



ARTICLES

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CONCILIATION AS A MODE OF SETTLEMENT OF DISCRIMINATION COMPLAINTS (The Experience of the Employment Discrimination Committees)

1. BACKGROUND

One of the most universally ratified ILO¹ Conventions is Convention No 111 concerning Discrimination in Employment and Occupation, 1958. It has achieved 107 ratifications to date and Australia ratified it in 1973.

Convention No 111 was a pioneer in the field of equality at work and in advance of other internationally binding Human Rights instruments. This Convention and Recommendation No 111, 1958 were adopted by the International Labour Conference to deal with the overall problem of discrimination in both public and private sectors of employment.

Its Preamble recalls the Declaration of Philadelphia of 1946 which 'affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.

It further mentions that 'discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights', 1948.

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¹ The International Labour Organisation (ILO) was established in 1919 by Part XIII of the Treaty of Versailles with the idea that 'universal and lasting peace can be established only if it is based upon social justice'. In its 68 years existence the International Labour Conference has elaborated over 160 Conventions and a similar number of Recommendations with the object of improving labour standards and promoting domestic labour and social legislation. Australia has been a member of the ILO since its creation in 1919.

Convention No 111 sets out certain goals but the means to achieve them were left to the member states. The framework and the process of elimination of discrimination was initiated but flexibility and scope for development were left to national authorities. It is a promotional convention in the sense that it requires a declaration and pursuit of a policy, rather than compliance with specific standards.

The Minister of Labour, Mr Clyde Cameron, when introducing ILO Convention No 111 in Parliament said:

'Most conventions specify specific standards and require compliance with those standards. This Convention is a declaration of intent, a declaration of a Government's policy, in this case in respect to discrimination on grounds of politics, religion, race, nationality or sex in employment or in employment opportunities ... Ratification of this Convention by Australia requires declaration of this policy as defined in the Convention. *This statement fulfills the requirement.*²

The Minister emphasized that discrimination was an anti-social offence and to practice discrimination was to practice injustice. He gave expression to the Australian Government's determination not merely to remove cases of blatant discrimination but also to promote real equality of opportunity in employment.

2. ESTABLISHMENT AND ROLE OF EDCs

The pursuit of this new policy was entrusted to a National and six State Committees on Discrimination in Employment and Occupation (EDCs) that operated successfully from 1973-1986. The National Committee comprised an independent Chairman, a representative of the Australian government, the Confederation of Australian Industry (CAI) (the most representative employer body in Australia), and the Australian Council of Trade Unions (ACTU) (the peak council of employee bodies) as well as members representing the interests of women, Aborigines and migrants. The Ministerial Statement of 22 May 1973 served as the legal basis for the creation of these non-statutory Committees. The State Committees — also tripartite in their composition — were constituted by administrative arrangements with the States and employer and union bodies. A Northern Territory Committee was established in 1979. The EDCs applied directly the provisions of the Convention and operated upon the guidelines and definition of discrimination laid down by it. In conformity with the Convention, the main objectives of the Committees were: to investigate and resolve by conciliation complaints of discrimination in employment and to conduct community education programs aimed at changing discriminatory attitudes.

The Committees' composition on a tripartite basis was in conformity with Articles 1(1)(b) and 3(a) of the Convention. In their efforts to persuade persons and organisations to abandon discriminatory practices the Committees have been immeasurably strengthened by their tripartite structure.

From the first report submitted to the ILO by the Australian Government on the measures taken to give effect to the provisions of Convention 111, (in accordance with Article 22 of the ILO Constitution),

² Aust, Parl, *Debates*, H of R (1973) vol 84, 2372.

it follows that the reasons for the implementation of this Convention without recourse to legislation were:

- (a) doubts concerning the constitutional power of the Commonwealth (Federal) Government to enact comprehensive and all embracing legislation on the subject;
- (b) support for the policy from the State Governments, the trade union movement and employer organisations;
- (c) the desire to effect a deep and lasting change in community attitudes and opinions as far as possible by *persuasion*; and
- (d) the desire to provide suitable machinery for the resolution of complaints which was *informal, flexible* and to which complainants had *easy access*.³

These four elements have accompanied the evolution of the work of the Committee for the past 13 years. Their mark on community attitudes *directly* through education and *indirectly* through conciliation and persuasion is of a lasting nature and may be judged as more effective than legislative sanctions. The machinery of conciliation, as we shall see later on, afforded easy access, and has been informal and flexible.

While the Committees were not established on a statutory basis they were administered by and reported to the Commonwealth Minister for Employment and Industrial Relations — up to 1983 — and from then on to the Attorney-General.

3. DEFINITION OF DISCRIMINATION

Article 1 of the Convention defines 'discrimination' as including —

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies'

The progressive interpretation of Article 1(1)(b) by the EDCs to cover nine additional grounds (age, criminal record, marital status, medical record, nationality, personal attributes, physical disability, sexual preference, trade union activity) to the seven grounds of discrimination enumerated by the Convention was possible only because of the tripartite consensus principle upon which the Committees operated.

Article 1(2) makes it quite clear that 'any distinction, exclusion or preference in respect of a particular job based on the *inherent requirements thereof* shall not be deemed to be discrimination'. This part of the provision which constitutes an exemption clause has been interpreted in practice by the Committees as being part of the definition of discrimination by reasoning *a contrario*. Namely, any act of distinction, exclusion or preference which is *not* related to the inherent requirements of a job and cannot be justified as such is deemed discrimination. In

³ Aust, *First Report to the ILO for the period 1.7.1973 — 30.6.1975*, 25.-c9--

legal terms Article 1 of the Convention provides a *general definition of discrimination* in which the inherent requirements of a job are the sole criteria for the justification of distinction, exclusion or preference. The definition that appears in Article 1 subsection (1) is merely illustrative of this general definition and constitutes a non-exhaustive catalogue of grounds of discrimination to be adapted to domestic needs and to be developed to suit the changing values and mores of the community.

4. GROUNDS OF ADMISSIBILITY OF COMPLAINTS

The Procedural Guidelines for Committees on Discrimination in Employment and Occupation (1983)⁴ portray the practice which had crystallised in the 10 years' experience of the EDCs and which has been consistently followed ever since (ie 13 years practice). The *Procedural Guidelines*⁵ for the investigation of complaints make a clear distinction between (A) 'relevant complaints' on grounds which are specifically listed within ILO Convention No 111 Article 1(1)(a) and (B) complaints *which have been determined in consultation* with representative employer' and workers' organisations and with other appropriate bodies as provided in ILO Convention No 111 Article 1(1)(b), that is

- age
- criminal record
- marital status
- medical record
- nationality
- personal attributes
- physical disability
- sexual preference
- trade union activities

Although no formal determination of additional grounds was made, the empiric fashion in which the nine additional grounds have developed endowed them with the necessary legitimacy.

The legal validity of 'such other' grounds of discrimination is supported by the wording of Article 1(1)(b) of the Convention itself and by the fulfilment of the condition precedent of tripartite consultation enshrined in the provision:

'such other distinction, exclusion or preference which has the affect of nullifying or impairing equality of opportunity of treatment in employment or occupation *as may be determined* by the Member *after consultation with representative employers' and workers' organisations*, where such exist, and with other appropriate bodies'.

The recent Human Rights and Equal Opportunity Commission Act, 1986 entrusts a new body, the Human Rights and Equal Opportunity Commission, with the implementation of human rights and equal opportunity policies, including the responsibilities hitherto discharged by the EDCs in respect of ILO Convention No 111. According to Section 3 of the Act, the ILO Convention on Discrimination (Employment and Occupation), 1958 is set out in Schedule I of the Act and thus forms part thereof.

4 Department of Employment and Industrial Relations, Canberra.

5 Ibid.

The Act reproduces the definition of 'discrimination' laid down in Article 1 of Convention No 111 as well as the exception in respect of a particular job based on the inherent requirements of the job. The formulation is for all practical purposes identical to that of the Convention.

The possibility under the Convention to create additional grounds of discrimination is reproduced by section 3(1) of the Act in the following manner:

- (b) any other distinction, exclusion or preference that (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and
(ii) *has been declared by the regulations to constitute discrimination for the purposes of this Act*.

The creation of additional grounds is thus possible by way of declared regulations.

Section 31 of the Act dealing with the functions of the Commission relating to equal opportunity expressly preserves in subsection (b) the mode of settlement of inquiries by conciliation exercised hitherto by the Committees. Subsections (f) and (g) provides for measures to prevent inconsistencies between relevant international instruments including Convention No 111.

The Act is, however, silent on the tripartite aspect of the composition and functioning of the machinery to safeguard equal opportunity in the spirit of the ILO Convention. The question also arises as to the future of the existing additional grounds created by the EDCs over the years. Are they to be maintained and applied by the new Commission?

Section 17 of the 1986 Act merely provides that the Commission will be assisted by advisory committees in particular in relation to compliance with ILO Convention No 111. The question that needs to be addressed is whether the practice of the EDCs over the past 13 years and the acquiescence of the social partners have matured into a customary rule of law and whether the conciliation process has engendered substantive rights and a 'legitimate expectation'.

Ubi remedium, ibi ius

It is to the latter question that we turn our attention primarily. It has been submitted that in the Common Law system (as distinguished from Civil Law systems) the Latin maxim of *Ubi ius, ibi remedium* which dictates that 'whenever there is a right there should also be an action for its enforcement'⁷ should be reversed. It is rather the existence of a remedy and a venue for redress, such as the EDCs, that crystallises a substantive right.

6 Section 17(1)(b) provides as follows: 'When requested by the Minister, to report to the Minister as to the action (if any) that needs to be taken by Australia in order to comply with the provisions of the Convention and, in particular, to advise the Minister in respect of national policies relating to equality of opportunity and treatment in employment and occupation.'

According to s 3 'Convention' means the Discrimination (Employment and Occupation) Convention, adopted by the General Conference of the International Labour Organisation on 25 June 1958.

See also Aust, *Report to the ILO for the period 1.7.1984 -- 30.6.1986*, 8.

7 *Salmon on Jurisprudence*. (11th edn 1957, Williams ed) 531. The 12th edition (1976) has not reproduced this part of the original book.

The eminent jurist Sir John Salmond, Professor of Law at the University of Adelaide (1897-1906),⁸ wrote on the evolution of rights in his classic on *Jurisprudence* in 1902: 'We find ... remedies and forms of action determining rights, rather than rights determining remedies'.⁹ Similarly, G W Paton in his *Textbook of Jurisprudence* states that: 'the law of procedure creates rights — or more accurately claims, liberties, powers, and immunities — just as does substantive law'. Furthermore, Dicey, the classic English authority on constitutional law maintained that what matters is not high-sounding declarations of rights but legal remedies!¹⁰

In the light of the authorities cited it may be valid to assume that the consistent practice of the EDCs has engendered certain rights or claims on the additional grounds of discrimination evolved by them over the years.

The most clear and unequivocal backing to the extension of grounds of discrimination we find in the Ministerial Statement of 22 May 1973.

'The ILO Convention is concerned with specific grounds of discrimination in employment, but it makes provision for extension after consultation with representative employer and worker organisations and with other appropriate bodies, into other areas where abolition of discrimination might be pursued, for example, discrimination in employment on grounds of age. The Government therefore proposes that it will be open to the Committee machinery to receive and investigate cases alleging discrimination in employment on grounds beyond those listed in the convention. The Government is not content just to eliminate discrimination on those grounds specifically referred to in the Convention. We are determined to go beyond the requirements of the Convention, to move into areas of discrimination not mentioned by the Convention at all — all areas of discrimination no matter upon what ground the discrimination is based. The National Committee will then be in a position to advise the Government on other forms of discrimination in employment and occupation considered to require action in Australia.'¹¹

The intention was not to create merely *de facto* additional grounds but grounds that would be at par with the grounds specified in the Convention.

Discrimination on ground of *age* was singled out as one of the examples of practices to be abolished. The possibility of including age amongst the grounds of discrimination had already been considered by the International Labour Conference 40th Session in 1956. It was pointed out by the U.K. Government and also by the Federal Republic of Germany that age may be a ground to be determined by any Member

8 See (1964) 2 *Adelaide Law Review* 222.

9 Above n 7, at 531.

10 (4th edn 1972) 590 et seq; see also David and Brierly, *Major Legal Systems in the World Today* (2nd edn 1978) 327 et seq on the importance of adjective law. And see more recently Sir Humphry Waldock 'The Effectiveness of the System set up by the European Convention on Human Rights' in (1980) 1 *Human Rights Law Journal*, 11-12.

11 Above n 2, at 2377.

State under Article 1(1)(b).¹² The Australian Delegation has proposed to include age amongst the specific grounds of discrimination enumerated in Article 1(1)(a).

Examining other *travaux préparatoires* of the International Labour Conference and the *Report of the Committee on Discrimination* prepared for the 42nd Session which in 1958 adopted Convention No 111, it appears further from the general discussion that it was the opinion of the Employers' members that the Convention and Recommendation should deal specifically also with *discrimination based on membership or non-membership of a trade-union* and that Article 1 should list such membership in the 'catalogue' of grounds of discrimination. In their opinion it was on this ground that some serious and objectionable forms of discrimination occurred.¹³ Listing this ground would have been in the spirit of ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, 1948 ratified by Australia in 1973. The EDCs in extending their investigation of complaints on this ground were acting within the spirit of the ILO.

Almost 30 years later the *ILO Draft Guide of Practice for Equal Opportunity and Treatment in Employment*, 1985¹⁴ reconfirms that Article 1(1)(b) of Convention No 111 'makes it quite clear that the grounds of discrimination listed in subsection (a) are not exhaustive and that each country may include in its definition such other grounds which are considered unrelated to job requirements or an individual's ability to perform a job. For example other ILO standards have specifically dealt with discrimination based on:

age
marital
status
family situation
family responsibility
disability, and
condition of migrant workers'¹⁵

Although the additional grounds developed by the EDCs are not identical with those enumerated by the ILO they have common ground, with the addition, however, of criminal record, personal attribute and sexual preference.

The EDC's 'such other' grounds were repeatedly made public in the Annual Reports of the National Committee. Likewise, the Australian Government's Reports to the ILO (pursuant to Article 22 of the ILO Constitution) have made constant reference to the extension of the scope of complaints.¹⁶

12 Cf ILO: *Discrimination in the field of Employment and Occupation Report VII (2)*, International Labour Conference, 40th Session, Geneva 1956 (Geneva 1957) 104-105.

13 4th Item on the Agenda of the 42nd Session of the *International Labour Conference*, 1958, Appendix VI: *Discrimination in Employment and Occupation*, 709 et seq. This proposal was, however, rejected by 160 votes to 262 with 40 abstentions.

14 Doc EGALITE/1985/D 3 (Rev 1) Geneva, 1968, 2.

15 See ILO Standards and action for the elimination of discrimination and promotion of equality of opportunity in employment. Doc EGALITE/1984/D 1 ILO, 1984.

16 Report for the period 1.7.1977 — 30.6.1978, 5A; Report for the period 1.7.1978 — 30.6.1980, 16; Report for the period 1.7.1980 — 30.6.1982, 18, and Report for the period 1.7.1982 — 30.6.1984, 7 and 11.

Over the years the proportion of complaints dealt with by the EDCs on grounds other than those specified by the Convention averaged just under 50 per cent. In 1980-81 almost 56 per cent of complaints belonged to the 9 additional grounds evolved by the Committees!¹⁷

The ILO Committee of Experts on the Application of Conventions and Recommendations — the ILO supervisory organ — noted that 'the national and state tripartite Employment Discrimination Committees, set up at the time of ratification of the Convention to investigate and conciliate complaints and to develop community education programmes to promote equal employment opportunity, have extended continuously the scope of their activities'¹⁸

In their observations 'the Committee (of Experts) requests the (Australian) Government to continue to supply information on the activities of the Employment Discrimination Committees ...'¹⁹

Australia is not alone in extending — by legislation or otherwise — the grounds of discrimination enumerated by Article 1 of the Convention.²⁰ Canada, for instance, has prohibited discrimination on grounds of age. Many states, including the 12 member states of the European Community which are bound by Council Directive 76/207 EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, have extended grounds of discrimination to cover distinction on the basis of 'marital or family status' in accordance with Article 2(1) of the Directive.²¹

One of the major tasks of the new Commission should be to define and list the admissible grounds of discrimination complaints in the light of the accumulated experience and policy of the EDCs. This task would be made easier if it also looks to ILO and overseas experience for guidance and inspiration.

5. CONCILIATION AS A MODE OF SETTLEMENT OF DISPUTES

ILO Recommendation No 111 concerning Discrimination in Respect of Employment and Occupation, 1958 provides in Article 4 as follows:

'Appropriate agencies, to be assisted where practicable by advisory committees composed of representatives of employers' and workers' organisations...should be established for the purpose of promoting application of the policy in all fields of public and private employment, and in particular...

b) to receive, examine and investigate complaints that the policy is not being observed and, if necessary *by conciliation*, (emphasis added) to secure the correction of any practices regarded as in conflict with the policy.'

The EDCs created in Australia to implement Convention No 111 were

17 Report for the period 1.7.1980 — 30.6.1982, 18.

18 *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference 71st Session 1985, ILO Geneva, 278-279.

19 *Ibid.*

20 Cf Report VII, Equal Opportunities and Equal Treatment for Men and Women in Employment, International Labour Conference 71st Session 1985, ILO Geneva, 60-62.

21 *Official Journal of the European Communities*, L 39, 4.2.1976, 40. See also Eve C Landau, *The Rights of Working Women in the European Community*, European Perspectives Series, Brussels (1985).

composed on the tripartite model of the above Recommendation and their procedure of hearing and receiving complaints was by conciliation in compliance with Article 4(b).

(a) Definition and Background

Conciliation is a process of peace-making. It is a mode of peaceful resolution of conflicts. It entails third party intervention in promoting the voluntary settlement of disputes.

As a human institution, it is probably as old as mankind. It has been in use since time immemorial and finds illustrations in the Bible. The New Testament (St Luke Ch 12 (57-59) *The Jerusalem Bible*) contains the following passage: 'When you go to Court with your opponent, *try to settle with him on the way* or he may drag you before the bailiff and the bailiff have you thrown into prison. I tell you, you will not get out till you have paid the very last penny.'

Conciliation has always been important in the field of international relations for the peaceful settlement of conflicts between states and for the maintenance of international peace. With 1986 being the International Year of Peace, it is appropriate to dwell upon conciliation — one of the modes of pacific settlement of disputes.

Chapter VI of the United Nations' Charter is entitled 'Pacific Settlement of Disputes' and article 33 reads as follows:

- '1 The parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security shall first of all, seek a solution by:
- negotiation,
 - enquiry,
 - mediation,
 - conciliation,
 - arbitration,
 - judicial settlement,
 - resort to regional arrangements, or
 - other peaceful means of their own choice.'

The above enumerated modes of settlement of disputes do not constitute any hierarchy. Some disputes by their nature better lend themselves to *diplomatic settlement* i.e, negotiation without third party intervention, or to settlement with third party intervention such as good offices, enquiry, mediation and conciliation.

Other disputes better lend themselves to *judicial settlement* i.e by arbitration or by a decision of the International Court of Justice.

The international experience and practice have shown that before a judicial settlement is attempted the diplomatic means of settlement are usually exhausted first. This is due to the principle of sovereignty of states in international law. States are reluctant to resort to *compulsory judicial settlement* of disputes. They rather prefer *voluntary settlements* such as mediation or conciliation to judicial settlement.

(b) Conciliation in Industrial Relations and Employment

Returning from international conciliation to the field of industrial relations. It is in this field that this method of settling disputes has been most frequently and intensively used and has thus achieved the highest degree of development and refinement.

The *ILO Practice Guide to Conciliation in Industrial Disputes*, 1973 offers the following description of conciliation:

'The practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to *reduce the extent of their differences and to arrive at an amicable settlement or agreed solution*. It is a process of rational and orderly discussion of differences between the parties to a dispute under the guidance of the conciliator.'

The conciliator's function is to assist the parties towards a mutually acceptable *compromise* or *solution*. For this the only powers on which he can really rely are his *powers of reassuring and persuasion* because unlike decisions of a judge or arbitrator, a conciliator's 'settlement' has *no binding force*.

Another unique and essential characteristic of the conciliation process is its *flexibility*, which sets it apart from other methods of settling industrial disputes. A conciliator cannot follow the same procedure in every case; he must adjust his approaches, strategy and techniques to the circumstances of each dispute.

(i) *Conciliation and Adjudication*

Conciliation is a non-judicial mode of settlement of disputes. Adjudication is a procedure whereby ordinary courts or special labour courts settle finally any dispute *over rights and obligations*.

(ii) *Conciliation and Mediation*

Both procedures consist in a third party providing assistance to the parties in the course of negotiations, or when negotiations have reached an impasse with a view to helping them reach an agreement. While in many countries these terms are interchangeable, in some countries a distinction is made between them according to *the degree of initiative taken by the third party*. Such distinction reflects the etymological origins of these terms: 'Conciliation' is derived from the latin *conciliare*, meaning 'to bring together' or 'to unite in thought' while 'Mediation' is derived from *mediare*, meaning to occupy a middle position.

The role of conciliator is generally a passive one compared with the role of a mediator.²² Although in the industrial relations context in Australia a conciliator seems to have a more active role.

(iii) *Conciliation and Arbitration*

The distinction between conciliation and arbitration in the settlement of industrial disputes is generally well established in national laws and regulations. However, when industrial relations are only in their infancy there may be a tendency to confuse the two processes, and the parties to a dispute may think of the person acting as conciliator between them as being empowered to lay down terms of settlement which they must accept. The distinction needs no elaboration in a country like Australia where the role of the Australian Conciliation and Arbitration Commission is deeply rooted in the industrial relations landscape since its creation in 1904.

22 See Maggiolo, *Techniques of Mediation in Labour Disputes* (1971).

(c) Interest and grievance disputes

A distinction is often made between interest disputes and grievance disputes:

(i) *Interest Disputes*

National practice is not uniform in its identification of this type of dispute, but the essential elements are more or less the same: in general they relate to the establishment of new terms and conditions of employment for the general body of workers concerned. In most cases the disputes originate from trade union demands or proposals for job security, wage increases, fringe benefits, or other improvements in the terms of employment. These demands or proposals are normally made with a view to conclusion of a collective agreement, and a dispute arises when the parties fail in their negotiations to reach an agreement. The conciliation of this type of dispute is itself a part of the collective bargaining process, being an extension or a continuation of the negotiations between the parties, with the conciliator's assistance.

The negotiations over these issues are usually a matter of give-and-take, of haggling and bargaining, between the parties. The practices prevailing in other sectors of the economy may provide some guidance on possible lines of accommodation. Apart from this the parties cannot refer to any definite mutually binding standards; each side seeks to obtain for itself the best bargain it can under the existing market and economic conditions. If the parties can resort to a strike or lockout, they will be influenced in maintaining their positions by their estimates of each other's bargaining power. In brief, to a much greater extent than in the case of other types of disputes, the issues in interest disputes are 'compromisable' and therefore lend themselves best to conciliation.

(ii) *Grievance Disputes*

Grievance disputes are also variously called 'conflicts of rights' or 'legal' disputes. They involve individual workers only or a group of workers in the same situation, and correspond largely to what in certain countries are called 'individual' disputes. They generally arise from day-to-day relations in the undertaking, usually as a protest by the worker or workers concerned against an act of the management. Probably one of the most common causes of grievances is the dismissal of a worker, which he or his union considers to be unjustified. In some countries grievances arise especially over the interpretation and application of collective agreements, and grievance disputes are therefore also called 'interpretation' disputes. There is, however, a great deal of variation in national practice with regard to the kinds of differences between employers and workers that would fall within this category of disputes.

In many countries labour courts or tribunals have been set up to adjudicate on grievance disputes (or 'legal' or 'individual' disputes). In many others (like Canada) the government promotes compulsory or voluntary arbitration for their settlement. Hence in a good number of these countries grievance disputes do not come before government conciliators.²³

Further studies disclose that conciliation is resorted to in case of

23 See *Conciliation in Industrial Disputes*, ILO, Geneva (1973) 16.

grievance disputes as a procedure of first instance and where no amicable solution is found the matter goes to a tribunal or a court of law.

In Kenya, for example, preference is given in rights disputes to the appointment of an investigator to recommend a solution. In Spain, conciliation in rights disputes, particularly those related to dismissal, seems to be very effective.

In Japan, where no clear-cut distinction between rights and interests disputes is made, conciliation is available in all types of disputes and grievance disputes can come to the National Industrial Relations Commission even though there are collectively agreed grievance procedures.

The prevalence of conciliation as a method for assisting in the settlement of rights disputes appears to reflect an attitude that settlement should if possible be effected by negotiation of the parties themselves, with outside help if necessary, rather than by immediate reference of such disputes to third party determination.²⁴

According to the *Hancock Report of the Committee of Review of the Australian Industrial Relations Law and Systems*²⁵ the distinction between 'interests disputes' and 'rights disputes' has not generally been explicitly drawn in the Australian system, the reason being that in the Australian system both types of disputes allow for third party intervention.

(d) ILO Approach To Conciliation

Four ILO Recommendations deal with or refer to conciliation:

(i) *Recommendation No 81 Concerning Labour Inspection 1947* provides in Article 8 that

'The function of labour inspectors should not include that of acting as conciliator or arbitrator in proceedings concerning labour disputes'

This provision comes to safeguard the impartiality of the conciliators.

(ii) *Recommendation No 92 concerning Voluntary Conciliation and Arbitration, 1951* deals with voluntary conciliation machinery to be available to assist in the prevention and settlement of industrial disputes between employers and workers.

This recommendation is concerned with 'interests disputes' and not with 'rights disputes'. However, it prescribes certain principles that are basic to all conciliation processes which have been elaborated over the past 30 years:

- (i) Equal representation of the parties (employers and workers). (Article 2)
- (ii) The procedure should be free of charge.
- (iii) The procedure should be expeditious and time-limits restrictions should be fixed in advance and kept to a minimum. (Article 3)
- (iv) The process should be set in motion either at the initiative of any party to the dispute or *ex officio* by the voluntary conciliation authority. *The Authority is thus not completely passive.* (Article 3)

24 See Yemin, in *Conciliation services: Structures, functions and techniques*, ILO, Geneva (1983, 62 Labour-management series) 131.

25 April 1985, 564-565.

(v) The conciliation process should encourage the abstention from strikes or lockouts whilst it is in progress.

(iii) The recommendation which is most relevant to us here is *Recommendation No III concerning discrimination in respect of employment and occupation, 1958*, mentioned above, which underlies the tripartite character of the EDCs and their mode of operation of conciliation.

Reading Article 4 of paragraph (b) we find that the ILO singled out the procedure of conciliation from all other possible modes of settlement of disputes on grounds of discrimination. It provides that the appropriate agencies - in the case of Australia the EDCs — should 'receive, examine, and investigate complaints ... *if necessary by conciliation* to secure the correction of any practices regarded as in conflict with the policy'.

Conciliation is the first step towards securing of compliance with the Convention. Only if this procedure fails is there resort to other modes of settlement of disputes.

Article 4 paragraph (c) further provides that the agencies should 'consider further any complaints which cannot be effectively settled by conciliation and to render opinions or issue decisions concerning the manner in which discriminatory practices revealed should be corrected'.

(iv) The last ILO recommendation that may have relevance is the *Grievances Recommendation, (No 130), 1967*.

Article 12 provides that:

'Grievance procedures should be as *uncomplicated* and *rapid* as possible, and appropriate time limits may be prescribed if necessary for this purpose; *formality* in the application of these procedures should be kept to a minimum'.

Grievance procedures should thus be *non-formal*, *uncomplicated* and *rapid*. These three qualities of non-formal justice seem to be the components of conciliation and its pre-requisites.

Article 13 further provides for '*the right to participate* directly in the grievance procedure or be represented', thereby safeguarding the principle of *equal access and representation* of the parties.

However, Article 17, which deals with the adjustment of unsettled grievances, sets out a list of alternative procedures of settlement:

- (A) Procedures provided for by collective agreement (joint examination, voluntary arbitration).
- (B) Conciliation or arbitration by competent public authorities.
- (C) Labour court or other judicial authority.
- (D) Any other procedure.

Conciliation is thus mentioned in the Grievances Recommendation but not given any pride of place in the hierarchy of instances of settlement of grievances disputes.

6. THE RATIONALE OF CONCILIATION

The choice of conciliation as the appropriate mode of settlement of discrimination complaints was deliberate. Both the ILO and Australia laid stress on the importance of education and persuasion rather than upon legal sanctions and legal procedures.

Changing of attitudes and prejudices can be better achieved by education rather than by legislation. This was the approach of various governments, such as the U.K. in their replies to the ILO.²⁶

Conciliation, unlike adjudication, does not require conclusive proof of a violation. It seems an amicable solution acceptable to both parties.²⁷

Furthermore, conciliation is future orientated, towards finding a solution, whereas adjudication is orientated towards the past²⁸ — the findings of facts that constitute discrimination and imposing sanctions where violations occur. In the new area of equality in employment the value of educational measures was placed higher than the value of legislative action. Another feature which deserves mention is the flexibility of conciliation in comparison to the rigidity of adjudication. The choice of this mode of settlement of discrimination complaints in Australia is explained in the Ministerial Statement as follows:

‘Finally the adoption of comprehensive legislation would require complementary Commonwealth and State legislation and this would inevitably, of course, delay action. We do not want delay. We are prepared, willing and determined to do everything necessary to eliminate delay so that we can begin the great work which is in front of us and which we are now obliged to undertake by the terms of convention No 111. It is for these reasons that emphasis is being placed on promotion of a climate of opinion favourable to the policy of equality of opportunity by education programs and by seeking to resolve discriminatory situations by conciliation rather than by legislative and court action. However, this does not preclude legislation either on a particular matter or generally at a later stage ...’²⁹

7. THE PROCEDURE OF CONCILIATION BY THE EDCs

In some ways it is a contradiction in terms to speak of a procedure of conciliation, because the very idea of conciliation suggests the absence of all formality. It may thus be preferable to speak of a process.

It was up to the National and State/Territory Committees to evolve their own internal rules. The Procedural Guidelines (rather than rules) that have thus been developed found expression in the above mentioned publication in 1983 after 10 years’ experience.

The Guidelines³⁰ for the investigation and conciliation of complaints describe the following ‘sequential action’:

(a) First Stage

Initial responsibility for investigating and conciliating complaints is normally with the Committee for the State or Territory in which the alleged discrimination took place.

26 See Summary and Analysis of Replies, Report IV(2), *International Labour Conference*, 42nd Session Geneva (1958) 4.

27 For additional reasons of Thornton, ‘Anti-Discrimination Remedies’, (1983) 9 *Adel LR* 236.

28 Per John Way, Assistant Secretary, Equality in Employment Branch, Attorney-General’s Department at an interview in September 1986.

29 Above n 2 at 2374.

30 Aust, Department of Employment and Industrial Relations, *Procedural Guidelines for Committees on Discrimination in Employment and Occupation*, (1983) 9 et seq.

A complaint is lodged with the *Executive Officer* who is the first instance conciliator. After receiving a complaint, usually in writing and signed by the complainant, the Executive Officer communicates with the respondent orally or in writing or both in order to hear the latter's side of the story and to find a solution.

The Executive Officer first investigates the complaint in order to establish the existence of a *prima facie* case of discrimination. (This is the terminology used by the Guidelines.)

If the Executive Officer is satisfied that a *prima facie* case has been established, he/she may either:

- a. investigate and attempt conciliation without referring to the Committee, or
- b. refer the case to the chairman/convenor or the Committee for advice before taking any action.

The preferred form of investigation in all cases is by means of personal intervention with the complainant, the respondent and other relevant persons. Within the interviewing process conciliation between the parties is attempted.

At each meeting of the State/Territory Committee, the Executive Officer reports progress on all cases on which action has been taken (or not) since the last meeting, including on cases resolved.

In relation to any case referred to it, the Committee may invite any person to appear before it ensuring complete impartiality between the parties.

(b) Second Stage

If the complaint is not resolved at this stage, referral to the National Committee is possible in the following circumstances:

- a. where a Committee considers that discrimination has occurred but is unable to resolve the case.
- b. where a Committee has been unable to elicit a response from the respondent.
- c. where the Minister (the Attorney-General) decides that a particular complaint should be dealt with by the National Committee.
- d. where the complaint is considered to raise a national issue; and
- e. where the complaint is against an organisation that has offices in more than one State and the complaint is a result of a Head Office policy.

If the National Committee reaches a conclusion which is different from that reached by a State or Territory Committee, the National Committee or Chairman/Convenor should discuss the matter with the State Committee Chairman/Convenor before it is finalised.

The Committees' decisions are reached by consensus. However, where considered necessary and appropriate, the Chairman/Convenor may resort to a vote, in which case the majority view prevails. Both complainant and respondent are notified in writing of the decision which clearly sums up the facts, the evidence and the reasons.

(c) Third Stage

If the National Committee is satisfied that discrimination has occurred but is unable to come to a satisfactory conciliation between the parties, there are no available sanctions. However, it may request the Minister (the

Attorney-General or formerly the Minister of Employment and Industrial Relations) to table a report on the case in Parliament with the agreement of the complainant.

The respondent is to be advised accordingly in writing and be given an opportunity to comply with the decision of the National Committee. If within 14 days the respondent does not take the appropriate action the report will be tabled in Parliament.

In the 13 years of operation of the EDCs no report has ever been tabled in Parliament although in two cases resort to that procedure came close.

8. NATURE OF CONCILIATION BY THE COMMITTEES

(a) Voluntary

The Committees' mode of settlement of disputes was from beginning to end of a voluntary nature. Their success rested solely upon the cooperation of both parties. The Committees served as pressure groups upon the respondents.

The EDCs have been an authentic model of conciliation in that they lacked coercive powers. They have exercised no power to subpoena witnesses and documents or call for a compulsory conference (as provided for in subsequent State or Federal Sex Discrimination legislation) and have had no authority to pronounce a binding decision or impose sanctions.

(b) Informal

The procedure before the EDCs has been free from formality and no rules of evidence were applicable. The *leitmotiv* has been creating a machinery for the resolution of complaints which was informal, flexible and to which complainants had easy access.³¹

Although some of the National and State Chairpersons have been distinguished lawyers, this qualification was not essential for the fulfilment of their role and the parties did not require legal representation.

(c) Speedy

On the basis that 'justice delayed is justice denied' the Committees set themselves the aim of resolving a complaint on state level within 4 months and 'every effort is made to ensure that resolution does not exceed 6 months in any case on the National Committee level.'³²

Criticism was voiced that the complaints were not dealt with quickly and that the rate of investigation by the National Committee was rather slow. This was also the subject of a Parliamentary Question No 458 by Senator Nissen to the Minister for Employment and Youth Affairs on 5 March 1981.³³

Concern about delays was likewise reiterated by the former Queensland Chairman, Professor K Ryan.³⁴ He pointed out that in 'complaints against

31 See First Report to the ILO, above n 3.

32 See *Procedural Guidelines*, above n 30 at 8-9.

33 Aust, Parl, *Debates*, S (1981) vol 90, 3280.

34 At an interview in Brisbane in 1986.

the Commonwealth or State Governments a lengthy process is involved'.

Speed is claimed to be one of the major advantages of informal non-judicial settlement of disputes. The criticism of long delays were thus aimed at the very *raison d'être* of the EDCs. It was pointed out that 'the normal six to nine months delay means that complainants often lose any other avenue of redress'.³⁵

It appears that lack of speed in resolving complaints has been to a great extent related to the fact that the EDCs had no power of subpoena to call for witnesses or documents. Although the Committees succeeded in getting at the evidence by persuasion eventually, it has sometimes taken them a long time.³⁶ Persuasion and exercising pressure is inevitably time consuming.

(d) Confidential

The success of conciliation depends to a great degree upon confidentiality. Early in the operation of the Committees it was quite clear that no publicity is in place in investigating and conciliating complaints and that, unlike in adjudication, the public and the media should be kept out of all proceedings at the two first stages, namely, before the State and National Committees. Only if the matter is tabled by the Minister before Parliament, in the last resort, does the principle of confidentiality give way. As no single report was tabled in the past 13 years, the question of confidentiality at this stage has not arisen in practice.

Confidentiality has two facets:

1. confidentiality *erga omnes* vis a vis third parties and
2. confidentiality between the parties *inter se*.

As far as confidentiality vis a vis third parties is concerned the *Procedural Guidelines* provide for a communication or advice to the parties in the following forms:

'All information provided by you in response to this request will be treated as confidential. *No information contained in your reply will be released to a third party without your written authority*'.³⁷ (emphasis added)

As far as confidentiality between the parties *inter se* is concerned, the *Procedural Guidelines* state that:

'Parties to a complaint of discrimination should be advised that all facts relevant to the question of discrimination established in the investigation may be provided to both parties. **CONFIDENTIALITY APPLIES TO BOTH WRITTEN AND ORAL MATERIAL**'.³⁷ (emphasis in the original text)

The EDCs have experienced long drawn out proceedings against them in *the Cockcroft Case, 1984*³⁸ which highlighted the problem of confidentiality between the parties *inter se*. The case has become unduly

35 See Ronalds, 'Employment Discrimination Committees Don't Work' (1981) 6 *Legal Services Bulletin* 18.

36 Per Professor H B Connell, Chairman of the Victorian Employment Discrimination Committee, at an interview at Monash University in 1986.

37 See *Procedural Guidelines*, above n 30 at 11.

38 *Cockcroft v Attorney-General*, (Ref Nos 84/331 and 84/77), Administrative Appeals Tribunal, Transcript of Proceedings, Sydney, 6 July 1984.

complicated by the fact that the EDCs were considered to be subject to proceedings under the *Freedom of Information Act, 1982*.

There were valid grounds to believe that conciliation committees, because of their very nature, fell under 'exempt agencies' (schedule 2 Part I of the FOI Act, 1982) and thus escaped the application of the Act:

The *Cockroft Case* merits legal study. In this article only an opinion can be expressed in favour of the exemption of conciliation agencies from the operation of the FOI Act. This, however, in no way detracts from the discretionary power of the Committees (as stated in the *Procedural Guidelines*) 'that all facts relevant to the question of discrimination *may* be provided to both parties'. Nothing could stop the EDCs from exercising their discretion in the matter to supply (or not) Mr Cockroft (complainant) with the document received from the respondent. Clearer guidelines will have to be laid down for the future operation of conciliation under the new Commission.

9. THE SUCCESSFUL ELIMINATION OF DISCRIMINATION PRACTICES

In the first years of the EDC's existence ie between 1973 and 1977, there was only scant and piecemeal legislation on the subject of discrimination on either Federal or State level. In the field of employment the jurisdiction of the EDCs was thus exclusive, as there was no other Federal or State bodies in operation.

The Committees, as we have seen, applied the principles enshrined in Convention No 111 and interpreted the definition of discrimination in an extensive fashion. 'Distinction' in the context of Article 1 of the convention was taken by the National Committee to mean 'any difference in treatment of persons when such difference is not related to an inherent requirement of the job'.³⁹ At the same time they interpreted the exemption clauses very restrictively and the provision on special measures of protection (Article 5) was viewed by them as largely outdated where it had the effect of excluding women from certain jobs: eg underground mining.

Consequently, they have also enlarged the number of grounds of discrimination admissible for investigation and conciliation under Article 1(1)(b).

The major success in eliminating discriminatory practices from advertisements, recruitment, conditions of work and vocational training (as they appear from the 12 Annual Reports of the National Committee and from the Government Reports to the ILO) have been in the field of sex discrimination. This is due to the fact that the majority of discrimination complaints were based on sex and society as a whole was more aware of the generations-long injustice resulting from sex discrimination, than of discrimination on other grounds.

(a) The Specified Grounds

(i) Sex

The major developments within this ground of discrimination related to recruitment or access to employment in non-traditional jobs. The breaking of the barriers to job integration of men and women was one of the most effective means to achieve equal opportunity for women. The Committees were part of the process of opening non-traditional jobs for women.

³⁹ See Glossary of Terms in the *National Committee Annual Reports*, eg 11th Annual Report (1983-4), at 56.

Early in its first years the Victorian Committee with the assistance of the National Committee opened the door for women to train as tram drivers in Melbourne. The persuasion of the Tramways Union (ATHOEA) was a very delicate matter that could be well handled only because of the tripartite nature of the Committees. In the late seventies the training of women as pilots with Ansett arose and the issue was successfully resolved on the basis of the Victorian Equal Opportunity Act, 1977.⁴⁰

The issue of the role of women in the *Defence Force* was also of concern to the Committees. Preventing women from taking up jobs unrelated to combat duties such as membership of military bands, etc was deemed by the Committees as a discriminatory practice. Expanding the role of women in the Forces, the Fire Brigade and in similar hazardous occupations was amongst the achievements of the Committees.⁴¹

The EDCs were instrumental in the variation of *Apprenticeship Awards* that reserved vocational training only to 'males'. The Committees fought for making all apprenticeships available to both sexes, eg apprenticeship trades of tile laying, plastering, stone-masonry and bricklaying, the furniture trades, etc.

The EDCs signalled the problem of the discriminatory practices that developed on the basis of 'protective measures', especially the problem of exclusion of women from work in *underground mines*. Complaints came to the West Australian Committee (later also to the Tasmanian Committee) on the ground of discrimination in recruitment as a miner. The first reaction of the National Committee was to abide by ILO Convention No 45 on Underground Work (Women), 1935 which prohibits women from working as miners in underground mines. The Convention which was ratified by Australia in 1953 falls under the exemption of Article 5(1) of Convention No 111, which provides that: 'Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination'.

Pressure to open job opportunities for women prevailed in the end over considerations of 'pseudo-protective measures'⁴² and the Committees prepared the ground as well as public opinion to move towards denunciation of ILO Convention No 45 because it had become out of step with legislative developments in the eighties (in Victoria, South Australia, etc).

Several states as well as the Northern Territories have removed the legislative prohibition on employment for women in underground mines because of its discriminatory character. Consequently, the National Labour Consultative Council — a tripartite National Statutory body — agreed in 1983 that action leading to denunciation of the ILO Convention should proceed and the ILO has been advised accordingly.⁴³

The Committees, likewise, paved the way for women's employment in non-traditional jobs in zoological gardens, in garages, in transport, in the Police (eg in 1977 first women in Western Australia joined the mounted police) etc.

40 *Ms Wardley v Ansett Transport Industries* (1980) 54 ALJR 449. See also G E Landau, 'Recent Australian Legislation and Case-Law on Sex Equality at Work' IN (1985) 124 *International Labour Review*, 335-351.

41 See on job segregation and protective measures for women, Connell, 'Special Protective Legislation and Equality of Employment Opportunity for Women in Australia' in *International Labour Review*, Mar-Apr 1980, 199-216.

42 Expression used by the ACTU *Working Women's Charter*, 1977 that called for an urgent review of all protective legislation and awards.

43 See last Government Report to the ILO on Convention No 45.

The Committees published guidelines for application forms for jobs, for non-discriminatory job advertisement and recruitment, for developing personnel practices (as a training manual for managers), and other educational material, all aiming at the elimination of discrimination and promoting equal employment opportunities.

(ii) *Marital Status*

Discrimination on grounds of Marital Status has been considered by the EDCs as a ground not specified under Convention No 111, yet discrimination on the basis of 'marital status' in the traditional sense (namely, not including *de facto* relationships)⁴⁴ could normally fall under sex discrimination.

Discrimination of *married* women as such may be classified under sex discrimination and thus be treated as a ground specified by the Convention. This is also the established practice overseas (eg the European Community Countries) to treat discrimination on grounds of marital or family status as sex discrimination.

The best illustration of marital status as a ground of sex discrimination was the compulsory retirement of women from public service upon marriage. It is difficult to imagine today that such a discriminatory practice still prevailed in some States of Australia less than 10 years ago.

A milestone on the road to eliminating discrimination was erected by the *Rockhampton City Council Case, 1978*⁴⁵ (in the context of local government) which struck a death blow to the deeply entrenched discriminatory practice of retiring women upon their marriage.

The National and Queensland Employment Discrimination Committees were closely involved in this case which attracted much media attention. The case concerned a junior female employee of the Rockhampton City Council who was dismissed, in accordance with the general policy of the Council, following her marriage.

She complained to the Queensland Committee and that Committee's investigations confirmed the general application of the Council's policy towards female employees. While these investigations were proceeding the Municipal Officers' Association of Australia made an application to vary the Municipal Officers' (Queensland) Consolidated Award 1975 so as to prevent the termination of an officer's employment by reason of that officer's marriage.

The Association's application was referred to a Full Bench of the Australian Conciliation and Arbitration Commission (the ACAC) and while these proceedings continued the Queensland Committee suspended its investigations.

The National Committee saw in the Full Bench's hearing of this application an opportunity to make its views known on a practice which was not confined to the Rockhampton City Council.

Accordingly the National Committee asked the Minister for Employment and Industrial Relations to intervene in the public interest in the Commission's hearing. The Minister agreed and the submission by the Counsel for the

44 See Glossary of Terms in the *National Committee Annual Reports*, above n 39. It extends 'marital status' to cover also *de facto* relationships. In doing so it is obliged to treat this ground of discrimination as a non-specified grounds under Article 1.1(b) instead of treating it under sex discrimination as one of the specified grounds under Article 1.1(a).

45 The ACAC C No 1325 (1977) Decision of 24 April 1978 reproduced from the 5th Annual Report of the National Committee (1977-8) pp 17-18.

Commonwealth Government dealt fully with the circumstances of the particular case thus pointing out that the Rockhampton City Council's policy was in conflict with Australia's international treaty obligations deriving from its ratification of ILO Convention No 111. The submission of the Commonwealth Government stated, in part:

'The Commonwealth Government and the National Employment Discrimination Committee and the Queensland State Employment Discrimination Committee...are all of the view that the employment policy of the Rockhampton City Council as it applies to female officers represents a clear case of employment discrimination made on the basis of sex within the terms of Convention 111.

...
The application...of such a policy makes a clear distinction between employees on the basis of sex, and the Commonwealth submits that this is discriminatory treatment within the terms of Article 1.1.(a) of the Convention.

...
The Commonwealth wishes to emphasise that its concern in this matter does not stem solely from the employment policy of the Rockhampton City Council. For instance, the Commonwealth is concerned that this policy may be applied by other local councils which are subject to this award.

The Commonwealth submits, therefore, that the action taken by the Rockhampton City Council is contrary to the spirit of the Convention and contrary to the policies pursued by the Commonwealth Government both in pursuance of that Convention and generally, and in these circumstances the Commonwealth respectfully submits the council's practice should not continued'

The National Committee welcomed the terms of the Decision which was announced on 24 April 1978. The Decision has the effect of preventing a person's dismissal on the basis of sex. Extracts from the Decision are set out hereunder.

'The policy of the Rockhampton City Council and those other councils which adopt a similar policy is in our view clearly discriminatory.

...
As indicated above, the policy in question is discriminatory and contrary to the avowed aims of the International Labour Organisation and the Federal Government.

...
In view of the special expertise of the Committees on Discrimination in Employment and Occupation, we consider it desirable that in the event that a dispute should arise as to whether or not a termination offends the provision to be inserted in the Award, such dispute should be referred in accordance with the procedures of those Committees to the Queensland Committee, and if necessary to the National Committee for resolution.'

The National Committee subsequently discussed ways of extending the Award variation in the 'Rockhampton' case to other Federal Awards and Agreements and wrote to the Confederation of Australian Industry seeking its cooperation in having, where possible, similar clauses included in other Awards/Agreements. The CAI advised the National Committee of its agreement to this suggested course of action provided that there was a clear understanding that the Committee system would be utilised to deal with complaints.

So far as the trade union movement was concerned the National Committee was encouraged by an earlier ACTU Circular urging unions to consider amending Awards/Agreements in line with the 'Rockhampton' decision.

The Committees handled also complaints where employment was barred to married women, eg complaints against TAA and Ansett which refused employment as Air Hostesses to married women.

In the field of marital status which includes family status as well, the decision of the ACAC in the *Maternity Leave Case 1979*⁴⁶ is a land mark in the evolution of the protection of a pregnant woman employee. The decision provided for a period of up to 52 weeks' unpaid maternity leave, the right of a pregnant employee to be transferred to a safer job prior to confinement, special maternity leave and sick leave entitlements, and the responsibility of the employer to place the employee in her former position upon resumption of duty from maternity leave.

The decision inspired legislation as well as variation of Awards. The Australian Conciliation and Arbitration Commission stated '*We also are of the view that consideration of possible discriminatory practices should be left to the Discrimination Committees and the various State authorities established for that purpose.*' (emphasis added)

In many countries discrimination on grounds of pregnancy is considered as an instance of discrimination based on sex (eg in the EEC member states). The ILO also considers discrimination on grounds of pregnancy to be discrimination on grounds of sex and seeks to promote job security for pregnant women in Convention No 103 on Maternity Protection (Revised), 1952 (not ratified as yet by Australia).

Elimination of sex discrimination from employment has been in recent years endeavoured by the Committees in two additional fields: (i) in the field of sexual harassment; and (ii) in the field of superannuation.

In the field of sexual harassment the Committees handled complaints emphasising in addition to the discrimination aspect the 'management' aspect of the issue. The Committees perceived in sexual harassment an issue of concern of the employer to provide for a healthy work environment rather than a mere criminal offence or a violation to be remedied by a civil or penal sanction.

In the field of superannuation the EDCs considered reduced benefits for women as discriminatory practices and as discriminatory conditions of employment.

(iii) *Race and Colour*

One of the areas in which legislation was adopted early in the life of the EDCs is that of racial discrimination. *The Commonwealth Racial Discrimination Act, 1975* which is based on the United Nations Convention on the Elimination of All Forms of Racial Discrimination, 1969 (ratified by Australia in 1975) renders discrimination, including discrimination in respect of employment, on grounds of race, colour, descent or national or ethnic origin, unlawful.

From 1975 it was the practice of the Commissioner for Community Relations to refer complaints of discrimination in employment under this Act to the EDCs for investigation.

Under the Racial Discrimination Amendment Act, 1981, the Commissioner for Community Relations, who initially administered this Act, was attached to the

46 The ACAC C No 3619 (1978) Decision of 9 March 1979 Mis 48/79 MD Print D9576.

Human Rights Commission. The Commissioner for Community Relations was responsible for enquiring into cases of alleged racial discrimination and for resolving such cases. Where the Commissioner for Community Relations was unable to resolve a case, under the Racial Discrimination Act, 1975 he was able to sign a certificate to this effect which enabled the complainant to institute proceedings in a Civil Court (State or Territory).

The 1986 Act entrusts a new Race Discrimination Commissioner to deal with complaints on race discrimination.

Between 1981 and 1986 the EDCs kept a mere residual jurisdiction over race discrimination and this accounts for the relatively small number of complaints handled by the EDCs in recent years on grounds of race and colour. One should note, however, that even at an early stage relatively few complaints were received on discrimination on grounds of race or colour and likewise few complaints were lodged on behalf of Aborigines.⁴⁶

The National Committee was involved, however, in solving *the issue of Award Wages on Aboriginal Reserves in Queensland*. This arose from the Queensland Government's practice of paying wages to Aborigines on Queensland reserves at the Queensland guaranteed minimum rate rather than at the appropriate Queensland Award Rates.⁴⁸

The Queensland Aboriginal Reserves complaint found a happy solution recently and the discriminatory rates were set aside. Most complaints on the basis of race and colour related to recruitment and only a small number like the Aboriginal Wages in Queensland related to conditions of work.

(iv) *National Extraction*

The second complaint before the National Committee was one based on national extraction. In a country of immigration, like Australia, where there are many ethnic groups of different origins, it is actually surprising that discrimination on this ground is not more current.

In certain cases the complaints on grounds of national extraction were not substantiated or it was found that the job required a more than average consideration of security and that applicants who were not long enough in Australia did not qualify. In such cases the exception of the 'inherent requirements of the job' prevailed.

Certain complaints of discrimination on the ground of national extraction related to being overlooked for promotion rather than exclusion from employment.

(v) *Religion*

Religion as a ground of discrimination in employment has not occupied any prominence. Certain practices of requiring applicants for jobs to state their religion, where this was not an inherent requirement of the job, have been abandoned at the request of the Committees.

A few complaints related to denial of promotion rather than access to employment and these were successfully conciliated.

In recent years the National Committee considered a number of cases involving educational establishments run by religious bodies. 'Difficulties have arisen where

47 National Committee's First Report (1973-4) p 14.

48 National Committee's 11th Report (1983-4) p 19.

employees' lifestyles have clashed with those advocated by the employing religious establishment and the duties of the employees' position involved an element of pastoral care.⁴⁹

The National Committee sought to strike a fair balance between the inherent requirement of the job and the expectations of the employee.

(vi) *Political Opinion and Social Origin*

These specified ILO grounds of discrimination have brought to the surface very few complaints. There were only 4 complaints received on grounds of political opinion and 8 complaints on grounds of social origin during 1984-85.⁵⁰

(b) **The Unspecified Grounds**

Amongst the grounds of discrimination that are not specified by ILO Convention No 111 but which preoccupied the Committees from their inception in 1973 one may single out discrimination on grounds of age, nationality and trade-union activities.

(i) *Age*

To judge by 'The Economist' (17 Jan 1987, p 13) in the first half of the next century age could become a more divisive influence on the world than race, sex and class have ever been. Age was discussed as a specified ground of discrimination at the ILO Conferences pending the adoption of the Convention in 1958.⁵¹ The Australian delegation to the ILO proposed the extension of the coverage of ILO Convention No 111 to age.

Age discrimination includes all age groups (eg certain unions did not employ persons over 45, Qantas preferred pilots not above 30 years of age). However, most complaints before the EDCs affected either young persons (in relation to apprenticeships) or older persons and issues of compulsory retirement at a certain age.

The Victorian EDC heard in 1986 a complaint which originated in the replacement of two senior staff members by two junior staff because of the age/wages structure of the Award System. The Committee's concern in this case was that its nature involved not merely replacement of a vacant position, but rather that an adult's employment was terminated specifically in order to employ a junior.

In the field of compulsory retirement because of age the NSW Supreme Court endorsed a decision of the Equal Opportunity Tribunal (NSW) in *Ms Anstee v Allders International Pty Ltd* (1985)⁵² that renders it unlawful for an employer to require a woman to retire at 60 when he/she allowed men to retire at 65.

It is against this background that the Committees have developed very sound policies to combat discrimination on grounds of age. It is with a view to save some of their expertise on the subject-matter that the following ideas are reproduced:

Definition

Age discrimination can be said to have occurred where the decision to employ, confer benefit or detriment on a person is made on the basis of the person's age,

49 Ibid 18.

50 National Committee's 12th Report (1984-5) 11.

51 ILO, *Discrimination in the Field of Employment and Occupation*, Report VII(2), International Labour Conference, 40th Session Geneva, 1957 105.

52 27 AIRL 271.

where age has no relevance to the inherent characteristics of the job, or is used to negate selection on merit.

Minimum Age

It is not discriminatory to refuse to employ a person because he or she has not reached a minimum age set by legislation or the industrial award, provided that the minimum age is the same for all persons.

Retirement Age

Regardless of the Social Security Act, 1947 as amended by subsequent Acts and given Royal Assent in 1985-6, it would be discriminatory to establish different retirement ages for any sub-groups within those employed in a particular occupation.

Should employers, unions and/or employees agree on a retirement age other than the general norm for *all persons* in an occupations category, or occupational category within an organisation it would not be considered discriminatory. The Committee notes that where such agreement exists, it would be good personnel practice to alert all candidates to the fact that retirement age in the occupation or organisation differs from the general norm and is an essential condition of employment.

Training

Access to occupational training should within the limits of available places, be available in order of merit to all persons who meet the minimum educational standards regardless of age. An exemption may be made where the employer could argue that after a certain age, it would be impossible to recoup the investment made in training before the individual retired.

(ii) *Nationality*

From the early years of their operation the EDCs received a significant number of complaints concerning the nationality requirement of 'British subject' for entry into the Australian Public Service. The Government policy in this matter has recently been reviewed, and with the adoption of the *Public Service Reform Act 1984*, Australian citizenship is now the only requirement for entry to the Australian Public Service. The Committees were instrumental in bringing about this change in policy.

(iii) *Trade Union Activities*

In practice some of the complaints on this ground may be classified as complaints under political opinion which is a specified ground under the Convention. Nevertheless there is merit in keeping it a separate ground of discrimination because it is inspired by another ILO fundamental right of freedom of association (including the freedom *from* association) to which Australia subscribed when it ratified in 1973 ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, 1948.

10. JURISDICTIONAL ISSUES

The EDCs experienced three distinct periods in their history from the point of view of their jurisdiction. They moved from exclusive to concurrent jurisdiction and ended up with residual competences before ending their operation in December 1986. In the first period they enjoyed exclusive jurisdiction over matters within their ILO competence in the absence of legislation and in the absence of other bodies to handle discrimination complaints.

The second period is marked by intensive legislative activity both on Federal and State levels. However, this legislation was piecemeal and fragmentary and only

some of it set up enforcement machinery. The first statute was the Commonwealth Racial Discrimination Act, 1975 creating the office of the Commissioner for Community Relations to conciliate complaints of racial discrimination not necessarily linked to employment. On state level it was followed by the South Australian Sex Discrimination Act, 1975 and the South Australian Racial Discrimination Act 1976, the New South Wales Anti-Discrimination Act, 1977, the Victorian Equal Opportunity Act, 1977 and the Western Australian Equal Opportunity Act, 1985. All four statutes on sex discrimination set up state bodies to promote equal opportunity with powers to conciliate complaints.

The jurisdiction under these statutes covers besides discrimination in employment also discrimination in education, accommodation supply of goods and services and clubs. Complaints on grounds of sex discrimination in the field of employment were referred to the Employment Discrimination Committees where they related to situations not covered by State legislation. As far as complaints on the ground of race were concerned, the EDCs handled such complaints in the field of employment that were referred to them by the Commissioner for Community Relations.

The Committees had thus exercised concurrent and overlapping jurisdiction with other State bodies up to the eighties.

With the proclamation of the Human Rights Commission Act 1981 on 10 December 1981 the Commonwealth Government established a Human Rights Commission, to ensure that practices and policies in Australia are in compliance with the International Covenant on Civil and Political Rights (ratified in 1980). The Federal Racial Discrimination Act, 1975 (enacted to implement the UN Convention on Elimination of All Forms of Racial Discrimination, 1969) was added to the Commission's responsibilities. With the passing of the Commonwealth Sex Discrimination Act on 1 August 1984 (to implement the UN Convention on Elimination of All Forms of Discrimination against Women, 1980), sex discrimination, including sexual harassment became part of the portfolio of the Human Rights Commission and had by cooperative arrangements with the States (that had legislation) been entrusted to the State bodies.

The overlapping of jurisdiction and duplication have created a gamut of interwoven but not integrated measures to promote equality at work. The substantial civil and political rights are scattered and fragmented in Federal and State statutes and there is no comprehensive instrument or Bill of Rights.

The recent statute, the Human Rights and Equal Opportunity Commission Act, 1986, as its name suggests, is setting up an institution or rather re-organising an existing Commission established in 1981. It is essentially a procedural framework rather than a Human Rights and Equal Opportunity Charter. The new body has a part-time President and full-time Commissioners: a Human Rights Commissioner, a Race Discrimination Commission and a Sex Discrimination Commissioner.

As a by-product of all this legislative activity the role of the EDCs in the field of employment was gradually usurped by other bodies and agencies, until with the establishment of the Human Rights and Equal Opportunity Commission the EDCs ceased to exist.

From 1 December 1983 the Committees, in my opinion, lost their right place within the Department of Employment and were moved to the Attorney-General's Department as an appendix to the Human Rights portfolio. This was the second blow given to the Committees, the first being their loss of exclusive jurisdiction over *employment complaints* under the various legislative instruments.

In the last period of their history the Committees retained a mere residuary competence, having previously undergone the shift from exclusive to concurrent jurisdiction. During that period (from 1982) the Committees concentrated on their second objective of conducting community education programs aimed at changing discriminatory attitudes. They launched educational videos and literature to reach wider sections of society.

In recent years the Committees, who had been pioneers in their field, handled complaints that fell outside the jurisdiction of the parallel bodies, eg domains that came under the exemption clauses of the various statutes:

1. Most statutes exempt small enterprises under 5 employees from the ambit of discrimination complaints. This exemption, which excludes for instance 25% of all employers in Victoria has little justification or merit besides having its origin in the 1975 UK Sex Discrimination Act.

The ILO Convention No 111 does not include such an exemption and complainants discriminated by employers of small enterprises could thus flock to the door of the EDCs. One illustration dates back to the late seventies when a Victorian solicitor refused to employ a woman articled clerk and claimed the exemption under the state legislation for small enterprises. The complaint was heard by the Victorian EDC which rejected the argument of the solicitor that the Victorian electorate chose to exempt small enterprises such as his. The Committee pointed out that the ILO Convention No 111 which does not provide for such an exemption, had been ratified with the agreement of all the States including Victoria.

2. The Commonwealth Sex Discrimination Act, 1984 that implements the UN Convention on Elimination of All Forms of Discrimination Against Women, 1980 does not generally apply to men. The Committees naturally heard complaints from both men and women as the ILO Convention deals with discrimination on grounds of sex generally.
3. State instrumentalities are exempt from the Commonwealth Sex Discrimination Act, 1984, yet the Committees accepted complaints from the public sector of the States.
4. Other exempt areas of domestic employment, employment in educational establishments and in educational establishments for religious purposes were residual domains of discrimination complaints in which the EDCs have exercised their jurisdiction.

The bulk of the work of the Committees in recent years has thus shifted to these areas and to the other non-specified grounds of discrimination under Article 1(1)(b) of the ILO Convention.

11. CONCLUSIONS

The Employment Discrimination Committees were the pioneers in Australia to pursue equal opportunity at the work place. They paved the way for other anti-discrimination bodies and for the Human Rights Commission.

The EDCs were authentic conciliation committees of a purely voluntary and non-coercive character. Their speed was sometimes hampered by their lack of subpoena powers but their informality, easy access, flexibility and confidentiality were in the best tradition of this effective mode of settlement of disputes.

In their 13 years' operation the EDCs have handled over 9000 complaints. The solution of these complaints resulted in the removal of wide-ranging discriminatory practices and policies, both from the public and private sectors of

employment, in compliance with ILO Convention No 111 and Recommendation No 111.

The general statement of the Australian Government to the ILO Committee on Equality of Opportunity and Treatment for Women Workers summarizes best the contribution of the Employment Discrimination Committees:

‘the success of the Committees extends beyond the resolution of complaints. Their very existence has focused attention on the whole question of discrimination in employment and occupation, and has made employers, unions and the community generally more sensitive to the issues involved.

The Australian Government considers that a major contributing factor to the success achieved to date by the Committees is their tripartite structure, and the co-operation between government, employers and workers representatives at the State and national level which has made the Committees, effectively, community Committees.’⁵³

The Ministerial Statement introducing Convention No 111 in the House of Representatives on May 22 1973 contains the following phrase:

‘Australian Society is an egalitarian society’⁵⁴

One may add that it is even more egalitarian today — 13 years later — and in the employment sphere much of the credit is due to the Employment Discrimination Committees.

53 Report VIII ILO Committee, 1975, International Labour Conference, 60th Session Geneva, 1975.

54 Above n 2 at 2378.