the parts of the Labor Party's platform. I am totally against the Labor Party's platform, which I believe does encourage homosexual behaviour. I believe it is inappropriate, by reason of the nature of homosexuality, for it to be classed as a criminal offence.

I do not believe society is being served in any positive way by continuing to treat homosexuality as a criminal offence, especially when it is generally accepted by the community, even by those opposed to it, that people are not prosecuted for homosexuality or for acts of sodomy in private. I am concerned about the public concern - and it is a concern that I share - that changing the law may indicate a change of attitude in this Parliament.

I have sought to put on the Notice Paper a preamble. A preamble is a very important part of an Act, and I have been urging the use of preambles on this Parliament because preambles state better than any other way the policy of an Act. I realise the public perception is not necessarily the same as the perception of a judge or a court. A preamble is probably better understood by judges than by the ordinary people of Western Australia, but I hope the people of Western Australia appreciate that the Parliament, by passing this Bill, is not expressing approval of homosexual behaviour."[53]

The Preamble to the Decriminalisation Act has little substantive legal effect in itself but is regarded by all sides of the debate as symbolic of the State's attitude to male homosexuality. Repeal of the Decriminalisation Act will have the effect of removing the Preamble from the statute book. By repeal, the State will be signifying that the symbolic statement no longer applies. Repeal would indicate that community attitudes have changed in the time since the enactment of the Decriminalisation Act.

The Australian Family Association strongly endorses the Preamble:

"*The Preamble expresses Parliament's disapproval of homosexual behaviour. It has no legal force but is considered offensive by the homosexual lobby. It is a useful reference point for citizens who also disapprove of homosexual behaviour. To repeal the Preamble would amount to a statement that Parliament now approves of homosexual behaviour, or is at least neutral towards it.*"[54]

[53]Hansard, Legislative Council 14/11/1989, p4320
[54]Submission No.12

Turning to the remainder of the Decriminalisation Act, because of section 37 of the *Interpretation Act 1984*, repeal will not have any effect on the current operation of those sections of the Criminal Code which were amended by the Decriminalisation Act.

The only sections of the Decriminalisation Act which have independent operation and will be repealed by the Bill are sections 23 and 24. These sections make it unlawful to encourage or promote homosexual behaviour, either generally or as part of the teaching in a primary or secondary institution.

Mr Christopher Kendall strongly supports the repeal of these sections:

> "*With respect to section 23 . . . it is again clear that this section does little more than fuel the fires of bigotry by supporting the idea that gay men and lesbians have nothing better to do with their time than recruit young men and women into the fold.*"[55]

Mr Kendall goes on to argue that the existence of the sections potentially undermines efforts to reduce youth suicide, incidence of HIV/AIDS and other sexually transmitted diseases by restricting the availability of information.

The Australian Family Association opposes repeal of sections 23 and 24 of the Decriminalisation Act, while conceding that their import is not clear:

> "*While their precise legal import is a matter of some debate, there is no doubt that these sections have provided some restraint on the public promotion of homosexual behaviour.*
>
> *. . . It is clear that if Parliament repealed sections 23 and 24 now there would be an increased push by homosexual activists to gain access to the schools, and less legal backing for those who opposed such moves. This will include pressure on the Curriculum Council to include education in "sexuality" in the mandatory curriculum for all WA schools. A previous attempt to include such a component was rejected on the basis of these sections.*"[56]

COMMITTEE FINDINGS ON *LAW REFORM (DECRIMINALISATION OF SODOMY) ACT 1989*

The Committee notes that the repeal of the *Law Reform (Decriminalisation of Sodomy) Act 1989* would not in fact mean that the Curriculum Council or any other body is required to teach students about homosexuality. However, it will mean that it is possible for the Curriculum Council or another education body to include teaching about homosexuality in the curriculum. Determination of curricula will take place according to existing procedures and will not be affected by the Bill except that the spectre of possible illegality will no longer affect discussion in schools of issues relating to homosexuality.

[55]Submission No.4
[56]Submission No.12

The Bill will remove the Preamble to the *Law Reform (Decriminalisation of Sodomy) Act 1989* from Western Australia's statute book.

The Committee is divided on this issue. The minority believes that the Preamble and other provisions of the *Law Reform (Decriminalisation of Sodomy) Act 1989* serve as both an impediment to adequate school sex education and as an incitement to community hatred.

The majority of the Committee does not agree that the growing acceptance of homosexuality extends as far as condoning male to male or female to female sexual activity. For that reason, the symbolic statement of Parliament's disapproval of homosexual activity that is contained in the Preamble should remain part of Western Australian law.

The majority view is that the effect of the Preamble is not to censure the inclusion of education about homosexuality in a school curriculum. The focus of the Preamble is not homosexuality per se, but rather what the Preamble euphemistically calls "homosexual behaviour", that is, consensual sexual acts between persons of the same sex. The disapproval is of the "promotion and encouragement of homosexual behaviour". Proselytizing homosexual behaviour is different from teaching about homosexuality. The latter probably would be accepted by most Western Australians as legitimate within an appropriate curriculum context. Conversely, encouraging young males to homosexual activity would be offensive to the majority.

It is not suggested by any witness that the proposed repeal is unworkable or will cause practical problems in implementation.

CHAPTER 14

DRAFTING OF THE BILL

14.1 INTRODUCTION

In this Chapter the Committee comments on specific issues raised by the drafting of the Bill and proposes a number of amendments to the Bill. These are set out in full in Appendix A, in a form suitable to be moved as amendments to the Bill in Committee stage in the House.

14.2 *EQUAL OPPORTUNITY ACT* #35O AND #35P - PRESUMED SEXUALITY, PRESUMED TRANSGENDER IDENTITY

#35O explains what it is for a person to discriminate on the ground of sexuality, and #35P does the same for the ground of transgender identity. The clauses are closely based on equivalent sections in existing Parts of the EO Act. However, the clauses differ in one important respect from existing sections in introducing the notions of "presumed sexuality" and "presumed transgender identity". For example, the text refers to discrimination "*on the ground of the sexuality or presumed sexuality*", and similarly to discrimination "*on the ground of transgender identity or presumed transgender identity*".

The Committee makes two comments. First, simply as a matter of drafting, the Bill's use of the terms is inconsistent. For example:

- #35O(1)(b) and (c) do not include reference to "presumed sexuality", while the otherwise similar #35O(3)(b) and (c) do;

- #35O(2)(a) refers to "presumed sexuality", while the equivalent #35O(2)(a) does not refer to "presumed transgender identity"; and

- #35O(1)(b) and (c) do not include reference to "presumed sexuality", while the equivalent #35P(1)(b) and (c) refer to "presumed transgender identity".

If the concept of "presumed" sexuality or transgender identity is to be included in the Bill, use should be consistent.

However, the Committee's second comment is that it is arguably not appropriate for the Bill to introduce the concept of "presumed" sexuality or transgender identity at all, for a number of reasons.

- It is not clear what the concept is intended to achieve.

- It is difficult to see how the concept would operate in practice, as the concept of "presumption" is a subjective, private concept, not easily proved. The proposal introduces a need to inquire into the mental state of the "discriminator" as defined,

which is a difficult task and probably not appropriate for the purposes of the EO Act.

- No existing ground of prohibited discrimination under the EO Act uses the concept of "presumed" identity, although conceptually it could be used for every ground if the drafters of the EO Act had seen fit. It would seem problematic to introduce it for the grounds of sexuality and transgender identity alone.

On the basis of these considerations the Committee recommends deletion of all references to "presumed sexuality" and "presumed transgender identity".

Recommendation 2: that references in proposed new section 35O of the *Equal Opportunity Act 1984* to "presumed sexuality" be deleted, and consequential changes made.

Recommendation 3: that references in proposed new section 35P of the *Equal Opportunity Act 1984* to "presumed transgender" be deleted, and consequential changes made.

14.3 *EQUAL OPPORTUNITY ACT* #35O AND #35P - RELATIVE OR ASSOCIATE

Each of #35O and #35P contains a subsection (3) protecting a person from discrimination arising as a result of the person's having a relative or associate of a particular sexuality or transgender identity respectively. The subsections are closely based on existing section 36(1a) of the EO Act which provides similarly for the ground of **race**. There is not an equivalent section in any of the other Parts of the EO Act.

The purpose of #35O(3) and #35P(3) is somewhat obscure. Intuitively it might be thought that the provisions are intended, using a simplified example, to prohibit an employer favouring:

- an employee whose **friend is not** a lesbian

over

- an employee whose **friend is** a lesbian.

However, as it is drafted, the provision actually prohibits the employer favouring:

- an **employee who is not** a lesbian

over

- an employee **whose friend is not** a lesbian.

It is not clear that the provision has any significant effect. In the Committee's view the usefulness of the provision is marginal at best. The House may wish to consider whether #35O(3) and #35P(3) should be deleted.

A further matter for consideration is that #35O(3)(b) and (c), read closely, do not add anything to the clause. If #35O(3) is to be retained in the Bill, these subparagraphs should be deleted. #35P(3) does not contain equivalent subparagraphs so the problem does not arise.

Recommendation 4: that the House consider whether proposed new sections 35O(3) and 35P(3) of the *Equal Opportunity Act 1984* should be deleted.

Recommendation 5: that if proposed new section 35O(3) of the *Equal Opportunity Act 1984* remains in the Bill, paragraphs (b) and (c) be deleted.

14.4 *EQUAL OPPORTUNITY ACT* DEFINITION OF "TRANSGENDER"

Clause 6(a) of the Bill inserts the following definition of "transgender" into section 4 of the EO Act:

> ***"transgender"*** *means a person of one sex who -*
>
> *(a) assumes any of the characteristics of the opposite sex, whether by medical intervention (including a reassignment procedure) or otherwise;*
>
> *(b) identifies himself or herself as a member of the opposite sex;*
>
> *(c) lives or seeks to live as a member of the opposite sex; or*
>
> *(d) attempts to be, or identifies himself or herself as, a transsexual;*"

The definition differs conceptually from the definitions used in relation to the existing grounds under the EO Act and the definition of "sexuality" under the Bill. All those definitions are in terms of an **abstract notion** or a **quality**: sex, marital status, pregnancy, family responsibility, family status, race, religious or political conviction, impairment, age and sexuality.

In contrast, the Bill defines a "transgender" as a type of **person**. This approach was presumably taken because there is no word expressing "the quality of being transgender". The approach is not in itself undesirable. However, it has led to some difficulty with the drafting where existing clauses of the EO Act have been used as a basis for the provisions of the Bill dealing with transgender issues, as clauses which were designed to accommodate a **quality** do not necessarily work to accommodate a **type of person**.

In a number of instances the difficulty is dealt with by use of the expression "transgender identity", which **is** a quality - see for example the heading of Part IIB, line 3 of #35P(1) and

line 3 of #35P(2). While the text reads somewhat awkwardly, this usage is effective in each case.

In other cases, the terms "transgender" and "a transgender" are used to signify a person - see #35P(1)(c) and the last line in #35P(1). In other cases again the term "transgender" is used to mean the quality of "transgender identity" - see line 4 of #35P(3).

Problems arising from inconsistent usage would be averted if throughout the Bill the term "transgender identity" is used to signify the quality of being transgender. The definition of "transgender" should be replaced by a definition of "transgender identity", to read as follows:

> " ***"transgender identity"*** *means the quality of being a person of one sex who -*
>
> *(a) . . . [AS CURRENT TEXT] . . ."*

Recommendation 6: that in clause 6(a) of the Bill, the first line of the definition of "transgender" be amended to read as follows:

> ***" "transgender identity" means the quality of being a person of one sex who -".***

Recommendation 7: that the term "transgender identity" be used in place of the term "transgender" throughout the Bill's proposed amendments to the *Equal Opportunity Act 1984*, and consequential changes made.

14.5 *EQUAL OPPORTUNITY ACT* EXEMPTIONS AND TRANSGENDER IDENTITY

In two instances, provisions of the Bill which prohibit particular discrimination on the grounds of both sexuality and transgender identity provide an exemption which applies only to the ground of sexuality. This is presumably an oversight. As a matter of policy, wherever an exemption allows a person to discriminate on the ground of sexuality, it will also be appropriate to allow them to discriminate on the ground of transgender identity.
The instances where this oversight occurs are as follows:

- #35Q(3); and
- #35S(2).

Recommendation 8: that in proposed new sections 35Q(3) and 35S(2) of the *Equal Opportunity Act 1984*, the words "or transgender identity" are inserted after the word "sexuality".

14.6 *EQUAL OPPORTUNITY ACT* USAGE OF "TRANSGENDER"

The usage of "sexuality" differs from the usage of "transgender identity" in that both heterosexual and homosexual persons have a "sexuality" while only transgender persons have "transgender identity".

Treating both usages in the same way has led to a drafting problem in #35ZE, which refers to "persons who are not of the sexuality or transgender identity of that other person", whereas it should refer to "persons who are not of the sexuality of that other person or are not of transgender identity".

Recommendation 9: that proposed new section 35ZE of the *Equal Opportunity Act 1984* be amended by replacing the words "persons who are not of the sexuality or transgender identity of that other person" with the words "persons who are not of the sexuality of that other person or are not of transgender identity".

14.7 OTHER CHANGES TO BILL'S AMENDMENTS TO THE *EQUAL OPPORTUNITY ACT*

For consistency with other Parts of the EO Act and to correct minor difficulties with the drafting of the Bill, the following changes should be made to the proposed new sections of the EO Act in clause 8 of the Bill.

- #35Q(3) and #35S(2) - replace the words "at the premises in which" with the words "on the premises on which" (cf section 66B(3)).

- #35ZB(1) and 35ZB(2) - replace all the words up to but not including "on the ground" with the following words (cf section 66M) -

  > "It is unlawful for a club or incorporated association, committee of management of a club or incorporated association or a member of the committee of management of a club or incorporated association to discriminate against a person who is not a member of the club or incorporated association"

- #35ZC - replace the headnote "Discrimination in sport on ground of sexuality" with the headnote "Sport" (cf section 35).

- #35ZC(3) - replace the word "first-mentioned" with the word "second-mentioned".

- #35ZD - move the section to follow immediately after #35ZA and renumber accordingly (cf section 47A).

Recommendation 10: that for consistency with the existing Parts of the *Equal Opportunity Act 1984* and to correct minor difficulties with the drafting of the Bill, the House make the minor drafting changes set out in paragraph [14.7] to the Bill's proposed amendments to the *Equal Opportunity Act 1984*.

14.8 *CRIMINAL CODE* SECTIONS 191 AND 192

Clause 16 of the Bill makes extensive amendments to section 192 of the *Criminal Code* which have the effect of making the language of the section gender neutral. Arguably the Bill does not change the effect of the section, as although sections 192(1), (2) and (3) describe misdemeanours in relation to a "woman or girl", section 192(4) provides that the same acts in respect of a "man or boy" are also misdemeanours.

Section 191 is very similar to section 192 but deals with procuration for prostitution rather than procuration by threats, fraud or administering drugs. It is not clear why the Bill does not amend section 191 in the same way as section 192. The House may wish to consider whether section 191 should be so amended.

Recommendation 11: that the House consider whether the Bill should amend section 191 of the *Criminal Code* in a manner similar to the Bill's proposed amendments to section 192 of the *Criminal Code*.

14.9 OTHER CHANGES TO THE BILL'S AMENDMENTS TO THE *CRIMINAL CODE*

To correct minor difficulties with the drafting of the Bill, the following changes should be made to the Bill's amendments to the Criminal Code.

- Clause 13 of the Bill - replace the word "part" with the word "Part,".
- Clause 14(c) of the Bill - replace the words "*after the word "her" "* with the words "*after the word "him" "*.
- Clause 15(2) of the Bill - delete the paragraph numbering "(a)".
- Clause 15(2) of the Bill - delete the words after "charge" and substitute the following:

  "*under this section to prove that the accused person believed, on reasonable grounds, that the person was of or above the age of 16 years.*".

Recommendation 12: that to correct minor difficulties with the drafting of the Bill, the House make the technical drafting changes set out in paragraph [14.9] to the Bill's proposed amendments to the *Criminal Code.*

APPENDIX A: LIST OF PROPOSED AMENDMENTS

75 - 1

ACTS AMENDMENT (SEXUALITY DISCRIMINATION) BILL 1997

When in committee on the ***ACTS AMENDMENT (SEXUALITY DISCRIMINATION) BILL 1997***:

Clause 4

subclause 4(a) - to insert after the word "**transgender**" the word "**identity**"

Clause 5

paragraph 5(a)(i) - to insert after the word "**transgender**" the word "**identity**"

Clause 6

subclause 6(a) - In the definition of "transgender", to delete the words -

' **"transgender"** means'

and substitute the words -

' **"transgender identity"** means the quality of being'

Clause 8

In proposed new Part IIB of the *Equal Opportunity Act 1984*, to make the following amendments to the following proposed new sections —

35O — To delete the words "or presumed sexuality" wherever they occur

35O(2)(a) — To delete the words "or the presumed sexuality"

EITHER

35O(3) — To delete the paragraph

OR

35O(3) - To delete subparagraphs (a), (b) and (c) and substitute the words "the sexuality of"

35P(1)(a) — To delete the words "or presumed transgender" and substitute the word "identity"

[NOTE: In the headnote to clause 35P, insert after the word "**transgender**" the word "**identity**"]

35P(1)(b) and 35P(1)(c) — To delete the word "transgender" and substitute the words "of transgender identity"

35P(1) — In the final line, to delete the words "a transgender" and substitute the words "of transgender identity"

35P(2)(a)— To delete the word "transgender" and substitute the words "of transgender identity"

EITHER

35P(3) - To delete the paragraph

OR EACH OF THE FOLLOWING THREE AMENDMENTS

35P(3) — To delete the words "or presumed transgender" and substitute the word "identity"

35P(3) — To delete the words "a transgender" wherever they occur and substitute the words "of transgender identity"

35P(3) — To delete the word "had" and substitute the word "has"

35Q(3) — To insert after the word "sexuality" the words "or transgender identity"

35Q(3) — To delete the words "at the premises in which" and substitute the words "on the premises on which"

35S(2) — To delete the words "at the premises in which" and substitute the words "on the premises on which"

35S(2) — To insert after the word "sexuality" the words "or transgender identity"

#35ZB(1) and 35ZB(2) - To delete all the words up to but not including "on the ground" and substitute the following words -

> "It is unlawful for a club or incorporated association, committee of management of a club or incorporated association or a member of the committee of management of a club or incorporated association to discriminate against a person who is not a member of the club or incorporated association"

35ZB(3) and 35ZB(4)(b) — To insert immediately before the word "transgender" the word "of"

35ZC(3) — To insert immediately before the word "transgender" wherever it occurs the word "of"

35ZC(3) — To delete the word "first-mentioned" and substitute the word "second-mentioned".

> [NOTE: delete the headnote "Discrimination in sport on ground of sexuality" and substitute the headnote "Sport"]

35ZD(2)(b) and 35ZD(3)(b) — To insert immediately before the word "transgender" the word "of"

> [NOTE: move 35ZD to follow immediately after 35ZA, with consequential renumbering.]

35ZE — To delete the words "of the sexuality or transgender identity of that other person" and substitute the words "of the sexuality of that other person or of transgender identity"

Clause 13

To delete the word "part" and substitute the word "Part"

Clause 14(c)

To delete the words 'after the word "her" ' and substitute the words 'after the word "him" '

Clause 15(2)

To delete the words after "charge" and substitute the following:

> "under this section to prove that the accused person believed, on reasonable grounds, that the person was of or above the age of 16 years.".

[NOTE: delete the paragraph numbering "(a)"]

APPENDIX B: LIST OF PERSONS INVITED TO MAKE A SUBMISSION TO THE INQUIRY

Australian Family Association

Dr Sandy Webb
Reproductive Technology Council
Health Department of WA

Father Walter Black
Catholic Church

GALL
Jim Lennin

Gay and Lesbian Equality

Max Karnaghan
Metropolitan Community Church

Mr Michael Bowyer
Solicitor
Public Trustees Office

Mrs Terese Temby
Catholic Education Office

Ms Norma Schwind
Parents and Friends of
Lesbians and Gays

Ms Kate Mudford
Equal Opportunity Consultant

Ms Annie Goldflam
Coalition of Active Lesbians
c/- Centre for Research for Women

Professor Con Michael
Dept of Obstetrics and Gynaecology
King Edward Hospital

Rev John Dunn
Mission and Justice Consultant
Uniting Church

The Chief Executive Officer
Health Department of WA

The Gender Council of WA (Inc)

The Gender Dysphoria
Foundation of WA

APPENDIX C: LIST OF WITNESSES

PART 1 - Witnesses who made written submissions to the inquiry

No	Date Received	Name
1	17.3.97	A J Hosken AJ Hosken & Co Barristers & Solicitors
2	31.3.98	Mr Graham Brown Community Development & Health Promotion Oficer “Here for Life” Youth Sexuality Project
3.	7.4.98	Dr Vivienne Cass
4.	7.4.98	Christopher N Kendall School of Law Murdoch University
5.	20.4.98	Brendon Entrekin Gay & Lesbian Equality (WA)
6.	20.4.98	Archie Zariski School of Law Murdoch University
7.	28.4.98	Joy Fison President Parents, Families & Friends of Lesbians & Gays Perth Incorp
8.	28.4.98	Ted Mildern Manager Adoption Services Family & Children’s Services
9.	28.4.98	Michael Bowyer
10.	5.5.98	Laura Thomas Secretary The Gender Council of Australia (WA) Inc

11.	6.5.98	Simon Croft
12.	12.5.98	J Barich President The Australian Family Association (WA)
13.	12.5.98	Helena Collins Ordinary Executive Member Gender Dysphoria Foundation of WA
14.	12.5.98	Lynn Ralph Chief Executive Officer Investment & Financial Services Association Ltd

PART 2 - Witnesses who appeared before the Committee

Hearing held on 15 April 1998

Professor C Michael
Reproductive Technology Council

Dr Sandra Webb
Senior Policy Officer
Reproductive Technology Council

Ms Leigh Newman
Solicitor
Health Department

Mr Ken Monson
Manager, SE Zone
Department of Family & Children's Services

Mr Ted Mildern
Manager, Adoption Services
Department of Family & Children's Services

Ms Nayantara Gupta,
Director, Legal Services
Department of Family & Children's Services

The Honorable Peter Foss
Attorney General