Review of the Complaints Handling and Dispute Resolution Provisions of the *Anti-Discrimination Act 1998*

Recommendation Paper

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FOREWORD

In 2006 the Attorney-General announced a review of the complaints handling and dispute resolution provisions of the *Anti-Discrimination Act 1998* (the Act). A Discussion Paper was subsequently released that examined the complaints handling provisions of the Act and other some related issues. Invitations were extended to the public to submit comments on a number of questions.

Over 40 submissions received from a variety of interested people and organisations.

This paper sets out the issues raised in the discussion paper, comments on the issues and makes recommendations for legislative change.

In addition to the submissions received about the review, the Catholic Archdiocese of Hobart petitioned the Government for changes to the law regarding the enrolment of Catholic students in Catholic schools. This paper includes the Church's proposal for an amendment to the Act and invites community comment.

Opportunity for further comment

You are invited to comment in writing on any of the issues raised in this paper.

Written responses may be posted to -
Review of the Anti-Discrimination Act 1998
Secretariat
GPO Box 825
Hobart TAS 7001
or by email to
legislation.development@justice.tas.gov.au

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Background of the review

In 2002, as part of the State Government's program of law and justice reforms, the Attorney-General appointed the State Service Commissioner to undertake a review of administrative review processes in Tasmania. The *Report of the Review of Administrative Processes* released in 2003 made suggestions for changes to the *Anti-Discrimination Act 1998*.

In 2004, some changes were made to the Act to address the State Service Commissioner's recommendations. In 2005, the Anti-Discrimination Commissioner streamlined a number of administrative processes relating to the investigation, management and determination of complaints.

A number of possible changes to the legislation have been identified to enhance the efficient and effective resolution of complaints. These were the subject of the Discussion Paper, which was released in 2006.

Terms of Reference of the Review

The purpose of the Review was to:

1. examine the complaints handling and dispute resolution provisions of the *Anti-Discrimination Act 1998*; and
2. make recommendations for legislative change to support fair, flexible and efficient investigation, conciliation and inquiry processes.

The review process

A Discussion Paper was released in 2006 and comments were received from a number of interested persons and organisations. These comments have been analysed and recommendations for change have been included in this paper. This Paper follows, as far as is practical, the same sequence of Issues and Questions as the Discussion Paper. The paper concludes with a Summary of the Recommendations.

This paper sets out a number of recommendations for change to processes and practices in the handling of complaints and dispute resolution process. In addition to this it seeks views of interested parties on the issue of whether there should be statutory exemptions for educational institutions that operate schools based on religious convictions. A complete list of the Recommendation and a list of the persons and organisations that made Submissions in response to the Discussion paper can be found at the end of this Paper.

In terms of the next steps after consideration of any comments received in relation to these recommendations, those amendments to the *Anti-Discrimination Act 1998* which the Government proposes to adopt will be submitted to Cabinet for approval. Following Cabinet approval an Amendment Bill will be drafted and circulated to relevant stakeholders for comment. Once the amendment Bill is finalised it will be returned to Cabinet for final approval and tabling in Parliament at the earliest opportunity.

COMPLAINTS

Who may complain?

The Discussion Paper looked at section 60 of the Act and who may make a complaint about discrimination or prohibited conduct.

As the Discussion Paper noted in some cases an organisation may make a complaint if the Commissioner is satisfied that the majority of the members of the organisation are likely to consent to the making of the complaint. The Discussion Paper looked at the definition of organisation and suggested that for the purposes of section 60(1)(d) the definition of organisation could be further refined to mean:

> A body whether incorporated or not which represents or purports to represent a group of persons within Tasmania and which has as one of its primary purposes the promotion of interests of the group?

Question 1:	Should the definition of organisation be clarified?

There was some support for this suggestion, because if the body is not a legal entity settlement outcomes may be difficult to enforce. This is a valid concern. However, as the Commissioner must be satisfied that the organisation making the complaint represents the members of the organisation there are already internal policies in place that govern the types of organisations that may be approved. In practice, the bona fides of the organisation, its legal status and capacity to represent a group of people are all carefully considered by the Commissioner. The Commissioner would not approve an organisation with dubious legal or other status to make a complaint. There have not been any identifiable incidents where problems have arisen with enforcement and therefore it is not recommended that the definition of organisation be amended.

Recommendation 1:
No change is required to the definition of organisation.

Acting on behalf of another

The Discussion Paper also looked at the issue of a person acting on behalf of another person towards whom the alleged discrimination or prohibited conduct was directed. As noted in the Discussion Paper, this broadly reflects the principle of next friend. The provision was included to provide an avenue for complaints to be made on behalf of children and persons with disabilities who may not have the capacity to lodge a complaint or understand that they may have been discriminated against.

The questions raised in the Discussion Paper were as follows -

Question 2:	Should this section of the Act be amended to clarify and include the following persons: (a) in the case of a person who is a child: (i) where the child has attained the age of 14 years, a person appointed by that child to make the complaint on that child's behalf; or (ii) where the child has not attained the age of 14 years, a parent or guardian of that child; or

	(iii) where the Commissioner is of the opinion that the child is capable of lodging a complaint himself or herself, the child; (b) where a person, under any other law or an order of a court, has the care of the affairs of a person, that person; or (c) where it is difficult or impossible for a person to make a complaint, a person approved by the Commissioner.
Question 3:	Should a litigation guardian be appointed to protect the interests of persons who may not lack the capacity to make a complaint in their own right?
Question 4:	Should the Commissioner or Tribunal have a role in approving settlement of complaints?

There were a number of submissions about these questions. The Tribunal noted that the issue of dealing with children and persons with disabilities was one of the most critical issues raised in the review. This is because of significant concerns about safeguards for children and adult persons with disabilities where others will be accepting outcomes on their behalf.

The ability of children or persons with disability to make a complaint through another person does not always result an appropriate outcome, if those acting on their behalf have conflicting interests. There was general consensus among submissions that some safeguards were required to protect those who do not have the capacity to make a complaint by themselves.

The Tribunal and others noted that there could be consequences for the respondents if these matters are not handled properly. For example, if settlement is reached for a child by a parent, the child may still be able to take out a fresh complaint once they reach 18 years of age.

The Children's Commissioner and the Tribunal submitted that an age threshold as proposed in question 2 was problematic. The Tribunal noted that the more acceptable approach in relation to children is the 'Gillick' competence test as adopted by the *Family Law Act 1975* in relation to children's wishes or views. However, this would be quite resource intensive to administer as specialist services would be required to make these decisions. Applying such assessments would also potentially add a layer of formality and additional costs within the jurisdiction. As emphasised in the Discussion Paper, the Anti-Discrimination jurisdiction is designed to be informal, expeditious and user friendly. Therefore a more cost neutral solution would be preferable.

The Tribunal suggested that if a comprehensive legislative scheme is in place to allow for the appointment of a litigation guardian then there may be no need to amend the Act as proposed in question 2. This would be a logical solution.

A number of precedents were suggested by the Tribunal such as the *Magistrates Court (Civil Division) Rules 1998*, the *Supreme Court Rules 2000* and the *Victorian Civil and Administrative Tribunal Rules 1998*. These examples are applicable to court or tribunal proceedings and could be modified for the Anti-Discrimination jurisdiction.

The submissions demonstrated general support for approving the persons who may make a complaint on behalf of another. One submission did not agree with the

Commissioner undertaking this role, but there was not any substantive justification for this position.

Authorising or approving a person to make a complaint on behalf of another is not so different from the existing powers the Commissioner exercises in accepting complaints made by representative organisations or individuals on behalf of a class of complainants. Therefore it is considered appropriate to extend this power to approving persons who make complaints on behalf of another.

Recommendation 2:
Amend the Act to provide that the Commissioner must approve a person who makes a complaint on behalf of another.

Recommendation 3:
Amend the Act to provide a process for the appointment of litigation guardian for children and persons who do not have the capacity to complain.

The Tribunal also raised the need to have some independent appraisal of outcomes reached in the settlement of a complaint. It is therefore recommended that the Commissioner and the Tribunal be given some power to approve settlement outcomes to ensure the interest of vulnerable parties are protected by their guardians.

Recommendation 4:
That the Act be amended to provide that the Commissioner and/or the Tribunal must approve settlement outcomes in matters involving children or persons who do not have the capacity to complain.

Investigation of Complaint by Commissioner

Section 60(2) of the Act provides that the Commissioner may also investigate any discrimination or prohibited conduct without the lodgement of a complaint, if he/she is satisfied that there are reasonable grounds for doing so.

As highlighted in the discussion paper there is a major limitation with this provision. It merely provides a power to investigate a matter without the lodgement of a complaint but does not give rise to a complaint on the Commissioner's own motion. Consequently, an investigation under this power cannot lead to a determination under section 71(1) because section 71(1) only relates to what may be done upon the completion of an investigation of a complaint. Nor for a similar reason, is an investigation able to lead to a referral to the Tribunal under section 78.

The only action the Commissioner may take following an investigation on the Commissioner's own motion is relatively indirect action of the kind referred to in sections 6(a) and (f) (Commissioner's functions) and section 7(d) (Commissioner's powers). The Tribunal would not be able to make an order under section 89 without a referral of a complaint to the Tribunal.

The Question raised in the discussion paper was -

Question 5: Should matters investigated by the Commissioner on the Commissioner's own motion be treated as complaints that may be referred to the Tribunal?

There was general support for the Commissioner being able to make a complaint on his/her own motion. There was some concern expressed that if matters that are investigated by the Commissioner are treated as complaints then the Commissioner becomes akin to a prosecutor. As there was no further exploration of this concern a response to the comment has been difficult to frame. Perhaps the concern relates to the Commissioner taking on what may be perceived as conflicting roles – that of investigator and prosecutor - and therefore it may make it difficult for the Commissioner to conciliate such a matter. It should be recalled that not all complaints proceed to conciliation, only those that the Commissioner believes can be resolved through conciliation. It may be that matters investigated by the Commissioner on her own motion should proceed directly the Tribunal for conciliation and determination.

As the Tribunal operates under an inquisitorial model, i.e. it does not adopt the adversarial processes usually associated with court or other hearings, the Commissioner would not necessarily have to undertake a prosecutorial role.

It should also be remembered that section 6 of the Act provides that the Commissioner has a role in promoting the recognition and approval of acceptable attitudes, acts and practices relating to discrimination and prohibited conduct. Sometimes people may not come forward and complain about discrimination because of entrenched bias, disinterest or an inability to fund or take carriage of a matter.

In light of section 6 it seems appropriate that the Commissioner should not only be able to investigate matters on her own motion, but these matters should be treated as complaints so that the full set of processes, sanction and remedies under the Act are available to address discriminatory behaviour.

Recommendation 5:
Amend the Act to provide for matters investigated by the Commissioner on his/ her own motion be treated as complaints that may after investigation be referred to the Tribunal for determination.

Acting on behalf of a person

Under section 61 the Commissioner may authorise a person to act on behalf of the complainant or respondent. The Commissioner also has the power to withdraw the authorisation if the Commissioner considers that it is appropriate to do so. As noted in the Discussion Paper it was intended that this section apply to lawyers, advocates or other representatives of complainants or respondents.

There were 4 questions posed around rights to representation. It is convenient to deal with these together.

Question 6:	Should the Commissioner be required by the Act to seek the views of the other party as to representation?
Question 7:	Should parties have a right to legal representation?
Question 8:	Should complainants lodging complaints by agents or other persons have a right to representation by the agent or other person?
Question 9:	If granted representation during the investigation phase, should this right extend to conciliation?

The Discussion Paper observed that there is an expectation that complainants and respondents can come to the Commission and have a complaint dealt with, at least in the early stages, without the need for legal or other representation. There are of course many examples of where people may need legal or other representation, but the general intent of the Act is to encourage parties to resolve issues within the structure of the legislation. Therefore requests for representation should be assessed among the particular circumstances of the case, the individual characteristics of the complainant and/or respondent and the qualifications and experience of the representative.

Often community based advocates without legal training act on behalf of clients and sometimes parents argue matters on behalf of their children. There were no submissions suggesting that the persons who are not legal practitioners should be automatically allowed to act on behalf of complainants or respondents. The complaints process is within a legal framework where rights can be affected and thus it is important that the interests of the actual person who has suffered discrimination are properly represented by those that have a fiduciary relationship to that person. Authorisation by the Commissioner of persons (other than legal practitioners) to act on behalf of a party provides appropriate scrutiny of the person who seeks to act on behalf of a complainant or respondent.

The submissions in response to these questions were primarily concerned with whether or not legal representation was a right. There was a strong (and legally correct) view expressed that legal representation, as opposed to other non-legal representation, is a right.

Alternative forms of dispute resolution and justice through Tribunals and Commissions have been a response to the problems of the expense and time consuming nature of litigation in court. Tribunals and Commissions are intended to be less formal, cheaper and more accessible so making them like courts by the use of legal forms and procedures can defeat some of the original objectives of setting up such bodies. The Office of the Commissioner and Tribunal are not formalistic but in the past the concerns have been raised that when lawyers become involved the process becomes more formal and lengthy and consequently more expensive. This could be perceived as a criticism of the legal profession and not a criticism of the complaints process and dispute resolution structure. Nevertheless it is accepted that legal representation is a right.

The experience of the Tribunal has been where there has been involvement of lawyers in the process this has been beneficial as it has focussed issues and matters have been dealt with more expeditiously. Often unrepresented parties require significant supervision and assistance through Tribunal processes (such as directions conferences and the like) and this can impact on the time is takes to resolve a matter.

The decision of the *Anti-Discrimination Commissioner* v *Acting Ombudsman* [2002] TASSC 24 has some relevant comments on the issue of legal representation. That decision refers to advice from the Solicitor General and comments from the Acting Ombudsman. The relevant references are quoted below.

> Paragraph 39 "…advice from the Solicitor-General that it is a common law right of persons generally to have access to legal advice and assistance and that such a right will not be abrogated by legislation unless the legislative intent to remove or detract from it is clear. The Solicitor-General advised that

> to give section 61 some meaningful content, it should be read as being permissive rather than obligatory. The intention of the section was to give a capacity, which was not required in the case of legal practitioners acting for a person, to authorise persons to act on behalf of a complainant or respondent. The Solicitor-General referred to a union official as an example of a person who might be so authorised."
>
> Paragraph 40 "Forcing a party who wished to be represented by a legal practitioners to justify at length why that representation was necessary was not a good way of providing 'expedition', 'less formality' or 'conciliation and resolution'."

In terms of seeking the views of the other parties as to representation the two points of view could be elucidated from submissions. Some saw it as a denial of natural justice not to ask the other party what they thought about the other party having a lawyer to represent them. On the other hand, others saw that the other party would have a biased view about whether his or her opponent should have legal representation so there is little value in seeking the other party's attitude to legal representation.

In practice the Commissioner has indicated that she would rarely decline a request for representation and the Commissioner does not seek the views of the other party when making her decision because often their view has little relevance to her decision as the other party is not impartial or aware of all the personal circumstances of the party seeking legal representation. There can be little value in seeking the other's party's view.

It should be noted that under section 85 a person may be represented or accompanied by another person at an inquiry only with the permission of the Tribunal. Interestingly the role of the Tribunal is deciding whether a person can be represented or accompanied has not been criticised or questioned in the same manner as the Commissioner's role in authorising representation.

One concern raised by the Tribunal in addressing the questions is that if there were any automatic rights granted by law in the initial part of the complaints process this may create expectations that these rights would automatically continue if the matter proceeded to the Tribunal.

Accordingly, in order to balance the competing views it is recommended that the status quo be retained.

Recommendation 6:
That section 61 of the Act not be amended as to representation and the status quo be retained.

Form of complaint

Section 62(1) provides the complaint must:

a) be made in writing and signed by the complainant; and
b) identify the person, class of persons or organisation against whom the alleged discrimination or prohibited conduct was directed and against whom the complaint is made; and
c) set out details of the alleged discrimination or prohibited conduct.

The question raised in the Discussion Paper was -

Question 10: Should the Commissioner receive oral complaints?

The Discussion Paper noted that other statutory officers and bodies require a written complaint or applications to be made in writing. It would be a departure from this general requirement to provide for oral complaints, this could create a precedent in other areas of the law.

The Discussion Paper also noted was that to require the Commissioner (or the Commissioner's staff) to assist persons reducing a complaint to writing would have resource implications for the Office of the Commissioner. It would also potentially create a conflict of interest or perception of bias because of additional assistance provided. Many of the submissions agreed with this concern.

One submission was concerned that a matter may not be accurately recorded by the Commissioner or her office. This may be a risk particularly where officers use their own terminology and bring to bear their own views in recording the details of a complaint.

A few submissions thought the Commissioner should provide this assistance. It is argued that there are other more appropriate groups or services available to assist people to make complaints. Furthermore, it should be noted that section 62(2) provides that the Commissioner may provide procedural advice and assistance to any person who requires assistance to make a complaint. It is understood that the Office of the Commissioner regularly provides guidance about how to make a complaint. There have been no issues raised with the Commissioner's role in providing advice and assistance to complainants on procedural issues and therefore no change is recommended.

Recommendation 7:
That the Commissioner should not receive oral complaints.

Time limit on complaints

Section 63 provides that complainants have 12 months to make a complaint. As the Discussion Paper noted, setting a limitation period involves balancing the interests of complainants (to come forward with evidence of their complaint) and respondents (to have certainty around when a complaint may be made).

The question raised in the Discussion Paper was -

Question 11: Is the 12-month time limit for the lodgement of a complaint adequate?

The majority of submissions did not support a change to the time limit. The Act provides that a late complaint may be accepted if it is reasonable to do so.

One submission suggested a 3 year limitation period. Given the nature of complaints and the informality of the jurisdiction it is argued that recollections can be easily eroded and evidence can be harder to preserve after that length of time. It is intended that matters in this jurisdiction be dealt with quickly and without the need for formal court processes or case management. Accordingly the following is recommended.

Recommendation 8:
No change to the time limit for complaints.

Rejection of complaints

Section 64(2) provides that the Commissioner has 42 days to assess a complaint and make a decision on whether to accept or reject the complaint. The question raised in the Discussion Paper was:

Question 12: Is the 42-day time frame adequate?

Some submissions, predominantly from government agencies, supported a reduction of the time limit to 30 days. However, given the matters to be considered and response to be sought 30 days may not provide adequate time to gather enough information to make this decision. There are sometimes complex legal issues to consider and information may need to be gathered from a variety of sources. This can take time and case investigation is structured around 42 days. A 30 day assessment period could be limiting when taking into account the matters that the Commissioner must consider under section 64(1).

Recommendation 9:
That the 42 day time limit for deciding whether to accept or reject a complaint be retained.

Part Accept/Reject Complaints

The Discussion Paper explored the Commissioner's ability to part accept or part reject a complaint. The questions raised were -

Question 13: Should Commissioner be able to accept and part reject complaints prior to investigation?

Question 14: Should rejected parts be subject to review by the Tribunal?

As noted in the Discussion Paper the onus is on the person making the complaint or a person authorised to make a complaint to describe the behaviour that may have amounted to discrimination. It is both inevitable and desirable that the precise matters of the complaint will be refined, clarified and possibly altered in scope as a result of examination and investigation. The Discussion Paper was suggested that 'justice' would not be served if the complaint was frozen by the exact terms of the original complaint.

As part of the debate around these questions the Discussion Paper referred to two decisions of the Tribunal namely *O* v *B* 22/2004 and *S* v *L* 64/2003. These decisions expressed the view that the Commissioner does not have the power to accept and reject parts of a complaint. If the whole complaint contains matters of substance, requiring investigation, and does not otherwise fall within the other bases for rejection contained in section 64 then the whole complaint ought to be accepted. The view of the Tribunal is that either a whole complaint warrants acceptance for investigation or it does not. Ultimately, on inquiry, it will be a matter for the Tribunal to determine the ambit of the complaint, and, if substantiated, whether or not it relates to conduct in breach of the Act.

These decisions have created some concerns for the Commissioner. For example, where complaints allege discrimination on a number of grounds simultaneously, but

only some of these are warranted in terms of the legislation (ie they may not be within jurisdiction or the grounds are unable to be supported) then the whole complaint must be accepted.

The Commissioner has suggested that rejection of parts of complaint should be allowed in cases where there is nothing of substance to support that aspect of the complaint. A consequence of accepting whole complaints is that the resources of the Commissioner and the respondent are expended in dealing with or responding to parts of a complaint that will never succeed. The Commissioner argues that it is reasonable to be able to identify the matters to be investigated, conciliation and hopefully resolved.

The majority of responses to questions 13 and 14 were 'yes'. However, the Tribunal did not support these changes for a number of reasons, which are now outlined.

The Tribunal believed that it is too early to refine a complaint before it is investigated and if the complaint is part rejected this would limit the Tribunal's ability to consider the scope of the complaint. The view of the Tribunal has merit. Accepting or rejecting parts of a complaint should not occur until there has been some investigation of the matter because altering a complaint at too early a point could affect the rights to continue with actions that may later be found to have some foundation.

The Tribunal submitted that the problem of unfounded allegations being made arises because the complainant is expected to nominate the sections of the Act that they think have been breached. The focus of a written complainant should be on the description of the conduct that has occurred. A complainant should not be expected to legally classify conduct with reference to the terms of the Act for example victimisation or inciting hatred. All that is required is a description of what happened when and who did or said what. This would then leave the Commissioner to assess the conduct as described and focus investigations accordingly. This is an issue that may be able to be addressed by reviewing complaint forms and guidelines about how to make a complaint. Rather than have a tick a box style of form there should be an emphasis on describing the conduct that took place.

The Tribunal response to the Commissioner's concern about allocating resources to investigating all aspects of a complaint was that it would be proper to allocate more resources and focus an investigation on the meritorious aspects of the complaint. In practice this is what occurs and where it is likely that part of a complaint cannot succeed this will be noted in the Commissioner's referral report to the Tribunal.

The current practice of the Commissioner is to identify in a referral report the aspects of a complaint that have merit is most useful. It does not impair the Tribunal's consideration of the whole complaint and the Tribunal remains free to make its own assessment about parts of the complaint that the Commissioner may not consider meritorious.

Recommendation 10:
That the Commissioner should not have the power to part accept or part reject complaints.

Naming of respondents

Another issue that the Discussion Paper canvassed was the naming of respondents.

Question 15: Should the Commissioner have a statutory power to reject a respondent?

Question 16: Should the Commissioner have a statutory power to name a respondent?

There was some support for the Commissioner to reject a respondent, but the Tribunal did not support this and again referred to the *O* v *B* precedent. In *O* v *B* it was found that it was not open for the Commissioner to refuse to treat persons as respondents simply because the Commissioner considered that it was sufficient to name some other person as a respondent. In that case the Tribunal was concerned that where respondents were rejected and the partial rejection was not able to be reviewed this could prevent proceedings continuing against those respondents where the investigation later revealed that they had committed breaches of the Act. The rejection of a respondent could unduly and artificially fetter the investigation and inquiry process. This is the more prudent approach and therefore no change is recommended.

Recommendation 11:
The Commissioner should not have statutory power to reject a respondent.

Regarding the naming respondents it is accepted that in some circumstances it will be necessary for the Commissioner to name, rather than reject, a respondent as the complainant may not have sufficiently identified a respondent. This is supported by the decisions of *Secretary of the Department of Justice and Industrial Relations* v *Anti-Discrimination Commissioner* (2003) TASSC 27, *Stee* v *Cowley and DHHS* [2005] TASADT 3 and *Commissioner of Police* v *Reid* (2000) TASSC 181. These decisions are authority for the Commissioner to clarify the name of a respondent.

The Tribunal was not opposed to an amendment that would allow the Commissioner to name a respondent.

Recommendation 12:
That the Commissioner should have statutory power to amend a complaint to name a respondent.

Amending the Complaint

The Discussion Paper then canvassed the issue of amending a complaint.

Question 17: Should the Commissioner have a statutory power to amend a complaint?

Question 18: Should the complainant have a statutory power to amend a complaint?

One of the aims of the law is to make the complaints resolution process as user friendly as possible. It is therefore not necessary or desirable for a complainant to identify breaches of the Act with the same particularity that would be required for civil proceedings.

As the Discussion Paper noted the decision of *S* v *L* found that the identification of facts which relate to a complaint is largely the function of an investigation. Therefore it would seem sensible that the Commissioner have a power to amend a complaint

because matters may be uncovered through the investigation process. There seemed to be general agreement that the Commissioner should be able to amend a complaint and that where there are matters beyond the original complaint they should be the subject of a fresh complaint. The Tribunal also agreed that the Commissioner should be able to amend a complaint.

The Tribunal also referred to the decision of *Commissioner of Police* v *Reid* which is authority for allowing a complaint to encompass matters that occurred after the lodgement of a complaint which may come to light during an investigation. The Tribunal suggested that it may be useful for the principles set out in *Commissioner of Police* v *Reid* to be reflected in the Act. The Tribunal also note that the decision did allow for a complaint to be extended to unrelated conduct and commented that there is a need for some certainty about the ambit of the complaint.

Recommendation 13:

a) That the Act be amended to allow for the amendment of a complaint; and
b) That the decision of *Commissioner of Police* v *Reid* be taken into account when developing the amendment.

Notification of rejection of a complaint

Section 63(3) provides that the Commissioner is to notify the complainant of the decision to accept or reject the complaint as soon as practicable. As there is no corresponding obligation to notify a respondent of a rejection of a complaint the following question was raised.

Question 19: Should the Commissioner notify the respondent of the rejection of a complaint?

Most of the submissions did not see the benefit in notifying the respondent of a complaint until it had been accepted for investigation. One submission was concerned that a complainant may be subject to further victimisation particularly if the matter did not proceed to investigation. There was support for the view that notifying a potential respondent prior to the acceptance of a complaint may not be useful in resolving the complaint as there is no complaint to respond to until the complaint has been accepted by the Commissioner. Positions may become entrenched early and the Commissioner may be provided with extraneous material that is not relevant to the determination to accept or reject the complaint.

The Tribunal in its submission commented that in applications to review a decision to reject a complaint it was not the practice of the Tribunal to give the respondent notice of a hearing to review. Where a case has attracted a level of media attention a potential respondent may be notified as a matter of courtesy and be given an opportunity to comment, but this is a discretionary matter for the Commissioner or Tribunal

Recommendation 14:
That the Commissioner should not be required to notify the respondent of the rejection of a complaint.

Vexatious litigants

Section 64(1) provides the Commissioner with the power to reject a complaint if the Commissioner considers the complaint trivial, vexatious, misconceived or lacking in

substance. The Discussion Paper raised a number of questions about the vexatious litigants. These included –

Question 20: Should the Commissioner have the power to declare a person to be a vexatious litigant and reject the person's complaint?

Question 21: Should the person be able to have this declaration and rejection reviewed by the Tribunal?

Question 22: Should an application to declare a person a vexatious litigant be dealt with by the Tribunal?

The main concern raised in the Discussion Paper was that vexatious litigants can take up the time and valuable resources of respondents, the Commission and the Tribunal. There was broad based support for the powers to declare persons to be vexatious litigants, but this was not supported by the Tribunal.

On balance the Tribunal's view was more compelling. The Tribunal raised significant concerns with specific provisions that barred individuals from bringing actions in what is ostensibly a human rights jurisdiction. This is seen as being contrary to the philosophical basis of the legislation and can result in unfair labelling and stigma. The Tribunal sensitively pointed out that "repeat litigants" are part of the landscape of the jurisdiction. Such declarations about individuals can detract from the objectives of the legislation and suggest that complaints or the bona fides of the complainant are being prejudged.

There are powers to reject unmeritorious complaints at section 64 and section 71. The Tribunal can impose a fine where an unmeritorious complaint has been dismissed section 99(3) and may order costs against a vexatious litigant. Costs orders extend to both inquiry or review hearings.

Another submission expressed reservations about vexatious litigant declarations and felt that vexatious litigants could generally be dealt with expeditiously and less formally by the Commissioner and the Tribunal without the recourse to more formal orders.

This submission also suggested that because of the informal nature of the jurisdiction any mischief caused by vexatious litigants is less than it may be in a more formal jurisdiction. Therefore it would seem that steps taken to ban these types of litigants through declaratory orders may be heavy handed and contrary to the philosophy of the Act.

Recommendation 15:
That there should be no power in the Act to have a person declared a vexatious litigant.

Review of rejected complaints

There were no questions raised in the Discussion Paper about the current provisions. However the current provisions may be slightly amended to allow for reviews of amended complaints as mentioned above.

Agreements not to complain

Section 66 deals with agreements not to complain. There were no issues in respect to the operation of this section and therefore no change is recommended.

Notification of acceptance of complaints

Once a decision is made to accept a complaint, investigation of the complaint will commence. This will involve an assessment of the merits of the complaint. Section 67 provides that both parties are to be notified of the acceptance of a complaint for investigation but the respondent does not have statutory right to a copy of the actual complaint, only a summary of the complaint unless the complainant consents to allow the respondent to have a copy of the complaint. The question raised in the Discussion Paper was –

Question 23: Should respondents have a right to a copy of the complaint?

Section 67 has been criticised as being unfair because without the actual complaint the respondent is at a disadvantage in responding to the allegations. The actual complaint is the foundation of the investigation and dispute resolution process. It not only forms the basis of the summary of the complaint as it contains evidentiary material and information that the Commissioner has relied upon in accepting the complaint for investigation. In commenting on this section the Discussion Paper reflected on the 'hearing rule', which requires a decision-maker to give a person whose interests will be adversely affected by the decision, an opportunity to be heard.

Many submissions supported the right of the respondent to have an actual copy of the complaint. This paper further suggests that both the complaint and a summary be provided, not just one or the other.

Interestingly the Tribunal submitted that it provides a copy of the actual complaint to the respondent once a matter reaches the inquiry stage. Given this the following is recommended -

Recommendation 16:
The Act be amended to allow for respondents to have a copy of the complaint as well as a summary of the complaint.

Withdrawal of complaints

Section 68 allows for complainant to withdraw a complaint. The Discussion Paper noted some of the reasons that a complainant may wish to withdraw a complaint. There are no particular problems with having the power to withdraw a complaint but the Discussion Paper suggested that the wording of section 68(5) may need further refinement.

If a complaint is withdrawn it follows that, in the ordinary meaning of those words, the complaint can no longer exist, but section 68(5) continues to refer to a withdrawn complaint as a complaint, which allows the complaint to be investigated and resolved under the provisions of the Act. There was seen to be some anomaly in the allowing a complaint to be withdrawn by the complainant but permitting the Commissioner to continue to investigate it (section 68(5)(a)(i)).

The question posed in the Discussion Paper was -

Question 24	Should section 68 be amended to clarify the circumstances in which the Commissioner may grant permission to withdraw the complaint and/or continue the investigation?

The majority of submissions did not expressly oppose this suggestion. One submission did not want the section changed but on the whole it would seem that the section could benefit from some refinement.

It would seem as a matter of policy that the intention of this section is to provide the Commissioner power to:

a) allow the complainant to withdraw the complaint so that the complaint lapses; or
b) refuse to allow the withdrawal of a complaint if the Commissioner is satisfied that the complaint was not withdrawn voluntarily and therefore the complain will continue to be investigated; or
c) where the complaint has been withdrawn voluntarily but it is in the public interest to continue the investigation, allow the complainant to discontinue prosecution of the complaint and permit the Commissioner to take carriage of the matter; or
d) where the complaint has been withdrawn involuntarily but it is in the public interest for the Commissioner to continue the investigation, allow the complainant to reinstate the complaint or permit the Commissioner take carriage of the matter.

The view of the Commissioner is that there may be circumstances in which she should take matters further. If section 60 is to be amended to allow the Commissioner to investigate complaints on his/her own motion and refer them to inquiry then it would seem logical that this section be also amended to clarify the Commissioner's role in taking over withdrawn complaints where it is in the public interest to do so.

Recommendation 17:
a) Amend section 68 to allow the Commissioner to take on complaints that have been withdrawn (voluntarily or involuntarily) if in the public interest to do so; and
b) Amend the Act to allow complainants to continue complaints that have been withdrawn involuntarily if in the public interest to do so.

Stale Complaints

The Discussion Paper raised a question about administratively closing or terminating a complaint where the complainant has lost interest in pursuing the matter. There is currently no statutory power to close the file on a complaint. Currently, inactive files remain open indefinitely. This is makes things difficult in terms of administration, investigation management and more importantly providing closure for respondents.

Question 25:	Should the Commissioner have a statutory mechanism for administratively closing a complaint where contact with the complainant has been lost, or where a complainant unreasonably fails to prosecute his or her complaint, as well as the discretion to revive closed complaints in appropriate circumstances?

One submission expressed the view that the onus is on the complainant to drive the complaint, but there needs to be some flexibility in the system to accommodate legitimate reasons for why complainants may not have actively pursued a matter. Other submissions agreed the active management of complaints makes it less likely

that complainants will abandon their complaints, but it was recognised that there are circumstances where the complainants do lose interest, move on and/or fail to notify the Commissioner of address changes and circumstances.

Responses to this question were generally supportive. It is submitted that providing certainty to respondents is one of the most important considerations in addressing this issue. Some submissions suggested including a timeframe in which a complaint could be closed and this would appear logical. One submission did not support the inclusion of discretion to revive a closed complaint and this certainly would be the fairer for respondents and administratively more effective for the Commissioner.

It is recommended that the Commissioner be able to administratively close these complaints where the complainant has failed to make contact within12 months of the last contact from the Commissioner. There should be no power to revive a closed complaint after 12 months has elapsed because this does not provide any certainty to the respondent or assist the Commissioner in closing inactive files.

Recommendation 18:
a) Amend the Act to include provision to close a complaint where the complainant has failed to make contact within12 months of the last contact.
b) Provide that there is no power to revive a closed complaint or submit another complaint about the same matter.

INVESTIGATION

Investigation of complaints

The next stage in the complaint process is the investigation of the complaint. Section 69 provides that once a complaint is accepted for investigation, the Commissioner or an authorised person may investigate a complaint in a manner that is appropriate to the circumstances.

As the Discussion Paper noted the Act does not prescribe how to investigate a complaint. This is not considered appropriate or necessary because the nature and extent of each investigation will depend on the circumstances of the case. Practice standards are best dealt with through guidelines and procedural manuals.

Freedom of Information

The *Freedom of Information Act 1992* (*FOI Act*) applies to the Commissioner and her Office. The question

Question 26: Should information contained in the Commissioner's records about complaints, preliminary inquiries, investigations, conciliations and reports be exempt from the *Freedom of Information Act 1991*.

The Discussion Paper raised a concern that there appears to be a conflict between the *FOI Act* and *Anti-Discrimination Act*. The conflict is that on the one hand the *Anti-Discrimination Act* requires confidentiality to maintained at all times to ensure that personal information is protected and the investigation process in not tainted. On the other hand, the parties and the general public may apply for documents under FOI and information may be released under the provisions of the FOI Act unless it is exempt information and it is not within the public interest to release it. Some of the concerns expressed in the Discussion Paper were as follows.

The issues involved in any investigation may be highly personal and disclosure prior to resolution may not only taint the process, but may defame parties and cause personal embarrassment and aggravation to persons involved. This view was reflected in submissions.

It would seem that while there is a need for public scrutiny of the operations of any statutory office or government agency, it is not appropriate that the scrutiny extends to the lives of individuals involved in dispute resolution processes. In particular persons who are not parties to a complaint should not have a general right to apply for the records of others. Under the general rules of procedural fairness the parties to an action are provided with the relevant documents and information in order to respond to allegations or applications.

Another area of contention in FOI applications is the provision of working information or deliberative notes. The Discussion Paper argued that the Commissioner and authorised officers should be able to make frank and candid records of their deliberations or opinions without fear that these will be disclosed. The Discussion Paper suggested that it is not in the public interest to disclose this material as it could prejudice further negotiations with parties, circumscribe free expression of opinion or disclose sensitive material that was neither conclusive nor necessarily reflective of the final decision that was or could be made.

There was wide support for such an exemption except for one submission. This person expressed concern that without FOI he would not have uncovered relevant facts which formed the basis of an application to review the Commissioner's decision. It could be argued, without going into the facts of that case, that this person would still have had a right to seek a review notwithstanding the FOI application.

Perhaps the middle ground is to ensure that there are appropriate statutory obligations on the Commissioner to disclose certain information to the parties such as the complaint, formal witness statements and reports on investigation. On the whole these powers already exist and therefore FOI is not entirely necessary.

Recommendation 19:
That the Anti-Discrimination Commissioner's records be exempt from the FOI Act.

Personal Information Protection Act 2004

The Discussion Paper also explored the interrelationship between the *Personal Information Protection Act 2004* and the *Anti-Discrimination Act 1998*.

Question 27: Should the Office of the Anti-Discrimination Commissioner be classified as a law enforcement agency for the purposes of the *Personal Information Protection Act 2004*?

Responses to this question were mixed. As noted in the Discussion Paper the *Personal Information Protection Act 2004* applies to public sector bodies, including the Office of the Anti-Discrimination Commissioner. Generally, a personal information custodian must advise an individual of what information they hold and the purpose the information has been collected, but law enforcement agencies are exempt from this requirement where it considered that non-compliance is reasonably necessary.

As noted in the Discussion Paper the Office of the Anti-Discrimination Commissioner is responsible for investigating and enforcing the law in respect to discrimination and

prohibited conduct. The Discussion Paper suggested that is was appropriate to describe the Office of the Anti-Discrimination Commissioner as a law enforcement agency, and made a comparison with the Ombudsman. One submission did not agree with this proposal.

In response it is suggested that the investigation and scrutiny of the affairs of others for the purpose of establishing legal rights is within the scope of law enforcement activities. These activities may be constrained or affected if the obligations imposed by the *Personal Information Protection Act 2004* in terms of notification and verification of third party personal information are strictly enforced. There are many circumstances where it is not necessary to advise another party. The Act already recognises that when a complaint is initially received it is not necessary to advise the putative respondent until the complaint is accepted for investigation. Potential witnesses may be contacted at appropriate stages of an investigation to verify and clarify information, but this should be at the discretion or professional judgment of the Commissioner not just at because of mandatory legal requirement.

Recommendation 20:
That the Office of the Anti-Discrimination Commissioner be dealt with in a similar manner to a law enforcement agency for the purposes of the *Personal Information Protection Act 2004*.

Completion of investigation

Section 71 provides that on the completion of an investigation the Commissioner may determine that the complaint:

a) is dismissed, on the ground it is trivial, vexatious etc; or
b) is dismissed because it does not relate to discrimination or prohibited conduct as defined by the Act; or
c) is dismissed because the complainant has already commenced action in another commission, court or tribunal with similar remedies; or
d) is dismissed because another person has commenced action in other commission, court or tribunal and the matter may adequately be dealt with in that forum; or
e) is dismissed because the matter has already been adequately dealt with by Commissioner, State or Commonwealth authority; or
f) proceeds to conciliation; or
g) proceeds to an inquiry.

The Commissioner is to notify the complainant and respondent of his or her decision and provide written reasons for the dismissal of the complaint. Where a complaint is dismissed the complainant has 28 days to apply to the Tribunal for a review of the decision. There were no issues raised in relation to section 71.

Dismissal because Discrimination not Substantial or Dominant Reason

If a complaint does not relate to discrimination or prohibited conduct as described in the Act it may be dismissed. If a complaint has an element, no matter how minor, of discrimination or prohibited conduct then is must be accepted. The question was raised -

Question 28: Should the Commissioner be able to reject a complaint if the discrimination is not the dominant or substantial reason for the alleged discriminatory act?

Some submissions supported a dominant or substantial reason test. Many responses expressed caution at adoption of such a test. A major concern was how to lift community standards and change behaviour if discriminatory behaviour or otherwise prohibited conduct is disregarded? For instance, even if a person is refused a service or rejected in a employment process because they do not hold the requisite requirements for the service or job, they should still not be subjected to discrimination or prohibited behaviour.

It is also important to remember that sanctions are commensurate with the discrimination or prohibited conduct. Therefore where discrimination may not have been the dominant or substantial reason the sanction should reflect this. In some cases an apology may suffice for the inappropriate remark or treatment, but the behaviour is nonetheless recognised as inappropriate and addressed. Despite the position in other states no change is recommended.

Recommendation 21:
The Commissioner must accept a complaint even if the discrimination is not the dominant or substantial reason for the alleged behaviour.

Review of rejection or dismissal

Section 72 provides that a complainant has the right to seek a review of the Commissioner's decision to reject or dismiss a complaint. As part of this process the Commissioner provides a copy of the decision to the Tribunal. There is not specific statutory requirement to do this, only a general expectation in section 97. The question raised in the Discussion Paper was -

Question 29: Should section 97 include a specific provision that the Commissioner provide a copy of his/her reasons of rejection or dismissal of the complaint to the Tribunal?

Many submissions agreed that there should be a specific statutory provision to ensure that complainant receives reasons for the decision. However, the Tribunal did not think such an amendment was necessary and was concerned that such an amendment may lead to an over prescriptive approach. As an alternative the Tribunal also suggested introducing a regulation making power that would allow for regulations to be made about procedural matters.

Recommendation 22:
That section 97 not be amended to provide that Commissioner must provide the Tribunal with a copy of his/her decision to reject or dismiss a complaint

Recommendation 23:
That a regulation making power be included to provide for procedural matters such as referrals to the Tribunal from the Commissioner, reviews and inquiries.

Reviews of decisions on the papers

The next matter raised in the Discussion Paper concerned reviews being conducted on the papers.

Question 30: Should the Tribunal review decisions of the Commissioner on the papers?

This was raised because of concerns that complainants can use the review process to have their day in court and it would be better to streamline the review process by having matters dealt with by way of written application. It was suggested that reviews on the papers could significantly reduce costs and time involved in relation to reviews.

In response to this the Tribunal submits that it conducts reviews with as little formality and as expeditiously as the requirements of the Act and a proper consideration of the matters permit. In practice, most reviews of rejections and dismissals would take less than 2 hours of Tribunal hearing time. The resources expended are relatively modest and therefore there may be little cost benefit in changing current practice. The Tribunal also gives parties the opportunity to make their submissions in writing and has dealt with some applications on the papers.

Some submissions supported a hearing on the papers, but with an opportunity to present arguments if there was a need to. It was also submitted by some that the preparation of written applications and responses can be difficult, time consuming and expensive for the parties. It may even place some parties at a disadvantage.

While the question of 'reviews on the papers' was not totally opposed it is recommended that the status quo be preserved as there seems to be little if any significant benefit to be gained by adopting such an approach.

Recommendation 24:
That there be no change to the Act regarding reviews being conducted on the papers.

Lapsed complaints

Section 73 of the Act clarifies that a complainant cannot make another complaint in relation to the same matter where a complaint lapses. There were no questions raised about the operation of this section. It is noted that this issue was also addressed above in relation to the closing of inactive complaints.

CONCILIATION

Conciliation of complaints

Section 74 provides that if after the investigation of the complaint, the Commissioner believes it may be resolved by a process of conciliation the Commissioner may refer the matter to conciliation. There is no power to refer matters to conciliation before or during an investigation, or even allow for additional investigation or conciliation throughout the process.

The questions raised in relation to conciliation were -

Question 31: Should the Commissioner have the statutory power to direct the parties to early conciliation during the investigation of the complaint?

Question 32: Should the Commissioner be able to investigate matters further following an unsuccessful conciliation?

The Commissioner supports 'early conciliation', that is conciliation during the investigation phase. The philosophy behind early conciliation is that in some cases if

the parties can be brought together earlier, before proceedings become protracted and positions entrenched, they have a better chance of resolving the matter.

Where a conciliation is concluded and it has not resolved the complaint, the complaint must under the Act as it currently stands be referred to the Tribunal for inquiry. This does not allow for any further investigation of matters raised during conciliation. There are circumstances in which the matter may benefit from further investigation by the Commissioner and perhaps further conciliation. Matters may come to light in conciliation that could be further investigated and verified, then dealt with again in conciliation.

There were mixed response to the questions. There was a concern that the Commissioner would be able to act on confidential information disclosed at conciliation, but on the other hand it was agreed that early discussion and disclosure of positions would provide an opportunity to test some assumptions about the complaint. There was also a concern that early conciliation would not work because there may not be enough information about a complaint. On the other hand early conciliation could be used to draw out relevant points of difference and may focus an investigation.

It must be remembered that a conciliation conference is held in private. This allows the parties to speak and negotiate freely during the conciliation without prejudicing their positions at a later date. The Commissioner also has to make a judgment about whether it is appropriate to conciliate a matter and the Commissioner does not refer matters for conciliation where there is no possibility of settlement or where it would not be in the interests of the parties (refer to section 78).

On the whole it would seem there are benefits to allowing for early dialogue because this can focus the area of dispute and an investigation. Providing parties with an opportunity for further conciliation before referral to the Tribunal for inquiry gives parties another chance to resolve matters and may result in less cost for parties.

Accordingly the following recommendations are made -

Recommendation 25:
Amend the Act to include a power to direct the parties to early conciliation before the investigation or during the investigation of a complaint.

Recommendation 26:
Amend the Act to allow for subsequent investigation following conciliation.

Conciliation conference

Section 75 provides that where the Commissioner believes that a complaint may be resolved by conciliation the Commissioner may direct a person to take part in a conciliation conference. With the permission of the Commissioner a person may be represented or accompanied by another person at a conciliation conference. The question raised was -

Question 33: Should the Commissioner seek the views of the other party about legal representation before making a decision to allow a party to be represented at a conciliation conference?

Again, as discussed previously, representation or bringing along a support person is not an automatic right. A decision to allow a party to be represented or accompanied

is made after consideration individual circumstances of the party. In practice most requests for representation or to have an accompanying person are agreed to by the Commissioner. The views of the other party have little if any weight.

Most submissions supported seeking the views of the other party, but cautioned against making conciliation too formal. However, given earlier discussion on the issue of representation and seeking the views of the other party to representation, no change is recommended.

Recommendation 27:
That the Commissioner need not be obliged to seek the views of a party as to representation of the other party at a conciliation conference.

Conciliated complaint

Section 76 requires that where a complaint is resolved, the Commissioner or authorised person must record the terms of the agreement reached. Conciliation agreements are enforceable as if they were orders made by the Tribunal. There were no issues raised with the section and therefore no recommendations to be made regarding this provision.

Conciliation proceedings not admissible

Section 77 provides that anything said, written or done in the course of conciliation proceedings is not to be taken in to account in any subsequent proceedings held in relation to the complaint. There were no issues raised with this provision and therefore no changes are recommended.

INQUIRY

Referral for inquiry

Once a complaint has been investigated and cannot be resolved through the Commissioner's conciliation then it is referred to the Tribunal for inquiry. Section 78 sets out the inquiry powers. An inquiry is an inquisitorial and open process.

A referral must occur within 6 months after notification of the complaint whether or not the investigation of the complaint has been completed. The purpose for prescribing 6 months was to ensure speedy resolution of complaints so that the parties can move on with their lives. However, there may be occasions where it may be necessary to extend this period because complexity of the issues raised, the number of parties and witnesses involved, and legal or other considerations. The six month investigation period may be extended with agreement from the complainant, however the respondent has no say in whether the investigation period is to be extended.

The questions raised in relation to inquiries were -

Question 34: Should the Commissioner have the unilateral power to extend complaints without the consent of the complainant?

Question 35: Should there be a limit on the number of extensions provided?

Question 36: Should there be a time limit on any extension, for example six months.

The Discussion Paper noted the Commissioner's view that it is unfair that the complainant has the power to veto an extension because it creates a perception of favour towards the complainant. Furthermore, it would seem that the Commissioner is better placed to make a decision about whether it is useful to allow more time to finalise the investigation or pursue conciliation. It is the Commissioner that is aware of all the facts and issues for both sides, not the parties.

The majority of submissions expressed the view that the Commissioner should be able to extend the time limit for complaints and there should only be one extension. Many agreed that seeking the complainant's opinion created a perception of bias.

In terms of extensions the Tribunal made a suggestion that extensions should not be limited in number but perhaps limited by a timeframe. The Discussion Paper suggested that finalisation of investigation and conciliation before referral for inquiry should be no longer than 12 months and this seems a reasonable time frame as there is a need to resolve matters in an expedient and fair manner. An extension of the investigation and conciliation period out to 12 months may be useful where another attempt to conciliate a matter following additional investigation may be an appropriate step.

One submission suggested that the extension be subject to review. However, a review of an extension could lead to further delay and possible confusion for parties. Apart from a criticism of the Commissioner's investigatory or conciliation practices, a review of an extension of an investigation period is unlikely to enhance the resolution of the complaint. A mechanism to review an extension of time is not supported.

Recommendation 28:
Amend the Act to provide the Commissioner with unilateral power to extend an investigation

Recommendation 29:
Amend the Act to allow for extensions not exceeding an additional 6 months thereby effectively giving the Commissioner up to 12 months to investigate and conciliate a complaint.

Referral report

Section 79 provides that once a matter is referred to the Tribunal for inquiry the Commissioner is to provide the Tribunal with a report relating to any complaint referred to the Tribunal within 48 days.

The question the Discussion Paper raised was -

Question 37: Should the referral report be made available to the Tribunal within less time, for example 28 days?

Most of the submissions supported reducing this time frame. Generally a referral will be made at the completion of the investigation and therefore an investigation report can be sent contemporaneously with the referral. But it must be accepted there may be occasions when the Commissioner would need some time to prepare a report to follow a referral for inquiry. For example, where a matter is automatically referred because investigation time has elapsed, the Commissioner may need time to prepare a referral report.

The Tribunal understandably would like the referral report to follow as quickly as possible and this generally occurs. However there are times where varying work loads, the complexity of the issues the complaint raises and staffing constraints may impact on the ability to prepare a report. For this reason no change to this time frame is suggested.

Recommendation 30:
That there be no change to section 79(2).

Section 79(3) states that following matters are to be addressed in the referral report:
(a) issues raised in the complaint that remain unresolved;
(b) application of exemptions and exceptions under Part 5;
(c) admitted facts;
(d) facts to be established;
(e) witnesses to be called; and
(f) documents to be provided.

The question raised in relation to the referral report -

Question 38: Should the referral report include reference to the following:
(a) conciliation;
(b) allegations;
(c) ambit of complaint; and
(d) Commissioners recommendations?

In practice the Commissioner includes a reference in the referral report to the fact that conciliation had taken place, but does not to set out or describe anything said or done in the course of conciliation proceedings. It is appropriate that no information about the confidential discussions held at conciliation be included in the referral report. The Tribunal finds this reference in the referral report useful and it is recommended that the legislation reflect current practice.

There was support in submissions for including references to conciliation, the allegations and Commissioner's view in the referral report. The Tribunal made some specific suggestions about matters to include in the referral report. As noted above it supported a reference to conciliation having taken place, but not details of what was discussed.

The Tribunal's submission refined the matters raised in the question and proposed that a description of the ambit or nature of the complaint be made along with the Commissioner's views as to merit of complaint or to certain aspects of the complaint along with what evidence was available to assist in determining the complaint. Of course these would only be the views of the Commissioner and the Tribunal would not be bound by them.

Following the previous discussion and recommendations about the Commissioner amending a complaint, defining the ambit of the complaint and amendments by the Commissioner in the referral report would be useful.

Recommendation 31:
Section 79 (3) to be amended so that the referral report includes reference to conciliation of a complaint (but not the details of what was discussed), a description of the complaint, a reference to amendments to the complaint and any material evidence to substantiate the complaint or to support the respondent's position

Directions conference

Once a matter is referred for inquiry the first step by the Tribunal in the inquiry process is a directions conference. As the Discussion Paper noted directions usually relate to the production of documents, times and dates for hearing, witness lists and anything that can facilitate the smooth running of the inquiry.

Section 80 of the Act provides that a directions conference be held in private, but direction conferences in other tribunals are generally open. The question raised was -

Question 39: Should a directions conference be held in private?

Most of the submissions supported retaining the status quo as there was no perceived benefit to the public to open these hearings. The Tribunal emphasised it utilises directions conferences to sort out issues of contention and clarify the focus of the inquiry. It must be remembered the actual hearing of the matter is held in an open forum, unless ordered otherwise.

The Tribunal made a strong submission to retain the current provisions. It submitted that the public interest was not served in dealing openly with what are largely procedural issues for the parties. Issues of jurisdiction, legal representation, security for costs and suppression orders are often dealt with in a preliminary directions conference.

The main point that the Tribunal wished to make in its submission was that closed directions conferences promoted conciliation and settlement. It gave parties a chance to consider the strength of their and the other party's case before public (media) scrutiny. Once allegations are in the public arena, many parties move into damage control to refute and argue allegations.

However the Tribunal did note that there were instances where written decisions about the outcome of the directions conference would serve as useful precedents and directions in future matters. The Tribunal suggested that consideration be given to having a discretion to publish decisions of directions conferences. This seems reasonable and is recommended.

Recommendation 32:
That the status quo be retained and that directions conferences remain closed to the public.

Recommendation 33:
That Tribunal have discretion to publish decisions on interlocutory matters.

Section 80(3) states that a person, without reasonable excuse, must comply with a requirement to attend a directions conference and produce specified information. Failure to comply may result in a penalty of up to ten penalty units ($1200).

Section 80(4) states that where a complainant does not comply with a requirement to attend a directions conference, the Tribunal may dismiss the complaint and order costs. As noted in the Discussion Paper this subsection does not include the words 'without reasonable cause'. There was concern raised that a complainant may not be able to attend due to some unforeseen event and thus have a reasonable cause for not attending. The following question was posed -

Question 40: Should this section be amended to provide that a complainant cannot refuse to comply with a requirement to attend a directions conference 'without reasonable excuse'.

The Tribunal's response was that this may be desirable, but it may be already be implicit in the interpretation of the section. The majority of submissions agreed with the proposal, accordingly the following is recommended -

Recommendation 34:
Amend section 80(4) to include the words 'without reasonable excuse'.

Proceedings relating to inquiry

The Discussion Paper briefly examined section 81. This section provides that the Tribunal may hold a single inquiry in relation to two or more complaints if they arise out of substantially the same events. This allows for efficient handling of complaints, without the need for duplication of inquiry proceedings and can also save time and resources for the Tribunal and the parties. There were no issues raised in relation to this section.

Representative complaints

Section 82 provides that the Tribunal may deal with a complaint as a representative complaint if satisfied that the complaint was made by a person or an agent of a person who is a member of a class of persons against whom the alleged similar discrimination or prohibited conduct was directed on behalf of that class. The question raised in the Discussion Paper was –

Question 41: Should section 82 require that the Tribunal be satisfied that the majority of members of the class consent to the action?

Unlike the provisions of section 60(1)(b)(ii), where the Commissioner must be satisfied in respect of class complaints, there is no requirement for the Tribunal to be satisfied that the majority of members of the class are likely to consent.

A major concern for the Tribunal in class action matters is the need to ensure that the person or agent purporting to represent a person or group of persons does in fact represent that person or group. Settlement orders can be binding and bar further action by people who may not have participated in the matter, so it is important that the interests of members of the class be carefully considered.

The submissions supported an amendment that the Tribunal be satisfied that the majority of members of a class consent to the action.

Recommendation 35:
Amend the Act to ensure that Tribunal must be satisfied that the majority of class members consent to the action.

Ordinary complaint not precluded

Section 83 provides that the making of a representative complaint by any person does not preclude the making of any other complaint by any other person in respect of the same discrimination or prohibited conduct. This section was included because

there may be cases where conduct gives rise to another complaint or the person may not have been part of the representative complaint.

The Discussion Paper commented that it would be unfair to bar persons who are not part of a representative action or who have experienced other discrimination from taking action. Conversely, this may not be fair if issues have already been resolved between a class of persons and the respondent. The question raised was -

Question 42: Should section 83 include a provision that where there is a representative action the making of any other complaint by any other person in respect to the same subject matter shall only be made if the Tribunal considers it reasonable in the circumstances?

The majority of submissions believed that a person should not be able to make a complaint even where there is a representative action unless the Tribunal considers the action reasonable. Some submissions did not support this approach.

In its submission the Tribunal noted the nexus at section 89(4) and read section 83 to mean an individual class member taking action to enforce an order of the Tribunal, whereas section 83 could be interpreted far more broadly. The Tribunal also said it would be reasonable to assume that Parliament did not intend people to benefit twice from an action.

On a broad interpretation the section could also apply to the commencement of another action and it would be quite proper that there be some assessment of the outcome of any previous action before another action is instituted.

It would seem appropriate in the scheme of the complaints handling process that the Commissioner makes this assessment in the first instance and the Tribunal then reviews such decisions. Complaints are lodged with the Commissioner for acceptance, investigation and conciliation. Complaints do not commence in the Tribunal. It is the Commissioner's decision to decide whether to accept a complaint. Therefore the preclusion should only be overruled by the Commissioner. Like other decisions regarding the acceptance or dismissal or a complaint this decision should be able to be reviewed by the Tribunal.

Recommendation 36:
A person is not precluded from making a complaint in respect to the same discrimination or prohibited conduct already the subject of a representative complaint where the Commissioner considers it reasonable in the circumstances. The Tribunal may review a decision of the Commissioner on such a matter.

Amendment of complaint

Section 84 provides that the Tribunal may amend any complaint. There were no issues raised in the Discussion Paper about the Tribunal's ability to amend a complaint.

Hearing of inquiry

Section 85 provides that an inquiry is to be held in public unless the Tribunal directs that it be held in private. As the Discussion Paper noted it is a general principle of our legal system is that cases are heard in open courts. However there are circumstances where it is appropriate to close a hearing or suppress the names of parties or witnesses. The following question was raised -

Question 43: Should there be a requirement that the Tribunal must suppress the names of children?

There was widespread support for such an amendment.

Recommendation 37:
Amend the Act to ensure that a child's name or information revealing the identity of a child shall not be published unless otherwise permitted by the Tribunal.

Representation before the Tribunal

Currently, a person is able to be represented or accompanied by another person at an inquiry only with the permission of the Tribunal. Section 85(3) allows for a party to be represented or accompanied at a hearing if permission to be represented or accompanied is granted to the other party. The question raised in the Discussion Paper was –

Question 44: Should there be an automatic right to representation for both parties because the Tribunal has granted leave to one party?

This was similarly discussed at questions 6 to 9. The majority of submissions supported retaining the status quo. One submission suggested that the representation each party has should be of an equivalent standard. In reality this is difficult to determine, as there is no rating system for legal representatives or other advocates. If the Tribunal does not consider a person an adequate or appropriate representative then they would not be granted leave to appear. Therefore the retaining the status quo is recommended.

Recommendation 38:
That section 85(3) not be amended.

Conduct of inquiry

Section 86 provides that the Tribunal is to conduct an inquiry with as little formality and as expeditiously as the requirements of this Act and a proper consideration of the matters permit. The Discussion Paper made some observations about the principles of the legislation such as providing an accessible and flexible system for the resolution of complaints, however there were no suggestions for change.

Security for costs

Section 86A allows the Tribunal to make orders in respect to security for costs. The Discussion Paper notes that these are relatively new provisions and there were no issues raised about the operation of this section. Earlier comments have noted the use of this section in deterring frivolous or vexatious litigation.

Evidence

Section 87 covers evidentiary matters. The Discussion Paper canvassed how evidence may be taken and the informal approach to evidence. There were no issues for discussion or recommendations made.

Publication of Evidence

Section 88 provides for the publication and suppression of evidence. It offers appropriate protections for vulnerable persons or the reputation of parties. There were no concerns about the operation of this section and therefore no recommendation as to change.

Orders

The Discussion Paper went through the types of orders that the Tribunal may make under section 89 when a complaint is substantiated. Where a complaint has not been substantiated the Tribunal must dismiss the complaint.

The main area for contention was the relief in respect to representative or class actions and the distribution of monies awarded to the complainants. The question posed was –

Question 45: In relation to representative actions should the administration of the fund be monitored? If so, how and by whom?

Many responses agreed with the idea of an administration fund but did not provide details or ideas about how the fund would be established, administered or audited. The Tribunal agreed it would be sensible to have section 89(4)(b) clarified and some provision inserted to ensure that the administration of such a fund occurs appropriately. Given the complexity of the issue, the Tribunal quite correctly suggested that further work was required on this issue and analysis of other jurisdictions may be useful.

As a preliminary suggestion, regulations may be a more appropriate vehicle to deal with procedural and administrative issues that arise in the administration of these types of funds.

There is a concern that this area of review could take time to complete so the following recommendation has been made –

Recommendation 39:

a) That further work done on the issue of representative actions and the establishment of a fund to distribute any settlement monies.
b) Further that a regulation making power regarding the administration of such fund be included in the Act.

Enforcement of orders

Section 90 of the Act provides for civil enforcement of an order. A person, or the Commissioner at the request of a person, may enforce an order made under section 89(1) or an agreement intended to resolve a complaint by filing certified orders or agreements and affidavits about compliance with the Supreme Court:

The Discussion Paper noted that there is no penalty for failure to comply with an order. Accordingly the question was raised -

Question 46: Should failure to comply with an order be an offence?

There were few but mixed response to the question. Given that enforcement is a civil matter and it is up to parties to pursue their personal remedies introducing a criminal

element for non-compliance is unnecessary. It should be remembered that the Supreme Court has a wide range of powers to achieve compliance.

Recommendation 40:
Failure to comply with an order should not be a criminal offence.

A comment was made in the Discussion Paper that the Commissioner's power to enforce an order is limited because the Commissioner must be requested to enforce an order by a person i.e. the complainant or respondent. The question raised was -

Question 47: Should the Commissioner be able to enforce an order regardless of the views of a complainant where the Commissioner believes that enforcement is in the public interest?

The Discussion Paper proposed that the Commissioner should have the power to act on his or her own initiative and regardless of the views of a person. Many submissions expressed a concern for the inclusion of such a strong power and wanted some way of ensuring that such a power would only be cautiously utilised. Some even went as far to say that there was the capacity to abuse such a power, which implied some bias on behalf of the Commissioner. This suggestion is not supported.

While it is accepted that the public interest might be better served with the Commissioner having such a power, at the end of the day these matters are civil in nature and the responsibilities of the parties. The Commissioner's primary role in complaints handling is to investigate and conciliate, not prosecute, unless the Commissioner believes there is a public interest in the matter. The Commissioner should not be involved in the essentially private actions of the parties.

One response to the question raised a concern that the Commissioner would be criticised because of decisions to enforce some orders and not others. There are also resource considerations to take into account. While it is proper that the Commissioner should be able to take carriage of complaints in his/her own right for public interest reasons, this is different from the Commissioner taking over a matter that has already been determined and the party has not chosen to pursue remedies which are open to them. Therefore no change is recommended.

Recommendation 41:
The Commissioner should not be responsible for enforcing an order.

Apologies and Retractions

Section 92 provides that where a complaint has been substantiated the Tribunal may require the respondent to apologise to the complainant and make any retractions the Tribunal considers appropriate. There were no issues raised with this section or recommendations.

Reasons for orders

Under section 93 the Tribunal, if requested by a complainant or respondent, is to give reasons in writing for any order it makes. The right to reasons is clearly established in common law. There is no problem with the general operation of this section but the question was raised -

Question 48: Should there be a statutory requirement that reasons be published without request?

As noted in the Discussion Paper, the Tribunal does provide reasons in writing and orally (and transcripts are available). There was strong support across the submissions that written reasons be made available. However, as the Tribunal noted, the Act offers a flexible and non-prescriptive approach to dealing with complaints and to include a mandatory requirement that reasons must be published in writing is at odds with the less formal style of the Act. Given this no change is recommended.

Recommendation 42:
There does not need to be a statutory requirement that Tribunal decisions be published without request.

Conciliation and agreement

Pursuant to section 94, where the Tribunal believes that a complaint may be resolved by conciliation, it may, at any stage during an inquiry, refer the matter to a conciliation conference.

The Discussion Paper noted two views about the operation of section 94:

a) matters should be referred back to the Commissioner for conciliation; or
b) as the complaint has been referred to the Tribunal for inquiry it is no longer subject to the power of the Commissioner and therefore the Tribunal should use its own conciliation processes.

Hence the question was asked –

Question 49: Should the Tribunal refer matters for conciliation back to the Commissioner or to court appointed conciliators under the *Alternative Dispute Resolution Act 2001*?

The Discussion Paper discussed why Tribunal matters should be conciliated under the *Alternative Dispute Resolution Act 2001*. The majority of submissions supported the Tribunal's current approach to conciliation under the *Alternative Dispute Resolution Act 2001.* Another reason put forward for not referring matters back to the Commissioner is that the Commissioner has already formed a view on the complaint. Given the Commissioner may not have been able to settle a complaint at conciliation there may be limited advantage in returning the complaint to the Commissioner for resolution when previous attempts have not resolved the matter.

Recommendation 43:
That matters before the Tribunal requiring conciliation be conciliated under the *Alternative Dispute Resolution Act 2001* and not be referred back to Commissioner for conciliation.

The Tribunal have also suggested in its response that any settlement reached at a conciliation conference should be enforceable as if it were an order of the Tribunal. Therefore the following is recommended.

Recommendation 44:
That agreements reached at conciliation be enforceable as if they were orders of the Tribunal.

Costs

In this jurisdiction parties generally pay their own costs. As the Discussion Paper noted, in 2004 the Act was amended to include section 99A. This section provides that the Tribunal may make an order for costs if it considers the circumstances justify the order. As explained in the Discussion Paper section 99A was introduced to deter persons from making frivolous and vexatious claims. The question raised in the Discussion Paper was –

Question 50: Should the circumstances in which costs may be awarded be more wide ranging? For instance, should the Tribunal be able to award costs to the complainant if the complainant has made reasonable settlement offers that the respondent has unreasonably refused and vice versa?

Many supported this approach but in exploring the question further it was difficult to envisage how this would operate without a codified set of principles for costs orders. The Tribunal pointed out that if the Act was too prescriptive about what may justify an order for costs it may well deter complainants. In keeping with the philosophy of the Act it is not considered appropriate to over-complicate matters with too many rules or directions.

Recommendation 45:
That section 99A of the Act not be amended.

The next question raised was that of an offer of compromise system.

Question 51: Should an 'offer of compromise system' be available to assist with the settlement of complaints?

There was support for 'an offer of compromise system' but little suggestion about how such a system would operate. The Tribunal was concerned that an 'offer of compromise system' might add another layer of complexity and difficulty in the process. This may be troubling for unrepresented complainants.

The Tribunal queried the assumption put forward in the Discussion Paper that such a system would promote settlement of matters. In fact the Tribunal already settles at least 50% of referred matters and the remaining matters that proceed through a full inquiry usually involve complex law, fundamental factual disputes or complainants with mental illnesses. For these reasons the no change is recommended.

Recommendation 46:
That there be no offer of compromise system incorporated into the Act.

OTHER PROVISIONS

Information and documents

Section 97 provides that the Tribunal, Commissioner or an authorised person may require any person to provide specified information or produce specified documents that the Tribunal, Commissioner or authorised person believes may be relevant to the complaint. There were no issues raised or recommendations about this section.

Interim Orders

Section 98 provides that the Tribunal, Commissioner or an authorised person, at any stage of an inquiry, investigation or a conciliation of a complaint, may make an interim order pending the completion of that inquiry, investigation or conciliation. The purpose of this section is to provide for injunctive relief to prevent the continuation or recurrence of unlawful conduct. There are penalties attached to non-compliance.

The question raised in the Discussion Paper was -

Question 52: Should the Commissioner or authorised officer have the power to make interim orders?

Many supported the current position as it could be used to stop unlawful conduct, protect parties and witnesses and preserve evidence. The Tribunal felt that this was at odds with the Commissioner's role and submitted that it was preferable that the Tribunal undertook these quasi judicial functions. The Commissioner agrees with the Tribunal. Therefore the following recommendation is made –

Recommendation 47:
That the Act be amended to provided that only the Tribunal have power to make interim orders.

Dismissal of complaint

The Tribunal may dismiss a complaint if it is not substantiated. It may also dismiss a complaint at any time during the inquiry process if it is satisfied that:

(a) the complaint is trivial, vexatious, misconceived or lacking in substance; or
(b) dismissing the complaint would, for some other reason, be just and appropriate.

There is no power to withdraw a complaint as there is under section 68 where a complaint is before the Commissioner. As the Discussion Paper pointed out, the withdrawal of a complaint is often a desirable way to resolve a complaint. The following question was raised –

Question 53: Should complainants have the option of withdrawing a complaint during the inquiry process if the Tribunal considers the withdrawal is voluntary?

The option of withdrawing a complaint was supported by submissions. The Tribunal suggested if complainants are permitted to withdraw their complaint at the inquiry stage any statutory amendment should indicate that no further complaint about the matter be made.

Recommendation 48:
That the Act be amended to allow a complainant may voluntarily withdraw a complaint from inquiry, but if it is withdrawn there can be no further complaint in relation to the same matter.

Order for costs

As the Discussion Paper noted in 2004, the Act was amended to provide the Tribunal with the power to award costs in relation to proceedings before it, including reviews

of rejections and dismissals. There were no issues raised with the operation of this section and therefore no recommendations made.

Appeals to the Supreme Court

Section 100 provides for appeals to the Supreme Court of Tribunal determinations of law, dismissals, orders and cost orders. The Discussion Paper canvasses the interaction of section 100 with the *Judicial Review Act 2000* and posed the question –

Question 54: Should the *Judicial Review Act* apply to decisions of the Tribunal?

It seems that there are two parallel review systems in operation. This has raised a number of concerns for parties and the Tribunal. There may be additional costs for the parties and the legal system if a *Judicial Review Act* application is made. A *Judicial Review Act* application creates some uncertainty as there may be no finality to proceedings and the status of a Tribunal decision. Overwhelmingly submissions supported a bar to judicial review applications.

The comments in *Mazukov* v *Anti-Discrimination Tribunal* (2004) TASSC 68 are also relevant to the question raised.

> "I conclude that the *Judicial Review Act* does apply to these decisions of the Tribunal…….I would like to observe that it seems surprising that the Parliament intended this result. The *Anti-Discrimination Act 1998* sets up a Commissioner to receive and accept or reject complaints of discrimination. If a complaint is rejected, the Act provides a mechanism for the review of that decision by the Tribunal. If a complaint is accepted, investigated, but dismissed, the Act confers a like review mechanism. By not exempting these decisions from the provisions of the *Judicial Review Act*, the Parliament has opened the way to another tier of appeals in discrimination matters that could include not only appeals to a single judge of the Court, but also appeals to the Full Court, and even applications for special leave to the High Court of Australia. The Schedule to the *Judicial Review Act* contains a lost of statutes, decisions pursuant to which are exempted from the operation of that Act, but the *Anti-Discrimination Act* is not included."

Therefore the following is recommended –

Recommendation 49:
That the Act be exempt from the *Judicial Review Act 2000.*

Proof of exceptions or exemptions

Section 101 provides that a person who relies on an exception or exemption referred to in Part 5 as a defence to a complaint is to prove that exception or exemption on the balance of probabilities. This was briefly discussed in the Discussion Paper but no issues were raised concerning the operation of this section.

Bullying

It may be recalled that the Vines Report was a reason for the review of the complaints handling processes. The Discussion Paper highlighted an outstanding matter from the Vines Report regarding bullying and the interaction with sections 16 and 17.

Section 17 states that a person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of gender, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

The attributes against which a person must not offend, humiliate, intimidate, insult or ridicule another person are limited under section 17 to 7 out of the 19 attributes listed in section 16. The question raised was -

Question 61: Should section 17 of the Act be amended to provide that a person must not engage in any conduct that offends, humiliates, intimidates, insults or ridicules another person on the basis of any attribute referred to in section 16?

This question received a lot of attention from the Christian Lobby who were opposed to any such amendment because of the debate around the *Catch the Fire Ministries* case [*Catch the Fire Ministries Inc & Ors* v *Islamic Council of Victoria Inc* [2006] VSCA 284]. In response to their submissions it is important to stress that the Act deals with inappropriate behaviour aimed at individuals or groups, not private beliefs. It is about addressing certain types of conduct.

Conduct that offends, humiliates, intimidates, insults or ridicules requires some action that a reasonable person having regard to all the circumstances would anticipate that the other person would be offended, humiliated, intimidated, insulted or ridiculed. Discussing and debating issues such as religion, even comparing faiths and promoting the benefit of one faith over another, are not affected where that discussion is legitimate and conducted in good faith. What is required is the presentation of reasonable and fair views. It is not accepted that free speech would be unduly fettered or religious freedom significantly curtailed if an amendment where made in the terms proposed in question 61.

The other submissions strongly supported the application of section 17 to all the attributes listed in section 16. It seems unfair and anomalous to limit conduct that offends, humiliates, ridicules and the like to only a select limited set of attributes when such conduct could apply to all the other attributes. The following is therefore recommended -

Recommendation 50:
That section 17 be amended to apply to all the attributes in section 16.

Penalties

The Discussion Paper raised a question about the adequacy of the Act's penalty provisions. The Act includes penalty provisions for a number of breaches such as failure to comply with directions, interim orders, produce evidence, false and misleading statements and the obstruction of proceedings.

Question 62: Are these penalty provisions adequate?

There were few submissions on this question. One submission pointed out the Discussion Paper did not provide evidence to support any changes to penalty. This is a fair comment. It is also important to remember that in 2007 penalty units were increased by 20% to $120 and will in future be adjusted in accordance with a CPI

based formula. The effect of this will be that the penalty units will automatically increase over time in line with changes to consumer price. Accordingly no change is recommended.

Recommendation 51:
That there be no change to the penalty provision.

GENERAL ADMINISTRATION OF THE ACT

Part 7 of the Act deals with matters that relate to the general administration of the Act and the complaints handling process. The Discussion Paper raised a number of questions that will be considered bellow.

Immunity for complainants and witnesses

As noted in the Discussion Paper the purpose of the immunity provision at section 102 is to allow for persons to bring their complaints without fear of being the subject of prosecution from the respondent. The question relating to the operation of this section was -

Question 55: Should section 101 be amended to include the words 'in good faith'?

The submissions supported the principle that where complaints are made and evidence is given in good faith then the immunity should apply. The submissions also supported the inclusion of the words 'in good faith' as it would clarify matters beyond doubt.

Recommendation 52:
That section 101 be amended to include the words "in good faith".

Immunities

Section 103 provides immunity for the Commissioner, and the chairperson and members of the Tribunal. The Discussion Paper looked at the issue of providing immunities for authorised officers and conciliators who perform important functions under the Act.

Question 56: Should immunity extend to authorised officers and conciliators?

This was clearly supported in the submissions as these officers are undertaking functions on behalf of the Commissioner and exercising professional judgment and certain powers under the Act that affect the parties.

Recommendation 53:
That immunity be extended to protect authorised officers and conciliators.

Commissioner and Tribunal members not required to give evidence in certain cases

Section 103A provides that the Commissioner, the Chairperson and members of the Tribunal are not compellable witnesses before a court or tribunal, or in any judicial or other proceedings, in respect of anything that came to their knowledge in exercising and performing their respective powers and functions under the Act. There were no concerns raised about this section.

False and misleading statements

Section 105 provides that a person, in connection with any matter referred to in this Act, must not make a statement knowing it to be false or misleading; or omit any matter from a statement knowing that without that matter the statement is misleading.

This applies to the making of false or misleading statements during the course of an investigation, conciliation or inquiry. There were no concerns raised about this section.

Offences in respect of proceedings

Section 106 prohibits certain behaviour directed at hindering proceedings and insulting persons performing functions under the Act. This provision is fairly wide. Nevertheless the following question was raised in the Discussion Paper -

Question 57: Should the Tribunal have the power to remove disruptive persons from hearings?

The Tribunal in its response advised that it already has sufficient power to remove disruptive persons under the powers contained in the *Admission to Courts Act 1916* and the *Admission to Courts (Lower Courts) Regulations 2006*. Therefore no change is recommended

Recommendation 54:
That there be no amendment to section 106 of the Act.

Admissibility in other proceedings

Section 107 provides that except for the purposes of this Act, anything said, written or done in relation to any proceedings under this Act is not admissible in any other proceedings. There were no issues raised with the operation of this section.

Application of the Act

Section 108 states that the Act does not apply to discrimination or prohibited conduct that took place and concluded before the commencement of this Act. There are savings and transitional provisions set out in schedule 2 of the Act allow for the continuation of cases previously commenced in the *Sex Discrimination Act*. There were no issues raised with the operation of this section.

Application of the Anti Discrimination Act to the Commonwealth

Although this was discussed at some length in the Discussion Paper there was no need to make any recommendations as to this issue. The issue will remain one of statutory construction.

Definitions

As well as dealing with the complaints handling processes the review looked at some supplementary and miscellaneous issues in relation to definitions.

Question 58: Are there any definitions in the Act that may need to be clarified or refined?

Question 59: Should the definition of transsexuality be clarified?

Question 60: Should intersex be defined in the Act?

There appeared from the discussion paper and submissions in response to the paper that a number of definitions require some amendment. Accordingly the following recommendations for change are made -

Recommendation 55:
a) That the definition of club be amended to include 'or' after the words 'from the funds of the association; and'
b) That the definition of competitive sporting activity to include the word 'and' before the word 'umpiring'.

Submissions and medical opinion evidence clearly support transsexuality being considered as a matter of gender identification not sexual orientation. It is therefore inappropriate to include reference to transsexuality as a sexual preference.

Recommendation 56:
That the definition of sexual orientation should not include transsexuality

For some time intersex persons have been lobbying Government to have their condition appropriately recognised in equal opportunity law. It is scientifically clear that a person who is intersex is neither a female or male person, nor are they a transsexual. It is inappropriate for persons with an intersex condition to be treated or considered to be transsexuals therefore it is proposed that intersex be included as attribute under section 16 and defined.

Recommendation 57:
Intersex should be defined in the Act and included as a separate attribute

The Children's Commissioner noted that the term 'child' was not defined. Accordingly it is recommended that -

Recommendation 58:
The term child be defined as a person under the age of 18 years.

ADDITIONAL MATTER

Exemptions for Educational Institutions

During the course of review the Catholic Archdiocese of Hobart (the Catholic Church) raised an issue that was outside the terms of reference of this review. The Catholic Church sought to have included an amendment that provides that -

> It is not unlawful to discriminate on the ground of religious conviction in relation to the refusal to accept a person's application for enrolment as a student at an educational institution that is conducted solely or mainly for students of a particular religion.

The main reason put forward for this amendment was manage an increasing demand for students to be enrolled in Catholic Schools. The Catholic Church submitted that they would potentially be in breach of the Act if they give preferential treatment to students of Catholic families. Further, with an increasing rise in private school enrolments the Catholic Church is concerned that the Catholic character and ethos of

their schools is being eroded because they cannot enrol Catholic students in preference to non-Catholics. They suggest that the Tasmanian Act is out of step with other jurisdictions that allow for exclusion of students who do not follow the faith of the particular school or group of schools.

At this stage there appears to be some support for the Church's position. However, this support must be weighed against a number of public policy considerations that relate to the provision of educational services, religious freedoms and the protection of human rights. Rather than make a recommendation at this stage it is appropriate to seek a broader community view on the proposal for an amendment outlined above by the Catholic Church so comment is invited on whether the Act should be amended to allow religious and denominational schools to limit the enrolment of students based on their lack of affiliation to the church or faith.

Recommendation 59: That further consultation be undertaken on the question of whether the Act should be amended to allow for educational institutions conducted in accordance with religious beliefs to discriminate against students who are not of the particular belief that the school promotes when students apply for enrolment?

SUMMARY OF RECOMMENDATIONS

Recommendation 1:
No change is required to the definition of organisation.

Recommendation 2:
Amend the Act to provide that the Commissioner must approve a person who makes a complaint on behalf of another.

Recommendation 3:
Amend the Act to provide a process for the appointment of litigation guardian for children and persons who do not have the capacity to complain.

Recommendation 4:
That the Act be amended to provide that the Commissioner and/or the Tribunal must approve settlement outcomes in matters involving children or persons who do not have the capacity to complain.

Recommendation 5:
Amend the Act to provide for matters investigated by the Commissioner on his/ her own motion be treated as complaints that may after investigation be referred to the Tribunal for determination.

Recommendation 6:
That section 61 of the Act not be amended as to representation and the status quo be retained.

Recommendation 7:
That the Commissioner should not receive oral complaints.

Recommendation 8:
No change to the time limit for complaints.

Recommendation 9:
That the 42 day time limit for deciding whether to accept or reject a complaint be retained.

Recommendation 10:
That the Commissioner should not have the power to part accept or part reject complaints.

Recommendation 11:
The Commissioner should not have statutory power to reject a respondent.

Recommendation 12:
That the Commissioner should have statutory power to amend a complaint to name a respondent.

Recommendation 13:
a) That the Act be amended to allow for the amendment of a complaint; and
c) That the decision of *Commissioner of Police* v *Reid* be taken into account when developing the amendment.

Recommendation 14:
That the Commissioner should not be required to notify the respondent of the rejection of a complaint.

Recommendation 15:
That there should be no power in the Act to have a person declared a vexatious litigant.

Recommendation 16:
The Act be amended to allow for respondents to have a copy of the complaint as well as a summary of the complaint.

Recommendation 17:
a) Amend section 68 to allow the Commissioner to take on complaints that have been withdrawn (voluntarily or involuntarily) if in the public interest to do so; and
b) Amend the Act to allow complainants to continue complaints that have been withdrawn involuntarily if in the public interest to do so.

Recommendation 18:
a) Amend the Act to include provision to close a complaint where the complainant has failed to make contact within12 months of the last contact.
b) Provide that there is no power to revive a closed complaint or submit another complaint about the same matter.

Recommendation 19:
That the Anti-Discrimination Commissioner's records be exempt from the FOI Act.

Recommendation 20:
That the Office of the Anti-Discrimination Commissioner be dealt with in a similar manner to a law enforcement agency for the purposes of the *Personal Information Protection Act 2004*.

Recommendation 21:
The Commissioner must accept a complaint even if the discrimination is not the dominant or substantial reason for the alleged behaviour.

Recommendation 22:
That section 97 not be amended to provide that Commissioner must provide the Tribunal with a copy of his/her decision to reject or dismiss a complaint

Recommendation 23:
That a regulation making power be included to provide for procedural matters such as referrals to the Tribunal from the Commissioner, reviews and inquiries.

Recommendation 24:
That there be no change to the Act regarding reviews being conducted on the papers.

Recommendation 25:
Amend the Act to include a power to direct the parties to early conciliation before the investigation or during the investigation of a complaint.

Recommendation 26:
Amend the Act to allow for subsequent investigation following conciliation.

Recommendation 27:
That the Commissioner need not be obliged to seek the views of a party as to representation of the other party at a conciliation conference.

Recommendation 28:
Amend the Act to provide the Commissioner with unilateral power to extend an investigation

Recommendation 29:
Amend the Act to allow for extensions not exceeding an additional 6 months thereby effectively giving the Commissioner up to 12 months to investigate and conciliate a complaint.

Recommendation 30:
That there be no change to section 79(2).

Recommendation 31:
Section 79 (3) to be amended so that the referral report includes reference to conciliation of a complaint (but not the details of what was discussed), a description of the complaint, a reference to amendments to the complaint and any material evidence to substantiate the complaint or to support the respondent's position

Recommendation 32:
That the status quo be retained and that directions conferences remain closed to the public.

Recommendation 33:
That Tribunal have discretion to publish decisions on interlocutory matters.

Recommendation 34:
Amend section 80(4) to include the words 'without reasonable excuse'.

Recommendation 35:
Amend the Act to ensure that Tribunal must be satisfied that the majority of class members consent to the action.

Recommendation 36:
A person is not precluded from making a complaint in respect to the same discrimination or prohibited conduct already the subject of a representative complaint where the Commissioner considers it reasonable in the circumstances. The Tribunal may review a decision of the Commissioner on such a matter.

Recommendation 37:
Amend the Act to ensure that a child's name or information revealing the identity of a child shall not be published unless otherwise permitted by the Tribunal.

Recommendation 38:
That section 85(3) not be amended.

Recommendation 39:
a) That further work done on the issue of representative actions and the establishment of a fund to distribute any settlement monies.
b) Further that a regulation making power regarding the administration of such fund be included in the Act.

Recommendation 40:
Failure to comply with an order should not be a criminal offence.

Recommendation 41:
The Commissioner should not be responsible for enforcing an order.

Recommendation 42:
There does not need to be a statutory requirement that Tribunal decisions be published without request.

Recommendation 43:
That matters before the Tribunal requiring conciliation be conciliated under the *Alternative Dispute Resolution Act 2001* and not be referred back to Commissioner for conciliation.

Recommendation 44:
That agreements reached at conciliation be enforceable as if they were orders of the Tribunal.

Recommendation 45:
That section 99A of the Act not be amended.

Recommendation 46:
That there be no offer of compromise system incorporated into the Act.

Recommendation 47:
That the Act be amended to provided that only the Tribunal have power to make interim orders.

Recommendation 48:
That the Act be amended to allow a complainant may voluntarily withdraw a complaint from inquiry, but if it is withdrawn there can be no further complaint in relation to the same matter.

Recommendation 49:
That the Act be exempt from the *Judicial Review Act 2000.*

Recommendation 50:
That section 17 be amended to apply to all the attributes in section 16.

Recommendation 51:
That there be no change to the penalty provision.

Recommendation 52:
That section 101 be amended to include the words “in good faith”.

Recommendation 53:
That immunity be extended to protect authorised officers and conciliators.

Recommendation 54:
That there be no amendment to section 106 of the Act.

Recommendation 55:
a) That the definition of club be amended to include ‘or’ after the words ‘from the funds of the association; and’
b) That the definition of competitive sporting activity to include the word ‘and’ before the word ‘umpiring’.

Recommendation 56:
That the definition of sexual orientation should not include transsexuality

Recommendation 57:
Intersex should be defined in the Act and included as a separate attribute

Recommendation 58:
The term child be defined as a person under the age of 18 years.

Recommendation 59:
That further consultation be undertaken on the question of whether the Act should be amended to allow for educational institutions conducted in accordance with religious beliefs to discriminate against students who are not of the particular belief that the school promotes when students apply for enrolment?

LIST OF SUBMISSIONS

No	Name	Organisation
1.	Kurt Von Stalheim	Private individual
2.	Dino Ottavi	Private individual
3.	Dr Graham Scarr	Private individual
4.	James Graham Migloo	Private individual
5.	Tony Briffa	President, Androgen Insensitivity Syndrome Support Group Australia
6.	Wendy Burbury	Private individual
7.	John and Steph Perry	Private individuals
8.	Luke Isham	Private individual
9.	Mark Brown	Private individual
10.	Simon Barnsley	Acting Secretary Department of Health and Human Services
11.	John Smyth	Secretary Department of Education
12.	Pastor Nick Overton	Australian Christian Lobby
13.	Annette Elphinstone	Private Individual
14.	Jane Hutchinson	Manager Hobart Community Legal Centre
15.	Marie Kennedy	ACROD
16.	Andrew Paul	General Manager, Clarence City Council
17.	Eris Smyth	Secretary National Council of Women Tasmania Inc
18.	DJ LeFevre	Private individual
19.	Christina Sonneman	Private individual
20.	Steve Isham	Private individual
21.	Sam Nugteren	Private individual
22.	Patrick Stam	Private individual
23.	Raymond Camac	Private individual
24.	PG Holloway	Private individual
25.	Robert Cockerell	Acting Deputy Secretary, Department of Primary Industries and Water
26.	Sam Green	Private individual
27.	Amy Wagner	Private individual
28.	Walter Wagner	Private individual
29.	Lee Smith	Private individual
30.	Norm McIlfatrick	Secretary Department of Economic Development
31.	David Pammeter	Executive Officer, Department of Premier and Cabinet
32.	Kathy Dwyer	Senior HR Consultant, Department of Infrastructure Energy and Resources
33.	Michael John Davis	Private Individual
34.	Anne Cutler	Ethnic Communities Council of Northern Tasmania
35.	David Fanning	Commissioner for Children
36.	Leyla Yilmaz	Manager Industrial and Employment Relations, Victorian Automotive Chamber of Commerce
37.	Erica Vaughan	Private individual
38.	Helen Wood	Chair, Anti-Discrimination Tribunal

39.	Julie Peters	Private individual
40.	Judith Blades	Disability Discrimination Advocate, Launceston Community Legal Centre
41.	Michael Mansell	Tasmanian Aboriginal Centre Inc
42.	Claire Bonner Rodney Croome	Tasmanian Gay and Lesbian rights Group
43.	Sarah Bolt	Anti-Discrimination Commissioner
44.	Catholic Archdiocese of Hobart	Catholic Church Schools