Chapter 4
The Sex Discrimination Act

Contents

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4.1 Introduction to the SDA

4.1.1 Scope of the SDA

The SDA covers discrimination on the ground of:

- sex (defined in s 5);
- marital status (defined in s 6);
- pregnancy or potential pregnancy (defined in s 7); and
- family responsibilities (defined in s 7A).

The definitions of discrimination include both 'direct' and 'indirect' discrimination, with the exception of the definition of discrimination on the ground of family responsibilities, which is limited to direct discrimination.

Part II Divisions 1 and 2 of the SDA set out the areas of public life in which it is unlawful to discriminate on the ground of sex, marital status, and pregnancy or potential pregnancy. These include:

- employment and superannuation;[1]
- education;[2]
- the provision of goods, services or facilities;[3]
- accommodation and housing;[4]
- buying or selling land;[5] and
- the administration of Commonwealth laws and programs.[6]

Discrimination on the ground of family responsibilities is made unlawful only in dismissal from employment.[7]

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1 Section 14.
2 Section 21.
3 Section 22.
4 Section 23.
5 Section 24.
6 Section 26.
7 Section 14(3A).

Sexual harassment is also covered by the SDA.[8] Sexual harassment is any unwelcome sexual behaviour which makes a person feel offended or humiliated where that reaction is reasonable in the circumstances.

Like discrimination on the ground of sex, marital status and pregnancy or potential pregnancy, sexual harassment is unlawful in a broad range of areas of public life.[9]

The SDA contains a number of permanent exemptions.[10] The SDA also empowers HREOC to grant temporary exemptions from the operation of certain provisions of the Act.[11] The precise scope and nature of a temporary exemption is determined by HREOC in each instance. Temporary exemptions are granted for a specified period not exceeding 5 years.[12]

The SDA does not make it an offence per se to do an act that is unlawful by reason of a provision of Part II.[13] The SDA does, however, create the following specific offences:[14]

- Publishing or displaying an advertisement or notice that indicates an intention to do an act that is unlawful by reason of Part II of the SDA.[15]
- Failing to provide the source of actuarial or statistical data on which an act of discrimination was based in response to a request, by notice in writing, from the President or HREOC.[16]
- Divulging or communicating particulars of a complaint of sexual harassment that has been lodged with HREOC in certain prescribed circumstances.[17]
- Committing an act of victimization,[18] by subjecting, or threatening to subject, another person to any detriment on the ground that other person:
  - has made, or proposes to make, a complaint under the SDA or HREOC Act;
  - has brought, or proposes to bring, proceedings under those Acts;
  - has given, or proposes to give, any information or documents to a person exercising a power or function under those Acts;
  - has attended, or proposes to attend, a conference or has appeared, or proposes to appear, as a witness in proceedings held under those Acts;

8 See pt II, div 3.
9 See sections 28B-28L.
10 See pt II, div 4.
11 Section 44.
12 Application may be made to the Administrative Appeals Tribunal for review of decisions made by HREOC under section 44: s 45.
13 Section 85.
14 See pt IV.
15 Section 86.
16 Section 87.
17 Section 92.
18 Section 94(1).

  - has reasonable asserted, or proposes to assert, any rights under those Acts; or
  - has made an allegation that a person has done an act that is unlawful by reason of a provision of Part II of the SDA.[19]
- Insulting, hindering, obstructing, molesting or interfering with a person exercising a power or performing a function under the SDA.[20]

4.1.2 Limited Application Provisions and Constitutionality

Section 9 of the SDA sets out the circumstances in which the Act applies.

Section 9(2) provides that '[s]ubject to this section, this Act applies throughout Australia.' It has been held that the SDA does not have extraterritorial effect.[21]

Section 9(4) provides:

> The prescribed provisions of Part II, and the prescribed provisions of Division 3 of Part II, have effect as provided by subsection (3) of this section and the following provisions of this section and not otherwise.

The prescribed provisions of Part II set out the areas of public life in which discrimination is unlawful under the SDA.[22] The prescribed provisions of Division 3 of Part II, set out the areas of public life in which sexual harassment is unlawful under the SDA.[23] The effect of s 9(4) of the SDA is to limit the operation of these unlawful discrimination provisions to the particular circumstances set out in ss 9(5)-9(20). While these circumstances are widely cast, it is nevertheless important for applicants to consider the requirements of s 9 in bringing an application under the SDA.

Section 9(10) provides that the various prescribed provisions in Part II of the SDA have effect in relation to discrimination against women, to the extent that the provisions give effect to the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW').[24] The SDA relies, in part, on CEDAW for its constitutional basis pursuant to the external affairs power of the *Constitution*.[25] Section 9(10) refers only to discrimination against women. Accordingly this section will not support a complaint lodged by a man under the SDA.

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19 Section 94(2). Note that the offence also occurs if a person is subjected to a detriment on the ground that the 'victimizer' believes that the person has done, or proposes to do, any of the things listed.

20 Section 95.

21 See *Brannigan v Commonwealth of Australia* (2000) 110 FCR 566. Note that 'Australia' includes external Territories: s 9(1). Coker FM held in *Trainor v South Pacific Resort Hotels Pty Ltd* [2004] FMCA 374 that the SDA is applicable in its operation to Norfolk Island. Coker FM stated that Norfolk Island is part of the Commonwealth and the application of the SDA as set out in s 9 includes the external Territories: [17].

22 Section 9(1).

23 Section 9(1).

24 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

25 Section 51(xxix) of the *Constitution*.

However, the remaining sections, 9(5)-9(9) and 9(11)-9(20), provide that the various prescribed provisions in Part II of the SDA have effect in a number of specified situations, which reflect heads of Commonwealth legislative power. A male wishing to bring a complaint under the SDA must establish that the complaint falls within one of these sections.

For example, s 9(11) provides that the prescribed provisions of Part II have effect in relation to discrimination by a foreign corporation, a trading or financial corporation formed within the limits of the Commonwealth or a person in the course of the person's duties as an officer or employee of such a corporation.[26] In *Dudzinski v Griffith University*,[27] a male complainant successfully established that Griffith University was a trading corporation for the purposes of s 9(11) of the SDA thereby bringing his complaint within the application of the Act. In *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Golf Club*,[28] the complaint brought by male complainants was dismissed by Commissioner Carter who found that the McLeod Country Golf Club was not a trading corporation and that the provisions of Part II of the SDA had no application to the Club.

4.2 Direct Discrimination under the SDA

4.2.1 Causation, Intention and Motive

Section 5(1) of the SDA provides the definition of direct sex discrimination:

> (1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the sex of the aggrieved person if, by reason of:
>
> (a) the sex of the aggrieved person;
>
> (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
>
> (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person; the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

The definitions of direct discrimination on the ground of marital status (s 6(1) – see 4.2.3 below), pregnancy or potential pregnancy (s 7 – see 4.2.4 below) and family responsibilities (s 7A – see 4.2.5 below) are in similar terms, although the definition of pregnancy or potential pregnancy uses the term 'because of' rather than 'by reason of'.

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26 This provision reflects s 51(xx) of the *Constitution*, which confers upon the Commonwealth Parliament power to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.'

27 Unreported, HREOC, Hon WJ Carter QC, 23 February 2000, extract at (2000) EOC 93-079.

28 Unreported, HREOC, Hon WJ Carter QC, 13 September 1995, extract at (1995) EOC 92-739.

The words 'by reason of the sex of the aggrieved person' in the direct discrimination provisions of the SDA require a causal connection between the sex of the aggrieved person and any less favourable treatment accorded to them. They do not, however, require an intention or motive to discriminate.

It would appear from the cases discussed below that the appropriate approach to the issue of causation is to consider, in light of all of the circumstances surrounding the alleged discriminatory treatment, what was the 'real reason' or 'true basis' for the treatment. The central question will be why the respondent treated the applicant less favourably. A respondent's intention (and possibly motive) may be relevant to that inquiry.

In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd*[29] ('*Mt Isa Mines*'), Lockhart J considered the meaning of 'by reason of', and discussed various tests to determine if the respondent's conduct was discriminatory.

His Honour stated:

> In my opinion the phrase 'by reason of' in s 5(1) of the [SDA] should be interpreted as meaning 'because of', 'due to', 'based on' or words of similar import which bring something about or cause it to occur. The phrase implies a relationship of cause and effect between the sex (or characteristic of the kind mentioned in s 5(1)(b) or (c)) of the aggrieved person and the less favourable treatment by the discriminator of that person.[30]

Lockhart J continued:

> In my view the Act requires that when an inquiry is being held into alleged discrimination prohibited by s 14(2) on the ground of the sex of an employee, all the relevant circumstances surrounding the alleged discriminatory conduct should be examined. The intention of the defendant is not necessarily irrelevant. The purpose and motive of the defendant may also be relevant. **...**
>
> ... in some cases intention may be critical; but in other cases it may be of little, if any, significance. The objects of the [SDA] would be frustrated, however, if sections were to be interpreted as requiring in every case intention, motive or purpose of the alleged discriminator: see *Waters*[31] per Mason CJ and Gaudron J (at 359).
>
> The search for the proper test to determine if a defendant's conduct is discriminatory is not advanced by the formulation of tests of objective or causative on the one hand and subjective on the other as if they were irreconcilable or postulated diametrically opposed concepts. The inquiry necessarily assumes causation because the question is whether the alleged discrimination occurs because of the conduct of the alleged discriminator; and the inquiry is objective because its aim is to determine on an examination of all the relevant facts of the case whether discrimination occurred. This task may involve the consideration of subjective material such as the intention or even motive, purpose or reason of the alleged discriminator; but its significance will vary from case to case …

29 (1993) 46 FCR 301.
30 Ibid 321-22.
31 *Waters v Public Transport Corporation* (1991) 173 CLR 349.

> … I am not attracted by the proposition (which appears to have been favoured by the majority of the House in *Eastleigh*)[32] that the correct test involves simply asking the question what would the position have been *but for* the sex … of the complainant … Provided the 'but for' test is understood as not excluding subjective considerations (for example, the motive and intent of the alleged discriminator) it may be useful in many cases; but I prefer to regard it as a useful checking exercise to be engaged in after inquiring whether in all the relevant circumstances there has been discriminatory conduct.[33]

The issue of causation was considered by the High Court in *Purvis v New South Wales (Department of Education and Training)*,[34] a matter involving a complaint under the DDA. The approach taken by the High Court in relation to this issue generally confirms the analysis of Lockhart J in *Mt Isa Mines*.[35]

It is also relevant to note that s 8 of the SDA provides that if an act is done by reason of two or more particular matters that include the relevant ground of discrimination, then it is taken to be done by reason of that ground, regardless of whether that ground is the principal or dominant reason for the doing of the act.

4.2.2 Direct Sex Discrimination

Allegations of direct sex discrimination have been raised largely in the context of cases involving pregnancy discrimination (see 4.2.4(b) below), sexual harassment (see 4.6.5 below) and sex-based harassment (see 4.6.6 below).

Ho v Regulator Australia Pty Ltd,[36] the FMC considered an allegation of direct sex discrimination contrary to s 5(1)(a). In that case the applicant alleged, amongst other things, that she had been discriminated against on the basis of her sex because she had been asked to change the towels in the men's washroom. Driver FM found that the request had been made because 'it was a job that needed doing and it was a job that always been done by "one of the girls"'.[37] Accordingly, his Honour found that the request had been made on the basis of Mrs Ho being a woman, in breach of s 5(1)(a) of the SDA.[38] Driver FM stated that:

> The request would not have been made if Mrs Ho had been a man. Appropriate comparators in the circumstances are the male employees in the workplace. They were not and would not have been asked to undertake this menial task. It follows that in making the request to Mrs Ho that she

32 *James v Eastleigh Borough Council* [1990] 2 AC 751.

33 (1993) 46 FCR 301, 324-26. Applied in *Commonwealth v Human Rights and Equal Opportunity Commission* (1997) 77 FCR 371, 390-92 (Sackville J); *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, [159]-[161].

34 (2003) 202 ALR 133, 187 [236] (Gummow, Hayne and Heydon JJ), 138-9 [13]-[14] (Gleeson CJ), 171-2 [166] (McHugh and Kirby JJ).

35 See discussion in 5.2.2(a)(i) on the DDA. Note the different views expressed by the High Court on the relevance of motive. Lockhart J's views on that issue appear to be closest to the views expressed by Gummow, Hayne and Heydon JJ.

36 [2004] FMCA 62.

37 Ibid [151].

38 Ibid [157].

> change the towels in the men's washroom, Mrs Kenny treated Mrs Ho less favourably than a man would have been treated in the same circumstances.[39]

4.2.3 Direct Marital Status Discrimination

Section 6(1) of the SDA defines direct discrimination on the ground of marital status:

> (1) For the purposes of this Act, a person (in this subsection referred to as the **discriminator**) discriminates against another person (in this subsection referred to as the **aggrieved person**) on the ground of the marital status of the aggrieved person if, by reason of:
>
> (a) the marital status of the aggrieved person; or
>
> (b) a characteristic that appertains generally to persons of the marital status of the aggrieved person; or
>
> (c) a characteristic that is generally imputed to persons of the marital status of the aggrieved person;
>
> the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different marital status.

Section 6 of the SDA was considered by HREOC, the Federal Court and the Full Federal Court in what is known as the *Dopking* litigation.[40] In that matter, complaints were made to HREOC by single members of the Defence Force (one of whom was Mr Dopking). The complainants had been posted by the RAAF to Townsville. They sought to receive certain allowances to cover costs associated with their posting. These allowances were only available to a 'member with a family' which was defined to mean a member normally residing with: (a) the spouse of the member; (b) a child; (c) where the member is widowed, unmarried or permanently separated, or where the member's spouse is invalided – a person acting as a guardian or housekeeper to a child; (d) any other person approved by an approving authority. The complainants' applications for the allowances were rejected on the ground that they were members without family.

HREOC found that this amounted to direct discrimination on the ground of marital status.[41] The respondent argued that the allowance was denied not because of the complainants' marital status, but because they were not part of a household including a person within the definition of 'family'.[42] This argument was rejected by Sir Ronald Wilson, who held:

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39 Ibid [151].

40 *Sullivan v Department of Defence* (1991) EOC 92-366; *Commonwealth v Human Rights and Equal Opportunity Commission* (1991) 32 FCR 468; *Sullivan v Department of Defence* (1992) EOC 92-421; *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191; *Dopking v Department of Defence* (Unreported, HREOC, Sir Ronald Wilson, 24 October 1994), extract at (1995) EOC 92-669; *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74.

41 *Sullivan v Department of Defence* (1992) EOC 92-421.

42 Ibid 79,005.

> In my opinion [the respondent's argument] neglects to mark the significance of paragraphs (b) and (c) of section 6(1). It is not only 'marital status' to which regard must not be had, but also 'a characteristic that appertains generally to or is generally imputed to persons of the marital status' of the complainant. Not being part of a 'household' is a characteristic that pertains generally to persons of single status, thereby as a matter of generality rendering single persons ineligible to receive the allowance. In the present case, that characteristic of not being part of a household attached to Mr Dopking, thereby rendering him ineligible to receive the allowance.[43]

On review by the Full Court of the Federal Court,[44] it was held by Lockhart and Wilcox JJ (Black CJ dissenting) that the approach taken by HREOC was incorrect. Lockhart J stated:

> In this case s 6(1) requires the comparison to be made between Mr Dopking as a person with the characteristic mentioned in para (b) or (c) of subs (1) and a person of a different marital status. There is no extension of that other person's marital status for the purposes of the section. In other words, the comparison is not made with a person having a characteristic that appertains generally to or is generally imputed to persons of another marital status; it is made with a person of a different marital status – for example a married person. ...
>
> The reason why a member of the Defence Force is… treated more favourably than others is because the member is accompanied by a person who normally resides with him or her and falls within the extended definition of 'family'. It is not the marital status of the person … that determines the more favourable treatment, but the fact that, whatever that person's marital status is, he or she has one or more 'family' members normally residing with him or her who in fact accompanies the member to the new posting.[45]

Wilcox J also favoured a 'narrow' view of s 6(1), requiring a comparison between:

> the treatment of an aggrieved person having a particular marital status (or characteristic which appertains generally, or is perceived to appertain generally, to persons of a particular marital status) and the treatment accorded to persons having a different marital status, without reference to the characteristics that generally appertain, or are imputed, to that marital status.[46]

In *MW v Royal Women's Hospital*,[47] HREOC considered a refusal to provide in vitro fertilization treatment to unmarried women. The fertilization procedure was regulated by the *Infertility (Medical Procedures) Act 1984* (Vic) which provided that the procedure may only be carried out if the woman is married. The complainants were not married but each was in a long term stable de facto relationship. They satisfied all the requirements for the program but were not permitted to continue on the program because they were not married.

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43 Ibid.

44 *Commonwealth v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 191.

45 Ibid 204-05 (Lockhart J). The matter was remitted to HREOC for consideration of whether or not there was indirect discrimination under the SDA.

46 Ibid 211. The existence of s 6(2) relating to indirect discrimination was regarded as significant by his Honour (211-12). Although the provisions considered by his Honour were subsequently amended in 1995 (see section 4.3 below), his Honour's reasoning on this issue would still appear to be relevant.

47 Unreported, HREOC, Commissioner Kohl, 5 March 1997, extract at (1997) EOC 92-886.

The Commissioner found that as the hospitals that had refused treatment were in the business of providing health care, they were subject to s 22 of the SDA (which proscribes discrimination in the provision of goods, services and facilities). The refusal to provide the IVF services to the complainants because they were not married constituted unlawful discrimination on the ground of their marital status.[48] The Commissioner stated that compliance with a State law is not a defence under the SDA[49] and the complainants were awarded damages.[50]

The same issue arose in *McBain v Victoria*.[51] The Federal Court found that s 8 of the *Infertility Treatment Act 1995* (Vic) required a provider of infertility treatment to discriminate on the ground of marital status. That section and a number of other provisions were declared by Sundberg J to be inconsistent with the SDA and, under s 109 of the *Constitution*, inoperative to the extent of the inconsistency.

There have only been two recent cases in which the Federal Court and FMC have considered claims of unlawful discrimination on the ground of marital status.[52] In each matter, the claims were dismissed without significant discussion of the relevant provisions of the SDA.

4.2.4 Direct Pregnancy Discrimination

(a) Generally

Section 7(1) of the SDA defines direct discrimination on the ground of pregnancy or potential pregnancy:

> (1) For the purposes of this Act, a person (the **discriminator**) discriminates against a woman (the **aggrieved woman**) on the ground of the aggrieved woman's pregnancy or potential pregnancy if, because of:
>
> (a) the aggrieved woman's pregnancy or potential pregnancy; or
>
> (b) a characteristic that appertains generally to women who are pregnant or potentially pregnant; or
>
> (c) a characteristic that is generally imputed to women who are pregnant or potentially pregnant;
>
> the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not pregnant or potentially pregnant.

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48 Ibid 77,191.

49 Ibid 77,192.

50 Ibid 77,194. Note that the Commissioner declined to make a declaration of invalidity under s 109 of the *Constitution* on the basis that HREOC was not a court and did not have the power to make a declaration of invalidity (77,193).

51 (2000) 99 FCR 116. Note that proceedings challenging this decision were brought in the High Court (with HREOC intervening) but they were dismissed without consideration of the merits: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372. See HREOC's submissions on the substantive issues at http://www.humanrights.gov.au/legal/guidelines/hcaivf1.html.

52 *Dranichnikov v Department of Immigration and Multicultural Affairs* [2002] FMCA 23; *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31.

There have been a number of cases in this area. These are discussed with particular emphasis on the identification of the 'comparator': ie the person or persons to whom an applicant is to be compared in determining whether or not there has been 'less favourable treatment'.

In the case of *Thomson v Orica Australia Pty Ltd*[53] ('*Thomson*'), the applicant had been employed for nine years before taking 12 months maternity leave as she was entitled to under the respondent's family leave policy. A few days before she was due to return to work, the applicant was advised that she would not be returning to her pre-maternity leave position and that she would be performing new duties. The applicant alleged that the changes to her job amounted to a demotion and that the respondent's actions amounted to a constructive dismissal.

Allsop J found that the job offered to the applicant on her return from maternity leave was 'of significantly reduced importance and status, of a character amounting to a demotion (although not in official status or salary)'.[54] Allsop J considered that the appropriate comparator, for the purposes of s 7(1) of the SDA, was a similarly graded account manager with the applicant's experience who, with the employer's consent, took 12 months leave and who had a right to return to the same or similar position. His Honour decided that the applicant had been treated less favourably than another employee in the same or similar circumstances who was not pregnant.[55]

Allsop J also found that the actions of the employer constituted a serious breach of the implied term of the contract of employment that an employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties.[56] His Honour found that the applicant was entitled to treat herself as constructively dismissed at common law[57] and that discrimination had occurred contrary to ss 14(2)(a),(b),(c), and (d) of the SDA.

Thomson was cited with approval in *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd*.[58] The applicant in that matter was employed in the position of Manager, Technology Support in the respondent's finance and administrative group. She claimed that upon her return from maternity leave her position no longer existed, due to a restructure, and she was persuaded to take a role in 'special projects' which was graded two levels lower. She was, however, remunerated according to her original position and invited to participate in an important new project. The applicant complained that, by effectively demoting her, the employer had breached ss 5(1), 7(1) and 14(1) of the SDA and an implied term of her contract of employment which guaranteed that she would be provided with a comparable position upon returning from maternity leave. She further complained that she was constructively dismissed.

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53 [2002] FCA 939.
54 Ibid [53].
55 Ibid [138].
56 Applying *Burazin v Blacktown City Guardian* (1996) 142 ALR 144, 151.
57 [2002] FCA 939, [148].
58 [2003] FMCA 160.

Driver FM accepted, citing *Thomson*, that by placing the applicant in a position which was inferior in status, she had been treated 'less favourably than a comparable employee would have been who was not pregnant and who was returning after nine months leave and with the rights of the kind reflected in the maternity leave policy'.[59] As such, the employer had engaged in discrimination as defined in s 7(1)(b) of the SDA and was in breach of s 14(2)(a) of the SDA.

In relation to the alleged breach of contract, Driver FM held that the employer's parental leave policy formed part of the contract for employment which gave the applicant the right to return to a comparable position.[60] However, Driver FM held that by remaining in her position as Business Improvement Facilitator and accepting the offer to work on the new project, the applicant 'forgave' the employer's breach of contract.[61] Her conduct was therefore inconsistent with her acceptance of a repudiation of the contract by the employer, even if that conduct had amounted to a fundamental breach.[62] Driver FM declined to make a finding of constructive dismissal.[63]

In *Mayer v Australian Nuclear Science and Technology Organisation*,[64] the applicant occupied a professional position with the respondent as a Business Development Manager. She informed her employer that she wanted to take 12 months maternity leave. Her three year contract was due to expire during that leave. She sought a two year extension to her contract but it was extended for a period of only one year. The applicant claimed the one year extension was discriminatory on the ground of her pregnancy because at that time other professional officers on fixed term contracts were offered contract extensions of two years or more.

Driver FM found that there had been discrimination as defined by s 7(1) and it was unlawful by s 14(2)(a).[65] His Honour held that the proper comparison to be made was between the applicant and other fixed term contract employees of the respondent who were not pregnant, who intended to take 12 months leave and who had sought to have their contracts extended.[66] Driver FM found that most (if not all) other fixed term contract employees of the respondent who were not pregnant and who had sought to have their contracts extended were granted a contract extension of an equal or greater period than the original term of their employment. His Honour noted that, whilst there was no uniform approach to the renewal of fixed term contracts, the respondent's practice gave rise to a reasonable expectation that, provided that performance was satisfactory, the contract would be renewed for a period no shorter than the initial contract period. Driver FM held that the applicant was treated less favourably than comparable employees.[67]

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59 Ibid [82].
60 Ibid [81]. Driver FM found that the statutory obligations contained in section 66 of the *Industrial Relations Act 1996* (NSW) in relation to parental leave were part of the respondent's maternity leave policy; were well known to employees; and gave business efficacy to the employment contract and should properly be regarded as forming an implied term of it [81].
61 Ibid [87].
62 Ibid [86].
63 Ibid [88].
64 [2003] FMCA 209.
65 Ibid [60].
66 Ibid [58].
67 Ibid [61].

His Honour was further satisfied that the applicant's pregnancy was a factor in the decision to grant her a one year extension. The respondent asserted that the dominant factor in considering the length of the extension was the doubt about a business case for the applicant's position. His Honour found that a factor in that uncertainty was doubt in the respondent's mind whether, and if so on what basis, the applicant would be returning from maternity leave. His Honour stated that by offering the one-year extension the employer was 'minimising the risk that Ms Mayer might not return or might want to return on an inconvenient basis after completing her maternity leave'.[68]

In *Ho v Regulator Australia Pty Ltd*,[69] the applicant alleged, amongst other things, that she had been discriminated against on the basis of her pregnancy. Driver FM found that the applicant's supervisor had made it clear to the applicant that her pregnancy was unwelcome and that she would be required to prove her entitlement to maternity leave. She was required to attend a meeting with an independent witness to discuss her request for leave as well as a change in her work performance which had followed the announcement of her pregnancy.

Driver FM held as follows:

> I find that in subjecting Mrs Ho to the meeting on 25 February 2002 the respondents discriminated against Mrs Ho on account of her pregnancy. The appropriate comparators are employees of the first respondent who were not pregnant but who had a condition requiring leave on the production of a medical certificate. It is hard to imagine an employee requiring leave on production of a medical certificate being summoned to a meeting before an independent witness to discuss their need for leave and an asserted decline in work performance and attitude since the medical condition became known. I find that such an employee would not have been subjected to an analysis of their work performance or been summoned to a meeting with an independent witness to justify a request for leave. By subjecting Mrs Ho to the meeting the respondents breached s.7(1)(a) of the SDA.[70]

In *Howe v Qantas Airways Limited,*[71] the applicant was employed by the respondent as a Customer Service Manager when she became pregnant. The applicant was earning $95,000 per annum, with a base salary of $64,000 in that position. The Enterprise Agreement regulating the applicant's employment required her to cease flying duties 16 weeks after the date of conception. The applicant registered her interest in available ground duties and was offered a position in the engineering department, performing photocopying and filing duties, earning about $30,000 per annum. The applicant commenced unpaid maternity leave rather than take this position. The applicant alleged that the respondent had unlawfully discriminated against her on the ground of her pregnancy by refusing her request to access her accumulated sick leave entitlements and/or by failing to pay the applicant her base salary when she was required to cease flying by reason of her pregnancy.

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68 Ibid [62].
69 [2004] FMCA 62.
70 Ibid [155].
71 [2004] FMCA 242.

Driver FM found that the proper comparison to be made was between the applicant and an employee of the respondent who was not pregnant but required to cease flying duties by reason of a medical condition. This hypothetical comparator was covered by the Enterprise Agreement that regulated the applicant's employment. The Enterprise Agreement provided that a flight attendant who, through personal illness, was unfit for flying but was fit for non-flying duty may take sick leave or if a temporary ground staff position was available and accepted by the flight attendant, he or she must be paid the rate of pay prescribed in the relevant award.

Therefore, as the comparator would have the option of performing ground duties or taking sick leave, Driver FM found that the refusal of sick leave to the applicant amounted to less favourable treatment and constituted discrimination in breach of ss 7(1) and 14(2)(b) of the SDA. However, the offer of a rate of pay applicable to the engineering department position was not discriminatory by reference to this same hypothetical comparator.

(b) Relationship between Pregnancy and Sex Discrimination

Complaints alleging direct discrimination in relation to return to work after a period of maternity leave raise potentially overlapping claims of sex and pregnancy discrimination. The taking of a period of maternity leave is a characteristic that appertains generally to women (s 5(1)(b)) as well as being a characteristic that appertains generally to women who are pregnant (s 7(1)(b)).

However, it has been held that s 7 of the SDA operates exclusively of s 5. In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd*[72] ('*Mt Isa Mines*'), Lockhart J stated:

> What is the relationship between ss 5, 6 and 7 of the SD Act? Section 5 relates to sex discrimination, s 6 to discrimination on the ground of marital status and s 7 to discrimination on the ground of pregnancy. Section 7 assumes that the aggrieved person is pregnant or has a characteristic that appertains generally to or is generally imputed to persons who are pregnant. If the facts of a particular case concern an aggrieved person who is pregnant or who has a characteristic that appertains generally to or is generally imputed to pregnant women, in my opinion s 7 operates exclusively of s 5. But s 7 would not cover the case of discrimination against a woman on the ground, for example, that it is a characteristic of women that they may become pregnant or bear children. If an employer refused to employ a woman on that ground, his conduct would not be discriminatory on the ground of pregnancy under s 7 because the woman is not in fact pregnant. But it would be discriminatory on the ground of sex under s 5 as it is a characteristic appertaining generally to women that they have the capacity to become pregnant. In that case the extended definition of sex provided by paragraph (b) (also (c)) of sub-s. (1) of s 5 applies.[73]

72 (1993) 46 FCR 301.

73 Ibid 327-28. While his Honour's reasoning remains relevant, note that s 7 was amended in 1995 so as to make discrimination because of potential pregnancy unlawful.

In *Thomson* (see 4.2.1(a) above), Allsop J held that the taking of maternity leave is a characteristic that appertains generally to women, and accordingly, less favourable treatment on the ground that a woman has taken maternity leave can amount to discrimination on the basis of sex, as well as pregnancy.[74] However, his Honour considered that he should follow the decision of Lockhart J in *Mt Isa Mines* in relation to the exclusive operation of s 7 and s 5.[75]

Allsop J concluded that, although he was satisfied the facts of the case would have supported a conclusion of unlawful sex discrimination under s 5(1)(b) and (c) and s 14(2), relief would be limited to that based on the claim of pregnancy discrimination under ss 7(1) and 14(2).

4.2.5 Discrimination on the Ground of Family Responsibilities

The definition of discrimination on the ground of family responsibilities appears in s 7A of the SDA. Unlike the other grounds in the SDA, the definition is restricted to direct discrimination. In addition, discrimination on the ground of family responsibilities is made unlawful only where an employee is dismissed (s 14(3A)) – although constructive dismissal will suffice.[76]

Section 7A of the SDA provides:

> For the purposes of this Act, an employer discriminates against an employee on the ground of the employee's family responsibilities if:
>
> (a) the employer treats the employee less favourably than the employer treats, or would treat, a person without family responsibilities in circumstances that are the same or not materially different; and
>
> (b) the less favourable treatment is by reason of:
>
> (i) the family responsibilities of the employee; or
>
> (ii) a characteristic that appertains generally to persons with family responsibilities; or
>
> (iii) a characteristic that is generally imputed to persons with family responsibilities.

Section 14(3A) of the SDA provides:

> It is unlawful for an employer to discriminate against an employee on the ground of the employee's family responsibilities by dismissing the employee.

In *Song v Ainsworth Game Technology Pty Ltd*[77] ('*Song*'), the applicant sought to continue an informal practice she had maintained for nearly one year, of leaving the workplace for approximately twenty minutes (from 2.55pm to 3.15pm) each afternoon to transfer her child from kindergarten to another carer.

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74 [2002] FCA 939 [168].

75 Ibid [170]. Allsop J noted that the SDA had been amended since *Mount Isa Mines* to insert the ground of 'potential pregnancy' into s 7, although this does not appear to have been relevant to, or an influence on, his Honour's analysis on this point.

76 *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31; *Evans v National Crime Authority* [2003] FMCA 375. See also *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [74].

77 [2002] FMCA 31.

The respondent sought to impose upon the applicant the condition that she attend work from 9am until 5pm with a half hour for lunch between 12pm and 1pm. When this condition was not accepted the respondent unilaterally changed the applicant's employment from full-time to part-time employment, purportedly to allow the applicant to meet her family responsibilities.

Raphael FM found that the applicant was treated less favourably than a person without family responsibilities who would have expected flexibility in starting and finishing times and in the timing of meal breaks.[78] His Honour further found that the unilateral change to part-time employment constituted constructive dismissal of the applicant and that one of the grounds for that dismissal was the applicant's family responsibilities in breach of s 14(3A) of the SDA.[79]

In *Escobar v Rainbow Printing Pty Ltd (No.2)*[80] ('*Escobar*'), *Driver* FM suggested that the case before him involved a factual situation effectively the reverse of that in *Song*. Rather than a case where the employer essentially compelled the employee to work part-time, Driver FM found that prior to the applicant's return from maternity leave, she sought to reach an agreement with the respondent that she return to work on a part-time basis.[81] Following that conversation, and prior to the applicant's return to work, the respondent employed another person to fill the applicant's full-time position. On the day that the applicant returned to work, the respondent told her that there was no part-time work available and terminated the applicant's employment.

Driver FM found that on the facts of the case the breach of s 14(3A) was clear:

> There is no doubt in my mind that the applicant was dismissed by the respondent when she presented herself for work on 1 August 2000. The employment relationship between the parties had continued to that point and the applicant was clearly sent away from the workplace on the understanding that the employment relationship was then severed. The reason for the dismissal is also clear. The reason was that Mr Meoushy was unwilling to countenance at that time the possibility of the applicant working part time and had filled her full time position, rendering that position also unavailable. Mr Meoushy had taken that action because he had formed a view (I think correctly) that the applicant was unwilling to work full time because of her family responsibilities. I am left in no doubt that the applicant was dismissed from her employment on 1 August 2000 because of her family responsibilities.[82]

Some queries have been raised regarding aspects of the reasoning in *Song* and *Escobar*.[83]

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78 Ibid [72].
79 Ibid [83].
80 [2002] FMCA 122.
81 Ibid [33].
82 Ibid [36].
83 Hon John von Doussa QC and Craig Lenehan, 'Barbequed or Burned? Flexibility in Work Arrangements and the *Sex Discrimination Act*' (2004) 27 *University of New South Wales Law Journal* 892.

In *Evans v National Crime Authority,*[84] the applicant, a single parent, was employed on contract as an intelligence analyst by the National Crime Authority ('NCA'). The applicant left her employment before the end of her contract after being informed that her contract would not be renewed. Prior to this, the applicant had a series of discussions with, principally, the manager of investigations responsible for her team ('the manager'), in which concerns were expressed about her attendance record and taking of personal leave (comprising carer's leave and sick leave – all within her leave entitlements).

Raphael FM found that the manager was unhappy with the concept of carer's leave[85] and that the manager considered non-attendance for reasons of carer's leave to be damaging to that person's employment prospects within the NCA.[86] His Honour was also satisfied that the manager's grading of the applicant at her performance review was influenced by his views as to her taking of personal leave.[87] This in turn affected the renewal of the contract.[88] Raphael FM concluded that the applicant had been constructively dismissed on the basis of her family responsibilities, contrary to s 14(3A).[89] In finding that there had been 'less favourable treatment' for the purposes of s 7A, his Honour stated that the proper comparator was an employee without family responsibilities who took personal leave within his or her entitlements.[90]

Raphael FM's finding of discrimination on the ground of family responsibilities was upheld on appeal by Branson J in *Commonwealth v Evans*.[91]

A number of cases involving issues relating to family responsibilities and requests for flexible working arrangements have included claims of indirect sex discrimination (s 5(2)). These cases are considered at 4.3 below.

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84 [2003] FMCA 375.
85 Ibid [88].
86 Ibid [89].
87 Ibid [88].
88 Ibid [93]. His Honour also made a finding of direct sex discrimination (the responsibility to care for children being a 'characteristic that appertains generally to women'), [101]-[105]. On appeal in *Commonwealth v Evans* [2004] FCA 654, Branson J overturned the finding of direct sex discrimination. Her Honour found there was no evidence before the Court that showed how a male employee who took the same or comparable amounts of leave as the applicant would have been treated. Branson J stated 'it is not illegitimate for an employer, all other things being equal and provided indirect discrimination is avoided, to favour for re-employment an employee who takes limited leave over an employee who regularly takes a lot of leave, albeit that it is leave to which he or she is entitled' [71]. The situation was distinguished from *Thomson v Orica* [2002] FCA 939 in which there was a family leave policy which required a certain standard of treatment (see 4.2.4 above).
89 [2003] FMCA 375, [106].
90 Ibid [108].
91 [2004] FCA 654.

4.3 Indirect Discrimination under the SDA

Section 5(2) of the SDA provides:

> For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

The definitions of indirect discrimination on the grounds of marital status (s 6(2)) and pregnancy or potential pregnancy (s 7(2)) are set out in similar terms.

These provisions all apply subject to s 7B which provides:

> (1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.
>
> (2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:
>
> (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
>
> (b) the feasibility of overcoming or mitigating the disadvantage; and
>
> (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.

Section 7C deals with the burden of proof. It provides:

> In a proceeding under this Act, the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act.

The current provisions relating to indirect discrimination were inserted by the *Sex Discrimination Amendment Act 1995* (Cth). Prior to the commencement of that amending Act, the indirect discrimination provisions of the SDA were in similar terms to those currently in the DDA.[92] This section considers the jurisprudence developed prior to 1995 only where it is relevant to the interpretation of the present provisions.

In *Mayer v Australian Nuclear Science and Technology Organisation*[93] ('*Mayer*'), Driver FM referred to the second reading speech of the Sex Discrimination Amendment Bill 1995, in which the then Attorney-General stated:

> The bill sets out a simpler definition of indirect discrimination. It provides that a person discriminates against another person if the discriminator imposes or proposes to impose a condition, requirement or practice that has or is likely to have the effect of disadvantaging the person discriminated

92 See 5.2.3 below.
93 [2003] FMCA 209, [72].

> against because of, for example, his or her sex. The focus is on broad patterns of behaviour which adversely affect people who are members of a particular group.[94]

There are three constituent elements to the current indirect discrimination provisions of the SDA. These are:

- the discriminator imposes, or proposes to impose, a condition, requirement or practice;
- the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same sex or marital status as the aggrieved person, or persons who are also pregnant or potentially pregnant; and
- the condition, requirement or practice is not reasonable in the circumstances.

These elements will be considered below together with the relevant case law.

In a number of recent cases, issues surrounding family responsibilities and requests for part-time work have been considered within the context of the definition of indirect sex discrimination. This is significant because s 14(3A) of the SDA only makes direct discrimination on the basis of family responsibilities unlawful in cases of dismissal from employment.[95] In contrast, discrimination on the basis of sex is unlawful in the employment context more generally, and in many other areas of public life.[96] In addition, invoking the indirect sex discrimination definition in such matters avoids the potential difficulties associated with the causation and comparator elements of the direct family responsibilities discrimination provisions.[97]

4.3.1 Defining the 'Condition, Requirement or Practice'

The words 'requirement or condition' should be given a broad or liberal interpretation to enable the objects of the legislation to be fulfilled.[98]

In *Australian Iron and Steel v Banovic,*[99] Dawson J considered the words 'requirement or condition' in the context of the indirect sex discrimination provisions of the *Anti-Discrimination Act 1977* (NSW). Dawson J stated:

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94 Commonwealth, *Parliamentary Debates,* House of Representatives, 28 June 1995, 2460 (Hon Michael Lavarch, Attorney-General).

95 See 4.2.5 above.

96 See pt II, divs 1 and 2.

97 Hon John von Doussa QC and Craig Lenehan, 'Barbequed or Burned? Flexibility in Work Arrangements and the *Sex Discrimination Act*' (2004) 27 *University of New South Wales Law Journal* 892.

98 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J); *Styles v Secretary, Department of Foreign Affairs* (1988) 84 ALR 408, 422-23; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [72]-[73]; *Clarke v Catholic Education Office* (2003) 202 ALR 340, 351 [44]. See also the discussion of the phrase 'requirement or condition' within the indirect discrimination provisions of the DDA (see 5.2.3(b) below).

99 (1989) 168 CLR 165.

> [I]t is clear that the words 'requirement or condition' should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employee: *Clarke v Eley (IMI) Kynoch Ltd* (1983) ICR 165, at pp 170-171. Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision.[100]

This passage was cited with approval by the High Court in *Waters v Public Transport Corporation*[101] in the context of the indirect discrimination provisions of the *Equal Opportunity Act 1984* (Vic).

In a number of indirect sex discrimination cases involving issues of family responsibilities and requests for part-time work, courts have held that the condition, requirement or practice that employees be available to work full-time is a 'condition, requirement or practice' within the meaning of s 5(2) of the SDA.[102] Courts have made this finding in circumstances where the requirement to work full-time formed part of the aggrieved person's ongoing terms and conditions of employment.[103]

In *Escobar v Rainbow Printing Pty Ltd (No.2)*[104] ('*Escobar*'), a female employee sought to return from maternity leave on a part-time basis. Her request was denied and her employment later terminated. Driver FM found this amounted to direct discrimination on the ground of family responsibilities[105] and that in the event he was wrong in relation to this finding, further found that the respondent's conduct constituted indirect discrimination on the basis of sex.[106] His Honour held that the refusal to countenance part-time work involved the imposition of an unreasonable condition that was likely to disadvantage women because of their disproportionate responsibility for the care of children.[107] In making this finding, Driver FM cited with approval[108] the decision of HREOC in *Hickie v Hunt & Hunt*[109] ('*Hickie*').

In *Hickie*, the complainant had taken maternity leave shortly after having been made a contract partner at the respondent law firm. She complained of a range of less favourable treatment during the period of her maternity leave and following her return to work on a part-time basis. Relevantly, an area of her practice was removed from her on the basis that it could not be managed working part-time. Commissioner Evatt stated 'I find that the condition or requirement that Ms Hickie work full-time to maintain her position was a condition or requirement likely to disadvantage women'.[110] The respondent's conduct was found to constitute indirect sex discrimination.

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100 Ibid 185.
101 (1991) 173 CLR 349, 393 (Dawson and Toohey JJ), 406-7 (McHugh J).
102 *Hickie v Hunt & Hunt* (Unreported, HREOC, Commissioner Evatt, 7 March 1998), [6.17.10], extract at (1998) EOC 92-910; *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33] and [37]; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [69]-[73].
103 *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209.
104 [2002] FMCA 122.
105 See 4.2.5 above.
106 [2002] FMCA 122, [37].
107 Ibid [33], [37].
108 Ibid [33].
109 Unreported, HREOC, Commissioner Evatt, 7 March 1998, extract at (1998) EOC 92-910.
110 Ibid [6.17.10].

In *Mayer*, the applicant similarly wanted to work part-time following a period of maternity leave. The applicant had worked on a full-time basis prior to her maternity leave. Driver FM held as follows:

> The test under s.5(2) is whether a condition, requirement or practice has, or is likely to have, the effect of disadvantaging a person of the same sex as the aggrieved person; in this case, a woman. In this case the relevant condition or requirement was that the applicant work full-time. Such a condition or requirement is likely to have the effect of disadvantaging women because, as I have noted, women have a greater need for part-time employment than men. That is because only women get pregnant and because women bear the dominant responsibility for child rearing, particularly in the period closely following the birth of a child. … In this case discrimination under s.5(2) is established because the respondent insisted upon the applicant working full-time against her wishes.[111]

One exception to this general line of authority is the decision of Raphael FM in *Kelly v TPG Internet Pty Ltd*[112] ('*Kelly*'). In this case, the applicant complained that the refusal by her employer to make available part-time work upon her return from maternity leave amounted to indirect sex discrimination. Raphael FM discussed, in particular, the decisions in *Hickie* and *Mayer*, and distinguished them from the case before him. His Honour noted that in both of those cases the applicants had been refused benefits that had either been made available to them (as in *Hickie*) or that were generally available (as in *Mayer*). In the present case, there were no part-time employees in managerial positions employed with the respondent. His Honour stated:

> Section 5(2) makes it unlawful for a discriminator to impose or propose to impose a condition requirement or practice but that condition requirement or practice must surely relate to the existing situation between the parties when it is imposed or sought to be imposed. The existing situation between the parties in this case is one of full time employment. No additional requirement was being placed upon Ms Kelly. She was being asked to carry out her contract in accordance with its terms.[113]

In those circumstances, his Honour held that the behaviour of the respondent constituted a refusal to provide the applicant with a benefit. It was not the imposition of a condition or requirement that was a detriment: 'there was in reality no requirement to work full-time only a refusal to allow a variation of the contract to permit it'.[114]

The correctness of the decision in *Kelly* was considered by Driver FM in *Howe v Qantas Airways Limited*[115] ('*Howe*'). Driver FM disagreed with Raphael FM in *Kelly*, on this issue, albeit in obiter comments, for reasons which included the following.

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111 [2003] FMCA 209, [71].
112 (2003) 176 FLR 214.
113 Ibid 233 [79].
114 Ibid 234 [83].
115 [2004] FMCA 242. The Sex Discrimination Commissioner appeared as *amicus curiae* in this matter and made submissions in relation to, inter alia, the correctness of the decision in *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584. The submissions of the Sex Discrimination Commissioner are at: http://www.humanrights.gov.au/legal/amicus_info.html.

First, if Raphael FM was correct in distinguishing the earlier authorities, an employer who consistently provides part-time work but then later refuses to do so can be liable under the SDA (as in *Mayer*) but an employer who has a policy or practice of never permitting reduced working hours cannot (as in *Kelly*). This would be an odd result. Second, in characterising the refusal of the respondent to allow the applicant to work part-time as a refusal to confer a benefit or advantage, Raphael FM conflated the notion of 'disadvantage' in s 5(2) of the SDA with the imposition of a 'condition, requirement or practice'. They are separate elements of s 5(2) and must remain so if the provision is to operate effectively. Third, Raphael FM did not consider whether the respondent's insistence on full-time work may have constituted a 'practice' within the meaning of s 5(2) irrespective of whether it was a 'condition or requirement'.[116]

4.3.2 Disadvantaging

A condition, requirement or practice must have, or be likely to have, the effect of 'disadvantaging' persons of the same sex or marital status as the aggrieved person, or persons who are also pregnant or potentially pregnant. The term 'disadvantaging' is not defined in the SDA and there is little discussion of the concept in the case law.

As discussed in 4.3.1 above, women who have encountered problems when seeking to work part-time upon return to work from maternity leave have successfully argued that a requirement to work full-time is a condition, requirement or practice that has the effect of disadvantaging women.[117] The courts have accepted, sometimes as a matter of judicial notice without any specific evidence, that this disadvantage stems from the fact that women are more likely to require part-time work to meet their family responsibilities.

The seminal statement to this effect comes from the decision of Commissioner Evatt in *Hickie*:

> Although no statistical data was produced at the hearing, the records produced by Hunt and Hunt suggest that it is predominantly women who seek the opportunity for part time work *and* that a substantial number of women in the firm have been working on a part time basis. I also infer from general knowledge that women are far more likely than men to require at least some periods of part time work during their careers, and in particular a period of part time work after maternity leave, in order to meet family responsibilities. In these circumstances I find that the condition or requirement that Ms Hickie work full-time to maintain her position was a condition or requirement likely to disadvantage women.[118]

116 Ibid [124].

117 *Hickie v Hunt & Hunt* (Unreported, HREOC, Commissioner Evatt, 7 March 1998), [6.17.10], extract at (1998) EOC 92-910; *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122, [33] and [37]; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, [69]-[73].

118 Unreported, HREOC, Commissioner Evatt, 7 March 1998, [6.17.10], extract at (1998) EOC 92-910.

This passage was cited with approval in *Escobar*[119] and in *Mayer.*[120] In *Mayer,* Driver FM went on to state, 'I need no evidence to establish that women per se are disadvantaged by a requirement that they work full-time'.[121]

In *Howe,* the issue of whether courts could continue to take judicial notice of this 'disadvantage' in the absence of any evidence was raised by the respondent. Driver FM stated (albeit in obiter comments) that 'it is open to the Court to take judicial notice that as a matter of common observation, women have the predominant role in the care of babies and infant children…and that it follows from this that any full-time work requirement is liable to disproportionately affect women'.[122] Driver FM went on to state:

> The point is that the present state of Australian society shows that women are the dominant caregivers to young children. While that position remains (and it may well change over time) s.5(2) of the SDA operates to protect women against indirect sex discrimination in the performance of that care giving role.[123]

The Commonwealth Sex Discrimination Commissioner appeared as *amicus curiae* in *Howe*.[124] In relation to this issue she submitted that the court could, at the present time, continue to take judicial notice of the fact that a requirement to work full time and without flexibility disadvantages, or is likely to disadvantage, women. She further submitted that that fact is so 'notorious' that it could be judicially noticed without further inquiry.

4.3.3 Reasonableness

Section 7B(2) identifies matters that are to be taken into account in determining reasonableness. It is not an exhaustive definition. It is clear from the authorities in relation to 'reasonableness' that all of the circumstances of a case should be taken into account.

The following passage from the decision of Bowen CJ and Gummow J in *Secretary*, *Department of Foreign Affairs and Trade v Styles*[125] has been described as the 'starting point'[126] in determining reasonableness:

119 [2002] FMCA 122, [33].
120 [2003] FMCA 209, [70].
121 Ibid.
122 [2004] FMCA 242, [113].
123 Ibid [118].
124 The submissions of the Sex Discrimination Commissioner are available at: http://www.humanrights.gov.au/legal/amicus_info.html.
125 *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 111 (Sackville J).
126 (1989) 23 FCR 251.

> the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.[127]

The following propositions can be distilled in relation to 'reasonableness' for the purposes of s 7B of the SDA:

- The test is an objective one but the subjective preferences of an aggrieved person or a respondent may be relevant in determining the reasonableness of the alleged discriminatory conduct.[128]
- Reasonableness is a question of fact which can only be determined by taking into account all of the circumstances of the case which may include the financial or economic circumstances of the respondent.[129]
- The test is reasonableness, not correctness or 'whether the alleged discriminator could have made a 'better' or more informed decision'.[130]
- It is not enough, however, that a decision has a 'logical or understandable basis'. While this may be relevant, taking into account all of the circumstances, such a decision may nevertheless not be reasonable.[131]

In *Escobar*, while not expressly referring to s 7B(2), Driver FM considered some matters relevant to the reasonableness of the requirement or condition. As discussed above (see 4.2.5 and 4.3.1), this matter concerned an employer's refusal of a request to work part-time from an employee returning from maternity leave. Driver FM found that the respondent's 'refusal … to countenance the possibility of part-time employment for the applicant', and his subsequent dismissal of her on that basis, was not reasonable.[132] In arriving at this conclusion, his Honour found the following factual matters persuasive:[133]

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127 (1989) 23 FCR 251, 263. This passage was also approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-6 (Dawson and Toohey JJ, with whom Mason CJ and Gaudron J agreed, 365), 378 (Brennan J), 383 (Deane J); applied in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ, 47, and Sackville J, 79, agreed).

128 *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74, 83 (Lockhart J); cited with approval in *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 111 (Sackville J).

129 *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 111 (Sackville J); *Waters v Public Transport Corporation* (1991) 173 CLR 349.

130 *Commonwealth v Human Rights and Equal Opportunity Commission* (1995) 63 FCR 74, 87 (Sheppard J); *Australian Medical Council v Wilson* (1996) 68 FCR 46, 61 (Heerey J); *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 112 (Sackville J).

131 *Commonwealth Bank v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78, 112-13 (Sackville J).

132 [2002] FMCA 122, [32].

133 Ibid [32], [37].

- the respondent had, at least initially, been prepared to countenance the possibility of the applicant working part-time;
- while the employment of a full-time employee to fill the applicant's position reduced the flexibility of the respondent to offer part-time employment, that reduction of flexibility was one that the respondent brought upon itself; and
- the employment of the full-time employee was undertaken without reference to the applicant in circumstances where the respondent had agreed to discuss the applicant's future working arrangements.[134]

In *Hickie*, where part of the complainant's practice area was taken away when she returned to work on a part-time rather than full-time basis, Commissioner Evatt found that 'the removal of her practice can be regarded as a consequence of her inability to meet a requirement that she work full-time'.[135] Such a requirement was 'not reasonable having regard to the circumstances of the case'.[136] The Commissioner went on to say:

> Hunt and Hunt have accepted that women should be able to work part time after their maternity leave. In that case, they should have approached Ms Hickie's problem by seeking alternative solutions which would have enabled her to maintain as much of her practice as possible. The firm should have considered seriously other alternatives. Ms Hickie would return in a few weeks and she was willing to work on urgent matters. Part of her practice could have been preserved for her with other arrangements.[137]

In *Mayer*, the refusal of the applicant's request to work part-time was also found to be unreasonable. Driver FM found that the evidence made it clear that there was in fact part-time work available for Ms Mayer. This work was 'different work to that which the applicant had been doing, but it was important work that the applicant was able to do and that needed to be done'.[138] Consequently, the respondent's refusal to accommodate the applicant's request for part-time work was not reasonable:

> Ms Bailey identified work that could properly occupy Ms Mayer's time until 3 January 2003 for two days each week. At a minimum, therefore, the respondent should have offered Ms Mayer employment for two days per week for the balance of her contract until 3 January 2003.
>
> The work that Ms Mayer could have performed part-time would have been discrete project work, rather than the performance of her previous functions. Ms Mayer gave evidence of important projects that she could have assisted on. Ms Bailey in her e-mail, stated that there were 'many projects' that Ms

134 It may be questionable whether or not this last factor is a matter relevant to the reasonableness of the requirement or condition per se: rather, it would seem to manner in which that requirement or condition was imposed.
135 Unreported, HREOC, Commissioner Evatt, 7 March 1998, [4.5.28], extract at (1998) EOC 92-910.
136 Ibid [4.5.30].
137 Ibid.
138 [2003] FMCA 209, [75].

> Mayer could work on. In my view, with a little imagination the respondent could, if it had wished to, found useful work for Ms Mayer to do for three days a week until 3 January 2003.
>
> … [T]he respondent's effort to find part-time work for the applicant was inadequate. The respondent's refusal of part-time work for three days per week was not reasonable.[139]

His Honour found, however, in respect of the applicant's proposal for job-sharing or working partly from home:

> It was reasonable for the respondent to refuse Ms Mayer's proposal for job sharing of her role, or for her to work partly from home… Ms Mayer's role required both a consistency of approach and regular interaction with other staff. The effective performance of that role would have been problematic if Ms Mayer had worked partly from home, or had shared her duties with another employee. It was clear from Ms Mayer's own evidence that she would not have been able to work full-time from home while caring for her child.[140]

As in *Escobar*, his Honour did not make express reference to s 7B(2) when expressing his conclusions on reasonableness.

4.3.4 The Relationship between 'Direct' and 'Indirect' Discrimination

In *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission,*[141] a matter involving a complaint arising under the pre-1995 provisions, Sackville J considered the relationship between 'direct sex discrimination' under s 5(1) and 'indirect discrimination' under s 5(2).

His Honour noted that s 5(2) in both its pre-1995 form and post-1995 form 'addresses "indirect sex discrimination" in the sense of conduct which, although "facially neutral", has a disparate impact on men and women'.[142] Citing *Waters v Public Transport Corporation*[143] and *Australian Medical Council v Wilson*[144] his Honour concluded that '[i]t seems to have been established that subss 5(1) and (2) are mutually exclusive in their operation'.[145]

In *Mayer*, a matter involving a complaint arising under the post-1995 provisions, Driver FM also considered the relationship between the direct and indirect provisions of s 5 of the SDA and found them to be mutually exclusive. His Honour stated:

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139 Ibid [75]-[76].
140 Ibid [77].
141 (1997) 80 FCR 78. This matter concerned the issue of indirect discrimination in the context of the opportunity available to employees on extended leave (for reasons related to child birth or child care) to obtain a position after a restructuring process and to entitlement to voluntary retrenchment.
142 Ibid 97.
143 (1991) 173 CLR 349, a decision under the *Equal Opportunity Act 1984* (Vic).
144 (1996) 68 FCR 46, 55 (Heerey J with whom Black CJ agreed), 74 (Sackville J), a decision under the RDA.
145 (1997) 80 FCR 78, 97.

> [Section] 5(2) does not depend on s 5(1) at all to give it meaning. The opening words of both ss 5(1) and 5(2) are the same. The distinction between the two sections is simply that s 5(1) deals with direct discrimination and s 5(2) with indirect discrimination. The provisions are therefore mutually exclusive. The test under s 5(2) is whether a condition, requirement or practice has, or is likely to have, the effect of disadvantaging a person of the same sex as the aggrieved person; in this case, a woman. In this case the relevant condition or requirement was that the applicant work full-time. Such a condition or requirement is likely to have the effect of disadvantaging women because, as I have noted, women have a greater need for part-time employment than men. That is because only women get pregnant and because women bear the dominant responsibility for child rearing, particularly in the period closely following the birth of a child. Discrimination under s 5(2) is either established or not by reference to its own terms, not by reference to s 5(1). In this case discrimination under s 5(2) is established because the respondent insisted upon the applicant working full-time against her wishes. The issue of family responsibilities is only relevant insofar as it establishes that women tend to be disadvantaged by such a requirement.[146]

The same reasoning would presumably be applied to the direct and indirect discrimination provisions relating to the grounds of marital status and pregnancy.

This does not, however, prevent applicants from pleading direct and indirect discrimination in the alternative.[147]

4.4 Special Measures under the SDA

Section 7D of the SDA provides that actions which constitute 'special measures' are not discriminatory. This provision 'recognises that certain special measures may have to be taken to overcome discrimination and achieve equality.'[148]

Section 7D of the SDA states:[149]

> (1) A person may take special measures for the purpose of achieving substantive equality between:
>
> (a) men and women; or
>
> (b) people of different marital status; or
>
> (c) women who are pregnant and people who are not pregnant; or
>
> (d) women who are potentially pregnant and people who are not potentially pregnant.

146 [2003] FMCA 209, [71].

147 See, in the context of the DDA, *Minns v New South Wales* [2002] FMCA 60, [245]; *Hollingdale v Northern Rivers Area Health* [2004] FMCA 721. See further 6.7 on Procedure and Evidence.

148 Explanatory Memorandum, Sex Discrimination Amendment Bill 1995 (Cth), [37]-[38].

149 Section 7D was inserted in the SDA in December 1995 by the *Sex Discrimination Amendment Act 1995* (Cth). Prior to 1995, s 33 of the SDA related to special measures. That provision was considered in *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Gold Club* (1995) EOC 92-739; *Proudfoot v ACT Board of Health* (1992) EOC 92-417; *The Municipal Officers' Association of Australia* [1991] 93 IRCommA; *Australian Journalists Association* [1988] 375 IRCommA. Those cases are, however, of little assistance in the interpretation of s 7D as the section was in substantially different terms.

(2) A person does not discriminate against another person under section 5, 6 or 7 by taking special measures authorised by subsection (1).

(3) A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:

(a) solely for that purpose; or

(b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.

(4) This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved.

Section 7D was considered for the first time by the Federal Court in *Jacomb v Australian Municipal Administrative Clerical and Services Union*[150] ('*Jacomb*'). In this case, the rules of a union provided that certain elected positions on the branch executive and at the state conference were available only to women. A male applicant alleged that the rules discriminated against men and were unlawful under the SDA. The essence of the applicant's objection to the rules was that the union policy of ensuring 50 per cent representation of women in the governance of the union (which was the basis of the quotas within the rules) exceeded the proportional representation of women in certain of the union branches. Consequently, women were guaranteed representation in particular braches of the union in excess of their membership to the disadvantage of men. The union successfully defended the proceedings on the basis that the rules complained of were special measures within the meaning of s 7D of the SDA.

The special measures provision is limited, in its terms, by a test as to purpose. Section 7D(1) provides that a person may take special measures for the purpose of achieving substantive equality between, inter alia, men and women. The achievement of substantive equality need not be the only, or even the primary purpose of the measures in question (s 7D(3)). It was accepted by Crennan J in *Jacomb* that the test as to purpose is, at least in part, a subjective test.[151] Crennan J stated 'it is the intention and purpose of the person taking a special measure, which governs the characterisation of such a measure as non-discriminatory'.[152] In applying this test, Crennan J was satisfied that the union believed substantive equality between its male and female members had not been achieved and that addressing this problem required women being represented in the governance and high echelons of the union so as to achieve genuine power sharing. Crennan J commented that it 'was clear from the evidence that part of the purpose of the rules was to attract female members to the union, but this does not disqualify the rules from qualifying as special measures under s7D (subs7D(3))'.[153]

Section 7D also requires the court to consider the special measure objectively. Crennan J appeared to accept the submission of the Sex Discrimination Commissioner (appearing as amicus curiae) that s 7D requires the court to assess whether it was reasonable for the person taking the measure to conclude that the

150 [2004] FCA 1250.

151 Ibid [61],[64]. For further discussion see, J O'Brien, 'Affirmative Action, special measures and the *Sex Discrimination Act*' (2004) 27 *University of New South Wales Law Journal*, 840.

152 [2004] FCA 1250, [47].

153 Ibid [28].

measure would further the purpose of achieving substantive equality.[154] In making this determination, the Sex Discrimination Commissioner submitted that the court must at least consider whether the measure taken was one which a reasonable entity in the same circumstances would regard as capable of achieving that goal. The court ought not substitute its own decision. Rather it should consider whether in the particular circumstances, a measure imposed was one which was proportionate to the goal. Crennan J stated that she was satisfied, on the evidence, that the union rules were a reasonable special measure when tested objectively.[155]

Section 7D(4) provides that the taking, or further taking, of special measures for the purpose of achieving substantive equality is not permitted once that purpose has been achieved. This gives rise to the question: when can it be said that measures are no longer authorised because their purpose has been achieved? The judgment of Crennan J in *Jacomb* provides little guidance on this point. Crennan J stated as follows:

> Having regard to the inflexibility of the quotas and the express provisions of subs 7D(4), monitoring is important to ensure the limited impact of such measures on persons in the applicant's position. The rules have only been utilised once and there was evidence that elections to the relevant positions were for four-year terms. Accordingly, it is too soon to find that the special measure is no longer needed or that rules 5 and 9 are deprived of their character as a special measure because they have been utilized once. However, rules 5 and 9 cannot remain valid as a special measure beyond the 'exigency' (namely the need for substantive equality between men and women in the governance of the union) which called them forth.[156]

4.5 Areas of Discrimination

The bulk of the claims that have been brought under the SDA have related to employment. However, the provisions in Part II, Divisions 1 and 2 of the SDA also proscribe discrimination in other areas of public life, including:

- education;[157]
- the provision of goods, services or facilities;[158]
- accommodation and housing;[159]
- buying or selling land;[160]
- clubs;[161] and
- the administration of Commonwealth laws and programs.[162]

An overview of the limited jurisprudence that has considered those provisions is set out below.

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154 Ibid [34],[62],[65].
155 Ibid [65].
156 Ibid [65].
157 Section 21.
158 Section 22.
159 Section 23.
160 Section 24.
161 Section 25.
162 Section 26.

4.5.1 Provision of Services and Qualifying Bodies

Section 22 of the SDA, which appears in Part II, Division 2 of the SDA, provides:

> (1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy:
>
> (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
>
> (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
>
> (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.
>
> (2) This section binds the Crown in right of a State.

In *Ferneley v The Boxing Authority of New South Wales*[163] ('*Ferneley*'), Wilcox J considered whether the respondent provided 'services' within the meaning of s 22 of the SDA. The respondent had certain statutory functions under the *Boxing and Wrestling Control Act 1986* (NSW) ('*Boxing Act*'), including under s 8(1), which provides:

> a male person of or above the age of 18 years may make an application to the Authority to be registered as a boxer of a prescribed class.

There were no provisions in the *Boxing Act* for registration of females. The applicant applied to the respondent to be registered as a kick boxer in New South Wales. That application was refused by the respondent, on the basis of s 8(1) of the *Boxing Act*.

It was accepted by all parties that the respondent should be treated as the Crown in right of the State of New South Wales.[164]

In the proceedings before the Federal Court, the applicant sought, inter alia, a declaration that s 8(1) of the *Boxing Act* was inoperative by reason of inconsistency with s 22 of the SDA and the operation of s 109 of the *Constitution*. It was necessary to consider whether the respondent's acts of failing to consider, on its merits, the applicant's application for registration involved a failure to provide a 'service' within the meaning of s 22. In deciding this question, s 18, which appears in Part II, Division 1 of the SDA, was also material. This provides:

> It is unlawful for an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorization or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy:

163 (2001) 115 FCR 306.
164 Ibid [2].

(a) by refusing or failing to confer, renew or extend the authorisation or qualification;

(b) in the terms or conditions on which it is prepared to confer the authorisation or qualification or to renew or extend the authorisation or qualification; or

(c) by revoking or withdrawing the authorisation or qualification or varying the terms or conditions upon which it is held.

Section 18 did not apply in this matter, as (unlike s 22) it does not bind the Crown in right of a State. However, Wilcox J held that, as Parliament had included a special provision concerning sex discrimination by authorities empowered to confer an authorisation or qualification needed for engaging in an occupation, s 22 must be read down to the extent necessary to exclude cases covered by that special provision. His Honour stated that this view was supported by the structure of the SDA, the fact that the heading of Division 1 was 'Discrimination in Work' and the fact that Division 2 was headed 'Discrimination in Other Areas.' His Honour noted that the registration sought by the applicant was to enable her to 'work' (as professional kick boxing was her source of income) and stated that discrimination in that area should therefore not be read to extend to provisions relating to 'other areas'.[165]

Wilcox J thus held that it was not a breach of s 22 for the respondent to decline to consider the applicant's application on its merits and the proceedings were dismissed on that basis.

Section 22 also arose for consideration in *MW v Royal Women's Hospital*[166] and *McBain v Victoria*[167] (discussed in 4.2.3 above).

4.5.2 Clubs

Section 25 of the SDA provides:

(1) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a person who is not a member of the club on the ground of the person's sex, marital status, pregnancy or potential pregnancy:

(a) by refusing or failing to accept the person's application for membership; or

(b) in the terms or conditions on which the club is prepared to admit the person to membership.

(2) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a person who is a member of the club on the ground of the member's sex, marital status, pregnancy or potential pregnancy:

(a) in the terms or conditions of membership that are afforded to the member;

165 Ibid [64]-[66].
166 Unreported, HREOC, Commissioner Kohl, 5 March 1997, extract at (1997) EOC 92-886.
167 (2000) 99 FCR 116.

(b) by refusing or failing to accept the member's application for a particular class or type of membership;

(c) by denying the member access, or limiting the member's access, to any benefit provided by the club;

(d) by depriving the member of membership or varying the terms of membership; or

(e) by subjecting the member to any other detriment.

In *Ciemcioch v Echuca-Moama RSL Citizens Club Ltd*,[168] the complainant applied for membership at the respondent club. Her application was considered but rejected by the club's committee. There were only two other instances of rejection in the history of the club. The complainant's husband had been suspended from the club a year previously and had taken legal action against the club which settled a month before the complainant's application was considered.

Commissioner O'Connor held that the club had discriminated against the complainant on the ground of marital status by having regard to an unlawful consideration, namely the characteristic of loyalty towards and support of a husband's lawful activities. This was a characteristic generally imputed to the relationship of marriage. The Commissioner was also satisfied that the club would not have treated a person of different marital status in the same way in similar circumstances. Although not specifically identified, the Commissioner appears to have considered that the conduct breached s 25(1)(a) (refusal of membership). The Commissioner declared that the complainant's application to join the club should be considered and that the respondent should pay her $3,000 by way of compensation.

In contrast, the complaints in *Eleven Fellow Members of the McLeod Country Golf Club v McLeod Country Golf Club*[169] were made by existing members of a club and were therefore brought under s 25(2) of the SDA. The male complainants alleged that they had been discriminated against on the ground of sex as they were eligible only for 'fellow' membership, not ordinary membership of the club. As fellow members they were unable to participate in management of the club. Management was reserved for women.

Since in this case it was males and not females who alleged unlawful discrimination, the power of the HREOC to grant relief depended upon a finding that the club was a trading corporation for the purposes of s 9(13) of the SDA.[170] In dismissing the complaint, Commissioner Carter was satisfied the club was not a trading corporation.[171]

Commissioner Carter was also satisfied that the club's arrangements came within the exemption provided for by s 33 of the Act (see 4.4 above).[172]

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168 Unreported, HREOC, Commissioner O'Connor, 13 July 1994, extract at (1994) EOC 92-657.

169 Unreported, HREOC, Hon W J Carter QC, 13 September 1995, extract at (1995) EOC 92-739.

170 The SDA has a wider application to discrimination against women under s 9(10), which provides that the relevant provisions have effect in relation to discrimination against women to the extent that those provisions give effect to CEDAW. See 4.1.2 above.

171 (1995) EOC 92-739, 78,483.

172 Ibid 78,485. Note the special measures provision is now contained in s 7D.

4.6 Sexual Harassment

Section 28A of the SDA provides:

> (1) For the purposes of this Division, a person sexually harasses another person (the **person harassed**) if:
>
> (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
>
> (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
>
> in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.
>
> (2) In this section:
>
> **conduct of a sexual nature** includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

That provision appears in Part II Division 3 of the SDA, which goes on to proscribe sexual harassment in various areas of public life, including:

- employment and partnerships;[173]
- qualifying bodies;[174]
- educational institutions;[175]
- the provision of goods, services or facilities;[176]
- accommodation;[177]
- buying or selling land;[178]
- clubs;[179] and
- the administration of Commonwealth laws and programs.[180]

This section considers the following issues in relation to sexual harassment:

- conduct of a sexual nature;
- unwelcome conduct;
- single incidents;
- the 'reasonable person' test;
- sexual harassment as a form of sex discrimination; and
- sex-based harassment and sex discrimination.

173 Section 28B.
174 Section 28C.
175 Section 28F.
176 Section 28G.
177 Section 28H.
178 Section 28J.
179 Section 28K.
180 Section 28L.

4.6.1 Conduct of a Sexual Nature

Section 28A(2) defines the term 'conduct of a sexual nature' in a non-exhaustive fashion. A broad interpretative approach has been taken in relation to the scope of that term. For example, both in the Federal jurisdiction and in other Australian jurisdictions, exposure to sexually explicit material and sexually suggestive jokes has been held to constitute conduct of a sexual nature.[181]

That line of cases was expressly approved by Driver FM in the cases of *Cooke v Plauen Holdings*[182] and *Johanson v Blackledge*.[183] In the latter case, the sale of a dog bone shaped so as to resemble a penis was held to be conduct of a sexual nature.

Similarly, in the case of *Aleksovski v Australia Asia Aerospace Pty Ltd*,[184] Raphael FM found that the conduct of a co-worker of the applicant constituted unwelcome conduct of a sexual nature. This conduct included: his declaration of love for the applicant; his suggestion that they discuss matters at his home; his reference to the applicant's relationship with her partner and repeating all of these things the following day; and becoming angry and agitated when the applicant refused to do as he wished.[185]

In *Cooke v Plauen Holdings*,[186] the applicant complained of acts including personal and inappropriate comments and questions by a supervisor, Mr Ong. She also complained that Mr Ong had sat close to her while supervising her, had asked her to model for him and invited her to come to his home for coffee. In relation to the comments, Driver FM held:

> Mr Ong was probably socially clumsy, even socially inept. He may not have intended his comments and questions to be sexual in nature but I do not think that that matters. The comments and questions can objectively be regarded as sexual in nature, they were deliberate and the applicant was the target.[187]

As to the invitations to model and to come over for coffee, his Honour also found that these could properly be regarded as sexual in nature.[188] However, the conduct of Mr Ong in sitting close to the applicant was found by Driver FM to be part of Mr Ong's 'unfortunate supervision style' rather than being conduct of a sexual nature.[189]

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181 *Bennett v Everitt* (1988) EOC 92-244; *Kiel v Weeks* (1989) EOC 92-245; *Horne v Press Clough Joint Venture* (1994) EOC 92-556; *Hopper v Mt Isa Mines* (1997) EOC 92-879; *Doyle v Riley* (1995) EOC 92-748; *Bebbington v Dove* (1993) EOC 92-543; *Hawkins v Malnet Pty Ltd* (1995) EOC 92-767; *G v R & Department of Health and Community Services* (Unreported, HREOC, Sir Ronald Wilson, 17 September 1993); *Djokic v Sinclair* (1994) EOC 92-643; *Hill v Water Resources Commission* (1985) EOC 92-127; *Freestone v Kozma* (1989) EOC 92-249.

182 [2001] FMCA 91, [24].

183 (2001) 163 FLR 58, 75 [84].

184 [2002] FMCA 81.

185 Ibid [81]-[85].

186 [2001] FMCA 91.

187 Ibid [26].

188 Ibid [29]. Driver FM found that the conduct did not constitute sexual harassment as the applicant was not 'offended, humiliated or intimidated by it', [29]. However, his Honour went on to find that the conduct amounted to sex discrimination, [31]-[33]; see 4.6.6 below.

189 Ibid [29].

Certain conduct may on its own not amount to conduct of a sexual nature. However it may do so if it forms part of a broader pattern of inappropriate sexual conduct.[190] This view was expressly adopted by Raphael FM in *Shiels v James*[191] in which it was held that incidents relating to the flicking of elastic bands at the applicant were of a sexual nature as they formed part of a broader pattern of sexual conduct.[192]

4.6.2 Unwelcome Conduct

For a breach of s 28A to have occurred, the alleged conduct or sexual advance must be 'unwelcome'. While determining whether the conduct is of a sexual nature is an objective test, determining whether it is unwelcome is a subjective test.[193]

In *Aldridge v Booth*,[194] Spender J stated:

> By 'unwelcome', I take it that the advance, request or conduct was not solicited or invited by the employee, and the employee regarded the conduct as undesirable or offensive: see Michael Rubenstein, 'The Law of Sexual Harassment at Work' (1983) 12 *Industrial Law Journal* 1 at 7 and *Henson v City of Dundee* (1982) 682 F 2d 897.[195]

In *Elliott v Nanda*,[196] the applicant alleged that she was sexually harassed during her employment at a medical centre by the Director. Moore J found that the conduct of the respondent, which involved fondling the applicant's breast, patting her on the bottom, trying to kiss her, massaging her shoulders and brushing against her breasts was conduct of a sexual nature and unwelcome. Relevantly, his Honour noted:

> the applicant was, at the time, a teenager and the respondent a middle-aged medical practitioner. In that context it is difficult to avoid the conclusion that [the conduct of the respondent] was unwelcome as were the sexual references or allusions specifically directed to the applicant.[197]

In relation to other conduct involving discussions about sexual matters, however, his Honour held:

> the applicant bears the onus of establishing that the conduct was unwelcome and I entertained sufficient doubt that it would have been apparent to the respondent that these general discussions were unwelcome (particularly given that applicant did not complain about the discussions at the time and participated in general discussions the respondent had with his friends about topics of current interest) to find, affirmatively, that this

190 See, for example, *Harwin v Pateluch* (Unreported, HREOC, Commissioner O'Connor, 21 August 1995), extract at (1995) EOC 92-770.
191 [2000] FMCA 2.
192 Ibid [72].
193 *Horman v Distribution Group* [2001] FMCA 52, [44], [64], citing with approval the decision of the New Zealand Employment Tribunal in *L v M Ltd* (1994) EOC 92-617; *Wong v Su* [2001] FMCA 108, [18]; *Daley v Barrington* [2003] FMCA 93, [33]-[34]; *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [130].
194 (1988) 80 ALR 1.
195 Ibid 5, cited with approval in *Hall v Sheiban* (1989) 20 FCR 217, 247 (Wilcox J).
196 (2001) 111 FCR 240.
197 Ibid 277 [107].

> conduct was unwelcome: see *O'Callaghan v Loder* [1983] 3 NSWLR 89 at 103-104.[198]

It should be noted that this statement of the test appears to introduce an objective element, contrary to the weight of authority.

While the behaviour of an applicant, including inappropriate behaviour, may be relevant in assessing whether or not the conduct was 'unwelcome', such behaviour does not disqualify an applicant from claiming sexual harassment by way of other behaviour. In *Horman v Distribution Group Ltd*,[199] Raphael FM held that while the conduct of the applicant resulted in a number of her claims of harassment being unsuccessful, 'everyone [is] entitled to draw a line somewhere' and certain of the activities complained about 'crossed that line'.[200]

In *Wong v Su*,[201] Driver FM held that there was no reliable evidence to support the applicant's claim that the respondent's conduct, although of a sexual nature, was unwelcome. Rather it was held that the sexual relationship between the parties was voluntarily entered into and continued for a considerable number of years.

In *Daley v Barrington*,[202] Raphael FM found that words to the effect of '[l]et's go over to the horse stalls I'll show you what a man can do' had been spoken to the applicant by the second respondent. However, his Honour also found that the applicant's reaction to the words being spoken was 'friendly and included putting an arm around' the second respondent. In these circumstances, Raphael FM stated:

> I am not satisfied that the remark made was unwelcome to this applicant even if I would otherwise have found that a reasonable person would be offended, humiliated or intimidated by it.[203]

4.6.3 Single Incidents

It is accepted that a one-off incident can amount to sexual harassment, as well as on-going behaviour.

In *Hall v Sheiban*,[204] all three members of the Federal Court in separate judgments expressed the view that the then s 28(3) of the SDA (now replaced by s 28A) was capable of including a single incident. Lockhart J stated that s 28(3) 'provide[d] no warrant for necessarily importing a continuous or repeated course of conduct.'[205] Both Wilcox[206] and French[207] JJ expressed the view that while the ordinary English meaning of the word 'harass' implies repetition, s 28(3) did not contain such an element and did not use the word 'harass' to define sexual harassment. French J emphasised that 'circumstances, including the nature and

198 Ibid 277 [108].
199 [2001] FMCA 52.
200 Ibid [64].
201 [2001] FMCA 108.
202 [2003] FMCA 93.
203 Ibid [34].
204 (1989) 20 FCR 217.
205 Ibid 231.
206 Ibid 247.
207 Ibid 279.

relationship of the parties may stamp conduct as unwelcome the first and only time it occurs'.[208] This approach has been adopted in recent sexual harassment cases.[209]

4.6.4 The 'Reasonable Person' Test

Under s 28A(1) of the SDA, a person sexually harasses another if the person engages in unwelcome conduct of a sexual nature in relation to the person harassed 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated'.

Determining whether a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated entails an objective test.[210]

In *Johanson v Blackledge*,[211] Driver FM held that it is not necessary for an applicant alleging sexual harassment to be the conscious target of the conduct, and that an accidental act can therefore constitute harassment. As noted above, in that matter, a customer was sold a dog bone by one employee which had been fashioned into the shape of a penis by other employees. Driver FM accepted that the bone had been intended for another person and was accidentally provided to the applicant. His Honour nevertheless found there to be sexual harassment, stating:

> Having regard to the necessary elements establishing harassment for the purposes of s 28A and s 28G, I do not accept the submission that an accidental act cannot constitute sexual harassment. It is clear that there have been instances where employers have been found liable for harassment of employees in circumstances where offensive posters or other offensive material have been left around the workplace and seen by the complainant. In some instances this material was on display prior to the arrival of the complainant in the workplace. In *G v R and the Department of Health, Housing and Community Services* [Unreported, HREOC, 17 September 1993] a toy in [the] form of a jack-in-the-box with a penis substituted for the normal figure was put on the desk of the complainant's husband. Other employees passed comments about the toy but these were not directed at the complainant. The complaint failed for other reasons but Sir Ronald Wilson found that the conduct complained of could constitute sexual harassment of the complainant even though she was not the target. Clearly, it is not necessary that the complainant be the conscious target of the offensive conduct. Sexual harassment can occur where the conduct is directed at a limited class of people (eg employees). I see no material difference in the

208 Ibid.

209 See, for example, the judgment of Driver FM in *Cooke v Plauen Holdings* [2001] FMCA 91, [25], applying *Hall v Sheiban* (1989) 20 FCR 217 and *Leslie v Graham* (Unreported, HREOC, Commissioner Innes, 21 July 2000).

210 *Johanson v Blackledge* (2001) 163 FLR 58, 75 [84]-[85]; *Cooke v Plauen Holdings* [2001] FMCA 91, [24]-[25]; *Horman v Distribution Group Limited* [2001] FMCA 52, [50]; *Wattle v Kirkland* [2001] FMCA 66, [46]; *Alekovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81, [83]; *Elliott v Nanda* (2001) 111 FCR 240, 277 [109]; *Kennedy v ADI Ltd* [2001] FCA 614; *Wattle v Kirkland (No 2)* [2002] FMCA 135, [67]; *Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142, [134].

211 (2001) 163 FLR 58.

> case of conduct directed at customers or potential customers. Once a person chooses to engage in conduct of a sexual nature in which another person, whether the intended target or not, who has not sought or invited the conduct, experiences offence, humiliation or intimidation and, in the circumstances, a reasonable person would have anticipated that reaction, the elements of sexual harassment are made out.[212]

In *Horman v Distribution Group Ltd*,[213] the evidence before Raphael FM was to the effect that the applicant had engaged in behaviour including crude and vulgar language, disclosure of personal information and the display of sexually explicit photographs of herself. Nevertheless, Raphael FM said:

> … I do not think that it necessarily follows that a person in the position of the applicant would still not be offended, humiliated or intimidated by some of the actions and remarks that I have found were made. To do this would assume an assent to a form of anarchy in the workplace that I do not believe a person in the position of the applicant would subscribe to. It is also significant that even Ms Gough [a co-employee], who was otherwise accepting of almost all the forms of behaviour that took place wanted to draw a line at the use of certain words. There was no denying of Ms Gough's entitlement to draw such lines, why should the applicant not be permitted the same right?[214]

In relation to evidence of the applicant's own use of 'crude and vulgar language', Raphael FM stated that:

> I am not sure that a reasonable person would not anticipate that the applicant would be offended, humiliated or intimidated by bad language solely because the applicant herself also used it from time to time.[215]

In *Font v Paspaley Pearls Pty Ltd*[216] ('*Font*'), Raphael FM found that the second respondent, Mr Purkis, had said to the applicant, in reference to the modelling of a pearl bikini at a promotional function: 'I need someone to model the bikini. Can you do it?'[217] Raphael FM found that the comment was conduct of a sexual nature, but was not satisfied that a reasonable person would have anticipated that the applicant would have been offended, humiliated or intimidated by the comment.[218]

The applicant in *Font* also complained of physical contact involving a slap and also a jab with a walking stick on 'the rear' by the second respondent. His Honour found this to constitute sexual harassment. In doing so, Raphael FM refused to accept that a 'defence of homosexuality' might apply[219] – the second respondent, it was accepted, was a gay man. His Honour noted that the fact that a person conducts themselves in a manner which would otherwise be in breach of s 28A cannot be negated by the fact that the person may not have any sexual designs upon the victim:

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212 Ibid 76 [89].
213 [2001] FMCA 52.
214 Ibid [51].
215 Ibid [49].
216 [2002] FMCA 142.
217 Ibid [17].
218 Ibid [130].
219 Ibid [134].

> The SDA is a protective Act. It is designed to protect people from the type of behaviour which other members of the community would consider inappropriate by reason of its sexual connotation. It is the actions themselves that have to be assessed, not the person who is carrying them out.[220]

Further to this, Raphael FM concluded that there is no requirement in the SDA that the protagonist should be of a different sex to, or have a different sexual preference than, the victim.[221]

In *Elliott v Nanda*,[222] the applicant was employed as a receptionist by the respondent. Moore J found that the employer's touching of the applicant and the making of sexual references or allusions directed to the applicant amounted to unwelcome conduct of a sexual nature. In making that finding his Honour noted the applicant was a teenager, and the respondent, a middle aged medical practitioner. His Honour said there could be little doubt that the conduct was such that a reasonable person would have anticipated that the applicant would be at least offended and humiliated by the conduct.[223]

In *Beamish v Zheng*,[224] the applicant complained of a range of conduct by the respondent co-worker, including sexual comments, an attempt to touch her breasts and an offer of $200 to have sex with him. In finding for the applicant, Driver FM stated:

> The workplace in which Mr Zheng and Ms Beamish worked was a fairly rough and tumble place in which lighthearted behaviour was tolerated. In the circumstances, a certain amount of sexual banter could have been anticipated. However, Mr Zheng's conduct was persistent and went beyond anything that could be described as lighthearted sexual banter. Ms Beamish's reactions to his conduct should have made clear that it was unwelcome. In the circumstances, a reasonable person would have anticipated that Ms Beamish would have been offended, humiliated or intimidated by Mr Zheng's persistent conduct. In particular, the attempt to touch her breasts was unacceptable and the offer of money for sex was grossly demeaning.[225]

In *Bishop v Takla*,[226] the applicant complained that her co-worker engaged in a range of conduct which constituted sexual harassment, including sexual remarks and physical contact. One such incident involved the respondent telling the applicant that he wanted to come up to a nightclub where she was working in another job, to which the applicant suggested that he come with his girlfriend. He responded that 'maybe I will come on my own'.[227] Raphael FM found that a 'reasonable person may well have anticipated that she might be intimidated by this'.[228]

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220 Ibid.
221 Ibid.
222 (2001) 111 FCR 240.
223 Ibid 277 [107]-[109].
224 [2004] FMCA 60.
225 Ibid [16].
226 [2004] FMCA 74.
227 Ibid [11].
228 Ibid [34].

4.6.5 Sexual Harassment as a Form of Sex Discrimination

The relationship between sexual harassment and discrimination on the ground of sex has been the subject of significant judicial consideration. Prior to the legislative proscription of 'sexual harassment' by the Commonwealth and all of the States and Territories, the NSW Equal Opportunity Tribunal held that unwelcome sexual conduct was sex discrimination under the *Anti-Discrimination Act 1977* (NSW) (as it then was) in the decision of *O'Callaghan v Loder.*[229]

The issue also arose in relation to the SDA in *Aldridge v Booth*,[230] which was heard after the insertion of the sexual harassment provisions (ss 28 and 29 as they then were). Spender J held that sexual harassment was a form of sex discrimination.[231] This finding was necessary for reasons relating to the Constitutional validity of the sexual harassment provisions of the SDA as CEDAW does not expressly deal with sexual harassment.

Spender J's decision was approved in *Hall v Sheiban*[232] by French J who held that s 28 of the SDA (the precursor to the current sexual harassment provisions in the SDA):

> puts beyond doubt that sexual harassment is a species of unlawful sex discrimination … [t]he requirements of s14 relating to discriminatory treatment in the terms and conditions of employment or subjection to detriment are subsumed in the nature of the prohibited conduct.[233]

While Lockhart J stated that it was an 'open question' as to whether the prohibition of sex discrimination included sexual harassment, he stated that 'a finding that s 14 does not include sexual harassment of the kind to which s 28 is directed would appear contrary to the trend of judicial opinion'. [234]

In *Elliott v Nanda*[235] ('*Elliott*'), Moore J stated:

> I respectfully agree with the statement of French J in *Hall v Sheiban* and of Spender J in *Aldridge v Booth* that s 14 is capable of extending to conduct that constitutes sexual harassment under Div 3 of Pt II. In my opinion, such a principle is consistent with the purpose and scheme of [the] SD Act and also with the overseas jurisprudence set out in *Hall v Sheiban* and *O'Callaghan v Loder* on the nature and scope of 'sex discrimination'.[236]

229 [1983] 3 NSWLR 89.
230 (1988) 80 ALR 1.
231 Ibid 16-17.
232 (1989) 20 FCR 217.
233 Ibid 277.
234 Ibid 235.
235 (2001) 111 FCR 240.
236 Ibid 281 [127].

Moore J also cited with approval decisions of HREOC which had clearly proceeded on the basis that conduct is capable of constituting both sex discrimination under ss 5 and 14 and sexual harassment under Division 3 of Part II of the SDA.[237] In the case before him, Moore J was satisfied the conduct of the respondent was in breach of s 14(2)(d):

> I have found that the conduct of the respondent involving touching the applicant and the sexual references or allusions specifically directed to the applicant were unwelcome, offensive and humiliating to the applicant and that a reasonable person would have anticipated as much. I am therefore satisfied that they imposed a detriment, within the meaning of s 14(2)(d), on the applicant on the grounds of her sex.[238]

This approach was also adopted in *Horman v Distribution Group Ltd*,[239] *Wattle v Kirkland*,[240] *Wattle v Kirkland (No.2)*,[241] *Font v Paspaley Pearls Pty Ltd*[242] and *Johanson v Blackledge.*[243]

In *Gilroy v Angelov*[244] ('*Gilroy*'), Wilcox J expressed reservations about whether s 14 applied in cases which involved the sexual harassment of one employee by another.[245] In that case, his Honour found that an employee had sexually harassed another employee within the meaning of s 28A and that their employer was vicariously liable under s 106. The applicant also contended that she had been discriminated against under ss 5 and 14 of the SDA. His Honour expressed reservations about whether s 14 applied and stated that s 28B was enacted specifically to deal with such complaints:

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237 Ibid 281-82 [128]. His Honour cited: *W v Abrop Pty Ltd* (Unreported, HREOC, Commissioner Atkinson, 27 May 1996), extract at (1996) EOC 92-858; *Phillips v Leisure Coast Removals Pty Ltd* (Unreported, HREOC, Commissioner Innes, 9 May 1997, extract at (1997) EOC 92-899; *Brown v Lemeki* (Unreported, HREOC, Commissioner Atkinson, 27 May 1997); *Biedermann v Moss* (Unreported, HREOC, Commissioner McEvoy, 20 February 1998).

238 (2001) 111 FCR 240, 282 [130]. That finding was necessary because under s 105 of the SDA a person will only be liable for aiding or permitting an act which is unlawful under Division 1 or 2 of Part II of the SDA. See further discussion of s 105 at 4.9 below.

239 [2001] FMCA 52.

240 [2001] FMCA 66.

241 [2002] FMCA 135, [67]. Driver FM expressly applied the reasoning of French J in *Hall v Sheiban* (1988) 20 FCR 217, 274-77 and Moore J in *Elliott v Nanda* (2001) 111 FCR 240, 281-82 [125]-[130].

242 [2002] FMCA 142, [136]-[139].

243 (2001) 163 FLR 58. This case involved sexual harassment in the provision of goods and services. Driver FM held that in order to constitute sex discrimination within the meaning of ss 5 and 22 of the SDA, the respondents must have engaged in some conduct which was deliberate and which was referable to the applicant's sex, or a characteristic of her sex (applying the reasoning in *Jamal v Secretary of Department of Health* (1988) 13 NSWLR 252). Driver FM concluded that this test had been satisfied on the evidence: (79-80 [95]-[96]).

244 (2000) 181 ALR 57.

245 In *Elliott v Nanda* (2001) 111 FCR 240 Moore J distinguished the decision in *Gilroy* on this basis. Moore J stated that 'the circumstances [Wilcox J] was considering differed from the present case, in that the harassment was there perpetrated by an employee, not by the employer.' Moore J went on to state 'to the extent that [Wilcox J] could be taken to have expressed the view that s 28B was enacted because it is artificial to extend s 14 to situations of sexual harassment, I would respectfully disagree' (281 [127]).

> I have reservations as to whether s 14(1) or (2) applies to this case. I think these subsections are intended to deal with acts or omissions of the employer that discriminate on one of the proscribed grounds. It is artificial to extend the concepts embodied in those sections in such a manner as to include the sexual harassment of the employee by another. As it seems to me, it was because s14 did not really fit that case that s28B was enacted. To my mind, s28B covers this case.[246]

Similarly, in *Leslie v Graham*[247] ('*Leslie*'), although Branson J agreed that s 14 was capable of extending to conduct that constituted sexual harassment as defined by s 28A,[248] her Honour was not persuaded that s 14 applied in cases which involved the sexual harassment of one employee by another.[249] In that case, Branson J found that an employee had sexually harassed another employee within the meaning of s 28B and that their employer was vicariously liable for that conduct. However, Branson J went on to state:

> while [the SDA] renders unlawful discrimination by an employer on the ground of sex, it does not render unlawful discrimination by a fellow employee on the ground of sex … I am not persuaded that [the respondent employee's] sexual harassment of [the applicant] constituted discrimination against her by her employer.[250]

In *Hughes v Car Buyers Pty Limited,*[251] Walters FM expressly disagreed with the decision of Branson J in *Leslie* on this issue. Walters FM found that the actions of a fellow employee of the applicant constituted not only sexual harassment, but also sex discrimination within the meaning of s 14(2)(d) of the SDA.[252] Walters FM also found that the respondent employer was vicariously liable for the employee's conduct and had itself unlawfully discriminated against the applicant on the ground of her sex.[253]

4.6.6 Sex-based Harassment and Sex Discrimination

Conduct which falls short of sexual harassment may nevertheless constitute sex discrimination if it amounts to less favourable treatment by reason of sex. In *Cooke v Plauen Holdings*,[254] for example, the applicant complained of the behaviour of her supervisor. This was found not to constitute sexual harassment (see 4.6.1 above). Driver FM found that the behaviour did, however, amount to sex discrimination:

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246 Ibid 75 [102].
247 [2002] FCA 32.
248 Ibid [73], citing *Elliott v Nanda* (2001) 111 FCR 240.
249 Note that Branson J did not refer to the decision in *Gilroy* in her judgment.
250 [2002] FCA 32, [73].
251 (2004) 210 ALR 645, 653 [42]-[43].
252 Ibid 653 [41].
253 Ibid 653 [44]. Like Branson J in *Leslie*, Walters FM did not refer to the decision in *Gilroy*.
254 [2001] FMCA 91.

> I find that Mr Ong subjected Ms Cooke to a detriment by reason of her sex in the course of his supervision of her. Mr Ong's supervision of Ms Cooke was more objectionable and more vexing than it would have been if she had been a man. In *Shaw v Perpetual Trustees Tasmania Limited* (1993) EOC 92-550 HREOC found that the complainant had established unlawful conduct within the meaning of the SDA insofar as her supervisor's treatment of her made her feel uncomfortable, unwelcome and victimised and this treatment was in part referable to her sex. The Commission found that the existence of a personality clash between the complainant and her supervisor did not exclude a characterisation of his conduct as hostile conduct based at least in part on the complainant's sex. The Commission found that it was sufficient if the sex of the aggrieved person was a reason for the discriminatory conduct. It was not necessary that it be the substantial or dominant reason. I think that this is a substantially similar case. Part of the reason for Mr Ong's conduct was that he had very poor human relations skills, although he was technically highly competent. However, part of the reason for his treatment of Ms Cooke was that she was a woman and thus more susceptible to his controlling tendencies.[255]

4.7 Exemptions

Part II, Division 4 of the SDA creates a series of exemptions to some or all of the unlawful discrimination provisions in Part II, Divisions 1 and 2. The exemptions do not operate in a blanket fashion.[256] They are specific to the different forms of discrimination as defined in Part I of the SDA or the different areas where discrimination may be unlawful as proscribed by Part II, Divisions 1 and 2. In summary:

- sections 30, 31, 32, 34(2), 35(1), 41, 42 and 43 create exemptions specific to discrimination on the ground of sex;
- section 35(2) creates an exemption which is specific to marital status discrimination;
- sections 41A and 41B create exemptions which are specific to discrimination in superannuation on the grounds of either sex or marital status;
- sections 38 and 39 create exemptions that apply to discrimination on the grounds of sex, marital status or pregnancy.

The balance of the exemptions in Division 4 (ss 34(1), 36(1), 37 and 40) are not specific to any particular ground of discrimination but operate in the context of specific areas such as accommodation, charities, religious bodies or an act done under statutory authority.

The exemptions do not apply to the prohibitions of sexual harassment contained in Part II, Division 3 of the SDA.

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255 Ibid [33].

256 See generally the Commonwealth Sex Discrimination Commissioner *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984* (1992).

Note also that s 44 empowers the HREOC to grant a temporary exemption on the application of a person.[257]

Many of the exemptions are yet to be the subject of any detailed jurisprudence. Significant decisions which have considered those provisions are discussed below.

4.7.1 Services for Members of One Sex

Section 32 of the SDA provides:

> Nothing in Division 1 or 2 applies to or in relation to the provision of services the nature of which is such that they can only be provided to members of one sex.

In *McBain v Victoria*,[258] the applicant challenged State legislation which prohibited the provision of fertility treatment to unmarried women not living in de facto relationships. This was found to be inconsistent with s 22 of the SDA which makes discrimination unlawful on the basis of marital status in the provision of goods, service and facilities. The State legislation was also found to be invalid under s 109 of the *Constitution* to the extent of the inconsistency (see 4.2.3 above).

As to the exemption in s 32, Sundberg J stated that it did not apply, as the service provided benefit to both men and women. His Honour stated:

> Section 32 looks to the *nature* of the service provided. The nature of the service in question in this proceeding is to be determined by reference to the State Act. All infertility treatments are dealt with in the one legislative scheme. There is no breakdown of the eligibility requirements for each type of treatment. Parliament has, in effect, characterised the treatments as being of the same general nature, namely treatments aimed at overcoming obstacles to pregnancy. Accordingly, the nature of these treatments is such that they are capable of being provided to both sexes. The service is the 'treatment procedure' – the artificial insemination of a woman with sperm from a man who is not her husband, or a fertilisation procedure. The reason for undertaking either of these procedures may be because of some physical feature of a man or a woman. The fertilisation procedure may involve taking a sound egg, capable of fulfilling its potentiality in ordinary circumstances, placing it in vitro, and fertilising it in this environment to solve a problem associated with the woman's husband. Whether the primary beneficiary of the treatment is a man or a woman, in the typical case the service is directed to achieving the desire of the couple to have a child. The fact that for biological reasons the embryo is placed into the body of the woman is but the ultimate aspect of the procedure. To concentrate solely on that aspect is not to view the overall "nature" of the service. The vice of the argument is

257 HREOC has developed criteria and procedures to guide the Commission in exercising its discretion under s 44 of the SDA. HREOC's guidelines are available at: http://www.humanrights.gov.au/legal/sda_exemptions.html. A recent example of an exercise of this power was the temporary exemption granted to the Catholic Education Office to offer an equal number of teaching scholarships to men and women. HREOC's decision is available at: http://www.humanrights.gov.au/legal/sda_exemption/ceo_exemption.html.

258 (2000) 99 FCR 116. Note that proceedings challenging this decision were brought in the High Court, however, they were dismissed without consideration of the merits: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

> that in order to bring the case within s 32 it is necessary to select from the scope of the service only that part of it that is provided on or with the assistance of a woman. Section 32 is intended to deal with services which are capable of being provided only to a man or only to a woman. The example given in argument is apt – a man who tells his doctor he wants a hysterectomy.[259]

4.7.2 Voluntary Bodies

Section 39 of the SDA provides:

> Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person's sex, marital status or pregnancy, in connection with:
>
> (a) the admission of persons as members of the body; or
>
> (b) the provision of benefits, facilities or services to members of the body.

Section 4 of the SDA defines a voluntary body as:

> an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include:
>
> (a) a club;
> (b) a registered organization;
> (c) a body established by a law of the Commonwealth, of a State or of a Territory; or
> (d) an association that provides grants, loans, credit or finance to its members.

In *Gardner v All Australia Netball Association Limited*[260] ('*Gardner*'), the respondent ('AANA') had imposed an interim ban preventing pregnant women from playing netball in the Commonwealth Bank Trophy, a national tournament administered by AANA. The applicant was pregnant when the ban was imposed and was prevented from playing in a number of matches as a result. She complained of discrimination on the basis of her pregnancy in the provision of services under s 22 of the SDA. The service in this case was the opportunity to participate in the competition as a player.

It was not disputed that AANA is a voluntary body for the purposes of the SDA, membership of which consisted of State and Territory netball associations. Individual netballers were not eligible to be members of AANA. AANA accepted that it had discriminated against the applicant. It argued, however, that its actions were protected by that exemption as they were 'in connection with' the provision of services to their member associations. Raphael FM decided that the exemption in s 39 did not apply. He held that it provided protection for voluntary bodies only in their relationships with their members but not in their relationships with non-members. The applicant was not, and could not be, a member of AANA.[261]

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259 (2000) 99 FCR 116, 121 [15].

260 (2003) 197 ALR 28. Note that the Commonwealth Sex Discrimination Commissioner appeared as amicus curiae in this case. A copy of the submissions made by the Sex Discrimination Commissioner are available at: http://www.humanrights.gov.au/legal/amicus/netball.htm.

261 Ibid [26].

Accordingly the actions of AANA constituted unlawful discrimination under the SDA.

In *Kowalski v Domestic Violence Crisis Service Inc,*[262] the applicant complained that he had been discriminated against by the respondent. He alleged that employees of the Domestic Violence Crisis Service had spoken only to his wife when they attended their house and refused him their services and that this was by reason of his sex. Driver FM dismissed the application, finding that the applicant had not been given the service of the respondent because the employees of the service had been informed by the police that it was his wife who had complained of domestic violence and was requiring their services.[263] In relation to the issue of s 39 of the SDA, Driver FM's brief comment suggests an approach similar to that taken in *Gardner*:

> The respondent had raised at the interlocutory stage of these proceedings a defence based on s.39 of the SDA. At trial, Ms Nomchong wisely did not press that defence. Section 39 clearly has no application in these proceedings because Mr Kowalski was not a member of the respondent and was not seeking to join.[264]

4.7.3 Acts done under Statutory Authority

Section 40(1) of the SDA provides:

> Nothing in Division 1 or 2 affects anything done by a person in direct compliance with:
>
> (c) a determination or decision of the Commission;
> (d) an order of a court; or
> (e) an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment; or
> (f) a certified agreement (within the meaning of the *Workplace Relations Act 1996)*.

In *Howe v Qantas Airways Limited*,[265] Driver FM considered the interpretation of s 40(1) of the SDA. In that case, the terms and conditions of the applicant's employment were substantially regulated by an enterprise agreement. The

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262 [2003] FMCA 99.

263 Ibid [43]. On appeal in *Kowalski v Domestic Violence Crisis Service* [2005] FCA 12, the appellant succeeded in establishing an error of fact which affected Driver FM's finding as to what was communicated to the Domestic Violence Crisis Service workers. Madgwick J found that the Domestic Violence Crisis Service workers were probably told that both the appellant and his wife had requested their attendance. However, the Court went onto state (at [68]):

> The difficulty for the appellant is that, even if it is accepted that both he and his wife requested the DVCS workers' attendance, the circumstances as a whole must be considered, including that the primary complaint was that the husband was removing property. There is no record in the police log of any complaint by Mr Kowalski of any untoward behaviour at all on the part of his wife.

Madgwick J found that it was highly probable that what was conveyed to the workers was that it was the appellant's wife that was the complainant. The finding of Driver FM that there had been no discrimination against the appellant on the basis of gender or marital status was therefore upheld.

264 [2003] FMCA 99 [45].

265 [2004] FMCA 242.

applicant alleged, inter alia, that the respondent had discriminated against her on the grounds of her pregnancy in the course of her employment.[266] The respondent sought to rely on the s 40(1) exemption in response to certain of these allegations made by the applicant. In relation to the interpretation of s 40(1), Driver FM stated:

> I accept the submissions … of the Sex Discrimination Commissioner [appearing as amicus curiae] that s.40(1) of the SDA should not be construed to protect acts which are consequential to compliance with an award or certified agreement … In my view, s.40(1) of the SDA means what it says. The subsection protects, relevantly, anything done by a person *in direct compliance* (my emphasis) with a certified agreement … [I]f the employer exercised a discretion in circumstances where the terms and conditions of employment were silent it could not be said that the respondent acted in direct compliance with the certified agreement.
>
> The limited authority available on the interpretation of s.40(1) and its State equivalents supports a narrow construction … In order for there to be 'direct compliance' within the meaning of s.40(1), the action taken by the discriminator must have been 'made necessary' by the clause in the award or certified agreement in issue.[267] (footnotes omitted)

4.7.4 Competitive Sporting Activity

Section 42(1) of the SDA creates an exemption for competitive sporting activity as follows:

> Nothing in Division 1 or 2 renders it unlawful to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.

It can be observed that the section does not explicitly state whether it applies only to mixed-sex sporting activity or same-sex sporting activity (or both).

The female applicant in *Ferneley v The Boxing Authority of New South Wales*[268] was denied registration as a kick boxer by reason of the *Boxing and Wrestling Control Act 1986* (NSW) which only provided for registration of males. The respondent contended that, even if it was found to be providing a service (see above 4.5.1) and thus bound by s 22, the exemption in s 42 of the SDA would apply.

The applicant, on the other hand, submitted that s 42 was intended to apply only

> where the sporting competition involved men and women competing against each other. It was not intended to apply where the competitors were of the same sex. The terms of section 42 are intended to determine when a person of one sex may be excluded, so it implicitly assumes that men and women are competing with each other in the relevant competitive sporting competition. Section 42 is not concerned with same sex sports.[269]

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266 See further discussion of this case at 4.2.4 above.
267 [2004] FMCA 242, [83]-[84].
268 (2001) 115 FCR 306.
269 Ibid 324 [81].

The applicant's argument was supported by the Sex Discrimination Commissioner, who appeared as amicus curiae.

In obiter comments, Wilcox J rejected the respondent's argument and held that 42(1) is only concerned with mixed-sex sporting activities and has no application to same sex sporting activity.[270] His Honour noted:

> To apply s 42(1) to same-sex activities leads to strange results. For example, on that basis, a local government authority could lawfully adopt a policy of making its tennis courts, or its sporting ovals, available only to females (or only to males), an action that would otherwise obviously contravene s 22. Yet the authority might not be able to adopt the same policy in relation to the chess-room at its local lending library, and certainly could not do so in relation to the library itself. There would appear to be no rational reason for such a distinction.[271]

In addition, his Honour noted that:

> the concept of excluding 'persons of one sex' from participation in an activity implies that persons of the other sex are not excluded; the other sex is allowed to participate. This can be so only in respect of a mixed-sex activity.[272]

Furthermore, Wilcox J found that this approach was consistent with the intention of Parliament.[273]

4.8 Vicarious Liability

Section 106 of the SDA provides:

> (1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:
>
> (a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Divison 1 or 2 of Part II); or
>
> (b) an act that is unlawful under Division 3 of Part II; this Act applies in relation to that person as if that person had also done the act.
>
> (2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

270 Ibid 325-26 [89]-[94].
271 Ibid 325-26 [90].
272 Ibid 326 [91].
273 Ibid 326 [92].

The following issues are considered in this section:

- onus of proof;
- 'in connection with' employment;
- 'all reasonable steps'; and
- vicarious liability for victimisation.

4.8.1 Onus of Proof

The applicant bears the onus of proof for the purposes of s 106(1) in establishing that there is a relationship of employment or agency and that the alleged act of discrimination occurred 'in connection with' the employment of an employee or duties of an agent.[274]

An employer or principal who seeks to rely on the defence in s 106(2) bears the onus of proof of establishing that it took all reasonable steps to prevent the alleged acts taking place.[275]

4.8.2 'In Connection With' Employment

Vicarious liability extends only to those acts done 'in connection with' the employment of an employee or with the duties 'of an agent as an agent' (s 106(1)).

The phrase 'in connection with' has been held to have a more expansive meaning than that given to expressions used in other general law contexts such as 'in the course of' or 'in the scope of'. In *McAlister v SEQ Aboriginal Corporation*[276] ('*McAlister*'), Rimmer FM stated that the clear intention of s 106(1) in using the word 'connection' was 'to catch those acts that are properly connected with the duties of an employee'.[277]

In *Trainor v South Pacific Resort Hotels Pty Ltd,*[278] an expansive interpretation of the phrase 'in connection with' was adopted by Coker FM. The respondent employer was held vicariously liable for the employee's conduct, even though the conduct occurred whilst the employee was off duty. In this case, an employee of the hotel sexually harassed a fellow employee in breach of s28B(2) of the SDA. The perpetrator's conduct was found to have sufficient connection with his employment because it occurred at the staff accommodation quarters of the hotel where both employees resided. Coker FM found that the respondent exercised control over its employees whilst on the hotel property, even when off duty. Coker FM stated '[i]t is obvious from the evidence, that staff behaviour on the respondent's property, was a key part of the employment relationship and more particularly, that the failure to comply with those requirements, led to the instant dismissal of [the perpetrator]'.[279]

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274 *Cooke v Plauen Holdings* [2001] FMCA 91, [35].
275 Ibid [35]; *Aldridge v Booth* (1988) 80 ALR 1, 12 (Spender J in obiter comments).
276 [2002] FMCA 109.
277 Ibid [135].
278 [2004] FMCA 374.
279 Ibid [68].

4.8.3 'All Reasonable Steps'

A central issue in determining vicarious liability under s 106 is the extent to which an employer must go to prevent sexual harassment.

In *Boyle v Ozden*[280] ('*Boyle*'), there was no evidence that any steps had been taken by the employers to prevent the commission of sexual harassment in the workplace. The employers in that matter were overseas at all relevant times, suggesting that they had no knowledge of the relevant incident. Nevertheless, HREOC found that s 106 of the SDA 'attaches vicarious liability to the [employers] unless they have done something active to prevent the acts complained of' and found the employers vicariously liable for the actions of its employee towards another employee.[281]

In *Gilroy v Angelov*,[282] where the employers owned a small contract cleaning business, Wilcox J found that since the respondent employers had actual knowledge of the harassment which had taken place and had done nothing about it, they did not have a defence under s 106(2).[283] His Honour noted that an employer would be more likely to show that they had taken reasonable steps to prevent sexual harassment if they followed a simple procedure of routinely providing new employees with a brief document pointing out the nature of sexual harassment, the sanctions that attach to it and the course to be followed by any employee who feels sexually harassed.[284]

His Honour did not express a concluded view on whether or not a defence under s 106(2) was available in circumstances where an employer has taken no steps to prevent harassment and has no knowledge that harassment has occurred or is threatened. In *Aldridge v Booth*,[285] however, Spender J stated, in obiter comments:

> It is to be noted that pursuant to [s 106(2)], it is for an employer or principal to establish all reasonable steps to be taken by that employer or principal to prevent the acts constituting the unlawful conduct. The discharge of this onus, of course, depends on the particular circumstances of a case, **but it is seriously to be doubted that it can be discharged in circumstances of mere ignorance or inactivity**. In *Tidwell v American Oil Co* (1971) 332 F Supp 424 at 436 it was said: 'The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action.'[286] (emphasis added)

280 (1986) EOC 92-165.
281 Ibid 76,614.
282 (2000) 181 ALR 57.
283 Ibid 75 [100].
284 Ibid.
285 (1988) 80 ALR 1.
286 Ibid 12.

In *Johanson v Blackledge*[287] ('*Johanson*'), discussed above,[288] the proprietors of the small butcher's shop, which had less than six employees, were unaware that their employees had provided the applicant with a bone fashioned to resemble a penis. The proprietors were responsible for overseeing all aspects of the daily operations of the business although they were not always present in the shop. In considering whether the proprietors could establish a defence under s 106(2), Driver FM indicated his approval of the decision in *Boyle* as authority for the proposition that it is not necessary for a respondent to be aware of an incident of harassment for vicarious liability to apply. His Honour also confirmed that it is no excuse to a claim of sexual harassment to argue that an employee was not authorised to harass people (which might otherwise take the act outside the sphere of employment).[289]

Driver FM held that the size of the employer will be relevant to the question of whether the steps taken by the employer to prevent sexual harassment were all that could reasonably be expected in the circumstances. His Honour stated:

> [I]t would be unrealistic to expect all employers, regardless of size, to adhere to a common standard of preventative measures. This defence has been interpreted in Australia as requiring the employer or principal to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus, large corporations will be expected to do more than small businesses in order to be held to have acted reasonably. I note, however, that the reasonableness factor applies to the nature of the steps actually taken and not to determine whether it was reasonable not to have taken steps in the first place.[290]

In the context of the matter before Driver FM, the butcher's shop was a very small business and his Honour found that a written sexual harassment policy was not necessary.[291] However, his Honour held that the respondents had not taken 'all reasonable steps' within the meaning of s 106(2):

> There is no evidence that the respondents informed employees that disciplinary action would be taken against them should they engage in sexual harassment. No brochures containing information on sexual harassment were made available and there is no evidence that the respondents advised new staff that it was a condition of their employment that they should not sexually harass a customer or co-worker… the instructions given by the employer to the employees were not specifically targeted at sexual harassment and were manifestly ineffective in their application.[292]

In addition, his Honour found that the respondents in *Johanson* did not have an effective complaint handling procedure in place to deal with complaints of harassment. His Honour held that '[i]t is not enough to have a policy. One has to apply it'.[293]

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287 (2001) 163 FLR 58.
288 See 4.6.4 and 4.6.5.
289 (2001) 163 FLR 58, 80-1 [99].
290 Ibid 81 [101].
291 Ibid 82 [103].
292 Ibid 82 [105].
293 Ibid.

The principle that the size of a business will be relevant in determining whether or not 'all reasonable steps' have been taken has been applied elsewhere. In *McAlister*, for example, Rimmer FM stated:

> Care needs to be taken when considering the meaning of the expression 'taking reasonable steps to prevent sexual harassment occurring'. The Sex Discrimination Act expects all employers to adopt preventative measures. This defence has been interpreted in Australia as requiring the employer to take some steps, the precise nature of which will be different according to the circumstances of the employer. Thus large corporations will be expected to do more than smaller businesses in order to be held to have acted reasonably.[294]

In *Aleksovski v Australia Asia Aerospace Pty Ltd*,[295] Raphael FM had regard to the fact that there was no system in place to ensure that the company's equal opportunity and sexual harassment policies were disseminated to the workplace. His Honour stated:

> It is generally accepted that all 'reasonable steps' in connection with sexual harassment in the workplace means that the employer is required to have a policy in relation to sexual harassment which should be clear and placed in written form and communicated to all members of the workforce. But in addition to that it is generally considered that continuing education on sexual harassment should be undertaken.[296]

Raphael FM also noted that the applicant in that matter was the only female member of the workforce at that site and that no 'special arrangements' were made to accommodate this.[297]

In *Shiels v James*,[298] the applicant was the only female employee on a building construction site. Raphael FM found in that case that the respondent was unable to satisfy the requirements of s 106(2) of the SDA because:

- Its anti-discrimination policy, 'good as it was', was not delivered to the applicant or indeed any of the workers on the site until six weeks after the applicant had commenced work and some four weeks after the allegations of sexual harassment.
- There was no verbal explanation of the policy nor was its existence specifically drawn to the attention of workers.
- The applicant could have expected that her interests would be looked after in a more direct manner in the particular circumstances in which she found herself, a lone female on a building site.
- The nominated sexual harassment contact people were based off-site and the applicant had little or no contact with them on a day-to-day basis.

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294 [2002] FMCA 109, [143]. See also *Cooke v Plauen Holdings* [2001] FMCA 91, [37].
295 [2002] FMCA 81.
296 Ibid [88].
297 Ibid [92].
298 [2000] FMCA 2.

- The applicant complained to the harasser about the incidents but he, although a senior employee of the company, did not desist from the behaviour.[299]

4.8.4 Vicarious Liability for Victimisation

In *Taylor v Morrison,*[300] Phipps FM considered an application for summary dismissal on the grounds that the SDA did not provide for vicarious liability for victimisation contrary to s 94. The Commonwealth argued that s 106, which provides for vicarious liability in relation to some sections of the SDA, did not extend to the proscription of victimisation contained in s 94 of the SDA. In dismissing the Commonwealth's application for summary dismissal, Phipps FM found that there were substantial arguments that the common law principles of vicarious liability nevertheless applied to claims of victimisation.[301]

4.9 Aiding or Permitting an Unlawful Act

Section 105 of the SDA provides:

> A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1 or 2 of Part II shall, for the purposes of this Act, be taken also to have done the act.

Issues have arisen in a number of cases as to whether 'permitting' requires knowledge on the part of the 'permitter'.

Sir Ronald Wilson, sitting as the then President of HREOC, held as follows:

> In my opinion, s.105 requires a degree of knowledge or at least wilful blindness or recklessness in the face of the known circumstances in order to attract the operation of the section. That knowledge does not have to go so far as to constitute knowledge of the unlawfulness of the proposed conduct but it must extend to an awareness of, or wilful blindness to, the circumstances which could produce a result, namely discrimination, which the Act declares to be unlawful.[302]

It can be observed that Sir Ronald Wilson's approach does not necessarily require actual knowledge of the unlawfulness of the acts in question, but does require some actual or constructive knowledge of the surrounding circumstances by the respondent.

In *Elliott v Nanda*,[303] the issue was whether the Commonwealth, through the Commonwealth Employment Service ('CES'), permitted acts of discrimination on the grounds of sex involving sexual harassment. The primary respondent was a medical doctor. The applicant obtained employment as a receptionist with the

299 Ibid [74].
300 [2003] FMCA 79.
301 Ibid [22].
302 *Howard v Northern Territory of Australia* (1995) EOC 92-672, 78,133. Cited, in the context of the DDA, in *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481, 494-95 [43].
303 (2001) 111 FCR 240.

doctor via services provided by the CES. There was evidence indicating that the respondent knew that several young women placed with the respondent had made allegations to the effect that they had been sexually harassed in a manner that would constitute discrimination on the ground of sex. (Note in this regard that s 105 relates only to Divisions 1 and 2 of Part II of the SDA, discrimination in employment and other areas. It does not extend to Division 3 of Part II – the sexual harassment provisions).

Moore J cited with approval the decision of Madgwick J in *Cooper v Human Rights and Equal Opportunity Commission*[304] in relation to the materially identical provision of the DDA (s 122) to the effect that the notion of 'permitting' should not be approached narrowly.[305] Moore J went on to state:

> In my opinion, a person can, for the purposes of s105, permit another person to do an act which is unlawful, such as discriminate against a woman on the ground of her sex, if, before the unlawful act occurs, the permitter knowingly places the victim of the unlawful conduct in a position where there is a real, and something more than a remote, possibility that the unlawful conduct will occur. That is certainly so in circumstances where the permitter can require the person to put in place measures designed to influence, if not control, the person's conduct or the conduct of the person's employees.[306]

Moore J held that the CES had permitted the discrimination to take place as the number of complaints of sexual harassment from that workplace should have alerted the CES to the distinct possibility that any young female sent to work for the doctor was at risk of sexual harassment and discrimination on the basis of sex.[307] The fact that the particular caseworker who facilitated the employment of the applicant was probably unaware of those complaints was found by Moore J to be immaterial. His Honour said that the collective knowledge of the officers of the CES was to be treated as the knowledge of the Commonwealth.[308]

304 (1999) 93 FCR 481. See 5.4.2 on the DDA for further discussion.
305 (2001) 111 FCR 240, 276-77 [160].
306 Ibid 292-93 [163].
307 Ibid 294-95 [169].
308 Ibid 295 [170].