

THE RACIAL DISCRIMINATION ACT 1975 AND THE ANTI-DISCRIMINATION ACT 1977: ASPECTS AND PROPOSALS FOR CHANGE

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Although legal measures alone may not fully ensure that all forms of racial discrimination in society are eliminated, certain anti-discrimination statutes may effectively contribute to this result. Of prime importance in legislation of this nature is the enforcement machinery employed and the role of the courts. The legislation ought to be constantly reviewed to ensure that it does not become out of date.

The Commonwealth and, more recently, the South Australian and the New South Wales legislatures have passed anti-discrimination acts.

David Partlett has compared and contrasted these various pieces of legislation and has analysed the Commonwealth Racial Discrimination Act 1975 and the New South Wales Anti-Discrimination Act 1977 in some detail. This article examines the limitations of these two statutes with reference to an article by Brian Kelsey which appeared in the first issue of this Journal.

The author warns that the legislation, although commendable, is merely a start in the elimination of racial discrimination in society, and constant vigilance is required by official bodies and the community.

I INTRODUCTION

Australia has now three pieces of legislation that attempt to deal with racial discrimination. The first of these is the Commonwealth Racial Discrimination Act 1975 ("the Commonwealth Act"); the second is the South Australian Racial Discrimination Act 1976 ("the South Australian Act"); and the third is the New South Wales Anti-Discrimination Act 1977 ("the New South Wales Act"). Suddenly, it would seem that it has become fashionable to have this kind of legislation on one's statute books. If for no other reason than this flurry of legislative activity, the legislation should be analysed and discussed. However, the reasons for a review of aspects of this legislation go much deeper; it is important social legislation touching the basic human rights of many Australians.

The New South Wales Act was six months in Parliamentary gestation and attracted a great deal of public comment. The publicity accorded to this legislation is in contrast to that received by the Commonwealth Act during its passage through Federal Parliament.

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The New South Wales Act deals with a wider variety of discrimination than does either the Commonwealth Act or the South Australian Act. This article will deal only with what may be generically termed "racial discrimination". The definition of racial discrimination poses some problems and these will be dealt with below. It should be noted at the outset that the Commonwealth Act implements the International Convention on the Elimination of All Forms of Racial Discrimination and it draws its validity from the external affairs power (section 51(xxix)) in the Australian Constitution.¹ The Commonwealth Act is thus not limited to Commonwealth Territories but applies Australia-wide. With the enactment of the New South Wales legislation therefore, that State now has two regimes designed to combat racial discrimination.

While there has been little academic comment on the Australian legislation in this field, one article to note is "A Radical Approach to the Elimination of Racial Discrimination" by Brian Kelsey.² Kelsey's article was critical of the notion of introducing legislation in this area. Since the appearance of his article the New South Wales and South Australian Acts have been enacted. It is not proposed to discuss the South Australian Act (which repealed the Prohibition of Discrimination Act 1966) in any detail. Although the South Australian Act improves the earlier legislation, it continues to adopt a criminally based approach and establishes neither an administrative dispute settling apparatus nor an educational or promotional foundation. There is a general consensus that criminal sanctions are ineffective in carrying out the aims of this kind of legislation.³ The South Australian legislature has responded to criticism of the Prohibition of Discrimi-

¹ Encouragement as to the constitutionality of the Commonwealth Act can be drawn from the ample width given to the external affairs power by the High Court in *New South Wales v. Commonwealth* (1976) 50 A.L.J.R. 218 and in *Re Judges of the Australian Industrial Court and Another; ex parte CLM Holdings Pty Ltd and Another* (1977) 13 A.L.R. 273. In the latter case, Mason J. found that the external affairs power and the incidental power (s. 51(xxxix)) sustained the enactment of sections 55 and 79(a) of the Trade Practices Act 1974 (Cth) "in an anticipatory way of provisions designed to give effect to" the Paris Convention for the Protection of Industrial Property; *id.*, 279. Section 55 was expressed to be suspended in its operation until the Convention entered into force in Australia. This *obiter* observation of Mason J. should be weighed against the less generous views of Gibbs J.: "I would not wish it to be thought that it can be implied from what is said on this subject that s. 55 is a valid enactment . . . I express no opinion upon it." *Id.*, 275.

² (1975) 1 *U.N.S.W.L.J.* 56; see also Evans, "New Directions in Australian Race Relations Law" (1974) 48 *A.L.J.* 479.

³ Street, *Report on Anti-Discrimination Legislation* (1967) para. 177.1: "Criminal enforcement is likely to run counter to the emphasis on conciliation and education which we believe to be essential in race relations". See also Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968) 46 *Can. Bar Rev.* 565,589. The criminal sanctions formerly contained in the Race Relations Act 1968 (U.K.) have been criticised: Lester and Bindman, *Race and Law* (1972) 374.

nation Act,⁴ for instance, by reducing to a civil standard the burden of proof necessary to make out an offence once it is shown beyond reasonable doubt by the prosecution that the defendant in fact discriminated in some way against another person.⁵ It is surprising that the South Australian Parliament with the models available to it chose criminally oriented legislation.

From this article it is hoped that some insights may be gained into the respective pieces of legislation discussed. Some observations will be made on Kelsey's criticisms of the Commonwealth Act and, insofar as his criticisms are applicable, to the New South Wales Act. Following this, it is proposed to suggest some possible amendments to the legislation. The law in this area is now in a state of flux. The Commonwealth Attorney-General, Mr Ellicott, introduced into Parliament the Human Rights Commission Bill 1977 on 1 June 1977. The Attorney-General stated in his Second Reading Speech that the Commission will take on the functions under other Acts, including specifically the Racial Discrimination Act. The resultant amendment of the Commonwealth Act will provide a unique opportunity to review its operation and to amend it accordingly. It is proposed to leave the Human Rights Commission Bill on the table of the House of Representatives so that possible amendments may be debated. It is to be hoped that this open-minded approach will equally apply to the revision of the Commonwealth Act.

On the other hand, while the New South Wales legislation has recently been enacted, in its terms the Anti-Discrimination Board has a duty to review State legislation⁶ and this may provide some hope that the Government will keep the Act under close observation and will be responsive to needs for change.

Legislative activity has not been confined to Australia. The United Kingdom Parliament enacted on 4 November 1976 the Race Relations Act 1976 ("the United Kingdom Act"). This legislation repeals and replaces the Race Relations Acts of 1965 and 1968.

I would hope, therefore, that my comments may provide a catalyst to further debate and stimulate some ideas that may be of use to legislators in contemplating possible directions for a change in the law.

II THE COMMONWEALTH RACIAL DISCRIMINATION ACT 1975 AND THE NEW SOUTH WALES ANTI-DISCRIMINATION ACT 1977

The two Acts adopt similar legislative schemes. They select the well-chartered model in which certain racially discriminatory acts are

⁴ For difficulties under the former Act see *Fingleton v. Max Flannagan Pty Ltd* 20 December 1973 (unreported); Ligertwood, "Laws Which Prohibit Discrimination" in Nettheim (ed.) *Aborigines, Human Rights and the Law* (1974) 23-27.

⁵ South Australian Act, s. 11.

⁶ New South Wales Act, s. 121.

proscribed, for example, in the areas of employment, accommodation and housing. Administrative mechanisms are established to enable the individual to complain in the event of an alleged breach of these proscriptions. The complaint is made in the first instance to an administrative figure rather than a court. It is the duty of the Commissioner for Community Relations in the case of the Commonwealth Act, and the Counsellor for Equal Opportunity in the case of the New South Wales Act, to attempt to achieve a settlement of a complaint. It may be said therefore that the Acts are similar both administratively, in the adoption of the conciliation process, and substantively, in the areas of particular proscription.⁷

There are, however, certain apparent differences. Some of those are worthy of immediate note:

- (1) The New South Wales Act expressly applies to education⁸ and, to the extent that it is not excluded by section 22, to sport. The Commonwealth Act does not expressly deal with these areas but impliedly they fall under the umbrella of section 9 of the Act.
- (2) The New South Wales Act takes into account the reality that discrimination in the employment situation does not always spring from the formal employer/employee relationship and therefore the Act includes principal/contractor and commission/agent situations.⁹ It may be observed that the Act was amended to delete its application to partnerships.¹⁰ In addition, the New South Wales Act recognises the importance of equal opportunity in the qualifications necessary for employment conferred by various bodies.¹¹ The Commonwealth Act does not expressly apply to these bodies granting qualifications. In common with the New South Wales Act, the Commonwealth Act expressly applies to employment agencies.¹² Section 14 of the New South Wales Act attempts the thorny problem of defining situations which may be exempted, where there is a genuine occupational qualification of race. The most typical example supplied is that of the Chinese waiter in the Chinese restaurant. The New South Wales legislature has discarded the benefits of a general flexible test, albeit wide and vague, in favour of a rigid, more certain list of

⁷ It may be observed however that the Commonwealth Act in its application could be somewhat wider because of the breadth of sections 9 and 10 of that Act; for discussion see text at notes 33 to 37 *infra*.

⁸ S. 17.

⁹ Ss 10 and 9 respectively.

¹⁰ Compare section 10 of the United Kingdom Act applying to partnerships of six or more persons.

¹¹ S. 29. Under s. 12 of the United Kingdom Act it is unlawful for a body to discriminate against a person when conferring a qualification or authorisation required either by law or in practice for a trade or profession.

¹² Commonwealth Act, s. 15(2); New South Wales Act, s. 13. The New South Wales Act does not deal with employer organisations; *cf.* Commonwealth Act, s. 15(3).

categories. The categories laid down cover the areas most likely to give problems where there may be legitimate reasons for discrimination. The Commonwealth Act, on the other hand, does not provide any specific exemption. Any exceptions to the unlawfulness of discrimination must be impliedly drawn from section 15(1)(a) which stipulates that a person must be "qualified", and from section 8(1) where such discrimination may be thought of as benign.

- (3) The major structural difference between the Acts is that under the New South Wales Act, the Anti-Discrimination Board has been superimposed on the Counsellor, the approximate equivalent of the Commissioner under the Commonwealth Act. Under section 113 of the New South Wales Act, the Board has a quasi-judicial function and may make orders binding on the parties. Class actions are intelligently encouraged.

III PARTICULAR POINTS OF CRITICISM

It is appropriate, because of the similarity between the Commonwealth and New South Wales legislation, that an analysis of certain important aspects of the respective statutes be made in the light of some of Kelsey's particular criticisms.

1. *A Complaint-Based Procedure*

Kelsey criticises the Commonwealth Act for, among other things, its "complaint-based procedure".¹³ The Commonwealth Act, however, takes cognizance of the fact that it would be a fundamental weakness to rely solely on complaints made by individuals. The Commissioner is duty bound to conciliate in two situations: first, where the complaint is made by an individual; and secondly, where "it appears to the Commissioner that a person has done an act that is unlawful. . ."¹⁴ Thus, the Commissioner does not need to receive a complaint in order to trigger the conciliation powers. Under this power the Commissioner can isolate instances of patterns of discrimination in the community and proceed to utilise his powers. Although the New South Wales Act relies on the complaint-based procedure, it does incorporate the class action concept by allowing a representative complaint to be made.¹⁵ Since the power of self-initiation has been widely accepted as indispensable, it is surprising that it has not been given to the Counsellor. An influential American commentator has said:

The peculiar virtue of complaints initiated by commissions is that they can be directed against the worst offenders. This authority is necessary to deal with businesses and unions which have not

¹³ Kelsey, note 2 *supra*, 66.

¹⁴ S. 21.

¹⁵ S. 88.

opened up employment or other opportunities to any minority, and against whom complaints are rarely filed. It is also needed to deal with those areas in which it is very difficult for one being discriminated against to know whether discrimination has occurred, as is typically the case with employment agencies.¹⁶

It has also been said:

It is no longer adequate for [commissions] to proceed wholly, or even principally, on the basis of complaints filed by private parties. Within the framework of flexible, general plans designed to make most effective use of their resources, the commissions should systematically initiate their own inquiries, negotiations and complaints where they have reason to believe significant discrimination is being practised.¹⁷

The recently enacted United Kingdom Act gives power to the Commission for Racial Equality to undertake on its own initiative formal investigations as well as investigations at the request of the Secretary of State.¹⁸ The importance of this power was emphasised in a report ("The British White Paper")¹⁹ by the Home Secretary.

The withholding of the power of self-initiation from the Counsellor under the New South Wales Act may only be justified on two grounds. In the first place, the ability to bring class actions which enables organisations to bring complaints where otherwise individuals would be powerless; and secondly, the view that the conciliation and interventionary roles should not be mixed because they are different functions requiring quite different approaches to the question of discrimination. Insofar as the active interventionary role would require an establishment of the facts and therefore investigation, there may be some weight in the argument. As has been pointed out by Professor Tarnopolsky:

The process of investigation will almost inevitably arouse a certain amount of hostility on the part of the respondent towards the

¹⁶ Witherspoon, "Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process" (1965) 74 *Yale L.J.* 1171, 1192.

¹⁷ Girard and Jaffe, "Some General Observations on Administration of State Fair Employment Practice Laws" (1965) 14 *Buffalo L. Rev.* 114. See also Reisman, "Responses to Crimes of Discrimination and Genocide; An Appraisal of the Convention on the Elimination of Racial Discrimination" (1971) 1 *Denver J. Int. L. & Pol.* 29. Reisman cogently demonstrates the weakness of a pure complaint-based procedure: "The great wound of continuing discrimination is its internalisation in the target; the discriminated person who has, after years and perhaps generations of alien acculturation, begun to adopt the image the discriminators hold of him and to doubt his own and his groups worth, *will always lack sufficient self-awareness and self-confidence to avail himself of the formal rights and prerogatives which the law purports to offer him.* *Id.*, 49 (emphasis added). See also Greenberg, *Race Relations and American Law* (1959) 196.

¹⁸ Ss 48 and 49.

¹⁹ *Racial Discrimination: Report to Parliament by the Secretary of State for the Home Department* (1975) Cmnd. 6234 para. 36.

investigator. It is unlikely that he would be as prepared to discuss possible terms of settlement with an investigator as he might be with someone else, even though that someone else is from the same government agency. Besides, the skills required in order to be a successful investigator are different from those required for effective negotiation.²⁰

For all this, the New South Wales Act, in allowing the Counsellor to carry out his own investigations after a complaint is made, cuts the ground from under this argument, leaving as its only support the ability of groups to bring class actions before the Board.

Thus it follows that Kelsey's criticism would have been apt in relation to the New South Wales Act, although he failed to appreciate the powers of the Commissioner under the Commonwealth Act. The Counsellor should have this power to better ensure the effectiveness of the New South Wales Act.

2. *The Role of Courts*

Both pieces of legislation eventually place reliance on courts of law. The presence of these traditional mechanisms in the Commonwealth Act is severely criticised by Kelsey.²¹ Access to the courts under the Commonwealth Act is more direct than under the New South Wales Act. Under section 24 of the former Act an aggrieved person may bring an action in court upon the giving of a certificate by the Commissioner that the matter has been attempted to be settled and has not been so settled. The latter Act attempts to substitute an administrative body—the Anti-Discrimination Board—for the court.²² In this way the Act copies the Ontario Human Rights Code which establishes a Board of Inquiry (although the Board is created *ad hoc* rather than permanently). Such an approach has the advantage that the matter is dealt with by a body with expertise in the area and the remedies are able to be applied with more flexibility.²³ The establishment of the Board overcomes to some extent Kelsey's criticisms relating to the unsatisfactory nature of court decisions in this area. One may agree

²⁰ Tarnopolsky, note 3 *supra*, 577. The combination of activities has been recognised elsewhere; Girard and Jaffe, note 17 *supra*, 118. These authors concede that the combination may be "highly controversial" but point out that the combination of functions may not be necessarily detrimental, and they cite instances of the National Labour Relations Board and Federal Trade Commission as examples where the combination has been satisfactory: *cf.* Keith, "The Race Relations Bill" in McKean (ed.), *Essays on Race Relations and the Law in New Zealand* (1971) 57, 66-67.

²¹ Kelsey, note 2 *supra*, 75-78.

²² See Part VIII of the Act.

²³ See Hill, "The Role of a Human Rights Commission: The Ontario Experience" (1969) 19 *U. Toronto L.J.* 390, 392 demonstrating the concentration on conciliation of dispute settlement in favour of the little-used Board of Inquiry: "[S]ince the enactment of this legislation in 1962, of approximately 2000 formal cases investigated, only about 50 have required resort to [Board of Inquiry] procedure".

with this criticism, as courts traditionally have had very little exposure to legislation of this kind and they would possibly have very little empathy for its application.

However, as was found in Ontario,²⁴ it is not possible to exclude entirely courts of law from the area. The doctrines of administrative law will inevitably impinge on any exclusiveness of jurisdiction on the part of the Board. The Board will therefore lose the flexibility in areas where its administrative expertise would be useful. Moreover, the tendency to magnify the courts' influence and thereby reduce the benefits accruing from an informal hearing is instilled by requiring first that the Board give written reasons for a decision and secondly, by the fact that the decision may be appealed from to a court. Whether or not one agrees with Kelsey about the ineptitude of the courts in this area, certainly the New South Wales Act does not avoid the courts' influence.

3. Conciliation Process

One of Kelsey's major criticisms is that under the Commonwealth Act solutions are sought "within the traditional forms of the existing power structure. *It is in fact precisely because the solution is sought within that structure and particularly within its formal administrative and judicial constructs that it will not be found.*"²⁵

In relation to both pieces of legislation it is possible to take exception to Kelsey's contention. In the first place, the conciliation role of the Commissioner or the Counsellor is not a common mechanism for dispute settlement in our system. It has been included with a knowledge that highly formal mechanisms are generally inappropriate in dealing with racial discrimination. Secondly, the function of the Commissioner and the Board in the promotion of research and education demonstrates the flexible multi-faceted role of both.²⁶ This extended role received very little treatment in Kelsey's article. Its basic importance is stressed in Professor Street's 1967 Report ("the *Street Report*"):

[T]he lesson has been learnt that protection against racial discrimination must be buttressed by an extensive educational programme. That programme should enable the public to realise the part which they can play in eliminating discrimination and to understand the problem of minority groups, and it should make members of minority groups aware of their rights and of the steps which they may take if they meet discrimination. Publi-

²⁴ See *Bell v. Ontario Human Rights Commission* (1971) 18 D.L.R. (3d) 1. For discussion see Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell v. Ontario Human Rights Commission*" (1971) 9 *Osgoode Hall L.J.* 203.

²⁵ Kelsey, note 2 *supra*, 70.

²⁶ New South Wales Act, ss 20 and 119 respectively.

cations, films, broadcasts and conferences have all been successfully used for these purposes in the United States and Canada.²⁷

For the Australian legislation to work effectively the research, education and publicity functions must be fully utilised. The enforcement powers under the Acts go hand in hand with these wider powers. It has been said by an American commentator:

The balance between educational and enforcement activity also depends on the social forces to which the Commission is subject. Finally, the extent to which the Commission makes use of its extensive enforcement powers depends on the support it receives from the elements of the community interested in eliminating discrimination.²⁸

4. *The Iron Fist*

There is little doubt that the conciliation process needs an effective enforcement apparatus behind it. Many writers, including Kelsey,²⁹ have made this observation in relation to the 1965 and 1968 British Race Relations Acts. In this context the two subject pieces of legislation diverge. The New South Wales legislature has, while only according the Counsellor the power to call a compulsory conference, given the Board the full panoply of powers possessed by a Royal Commission.³⁰

The Racial Discrimination Bill as presented to the Commonwealth Parliament contained provisions which would have granted satisfactory powers to the Commissioner in furthering the conciliation process. In the first place, compulsory evidence-gathering powers were given under clause 23; secondly, the Commissioner was given power to bring an action in court to enforce the rights of the individual. The threat of court action was lessened by the Senate amendment which deprives the Commissioner of a right to bring an action on behalf of an aggrieved person, and by requiring an aggrieved individual to procure from the Commissioner a certificate under section 24(3) before being able to commence an action in court. The only coercive power is that which corresponds with the Counsellor's power to call a compulsory conference of the parties under section 22 of the Act. While the usefulness of this section is limited, it does at least allow the Commissioner to force a recalcitrant discriminator to attend a conference; an alleged discriminator must listen to the case and may be made to realise that the matter is serious.

5. *The Proscribed Areas*

A theme in Kelsey's article is that the Commonwealth Act is in essence a cosmetic piece of statute law which will not fulfil its purpose

²⁷ Street, note 3 *supra*, para. 119.2.

²⁸ Mayhew, *Law and Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination* (1968) 119.

²⁹ Kelsey, note 2 *supra*, 72.

³⁰ S. 110.

of eliminating racial discrimination from our society.³¹ Only experience will test this thesis, but one way to predict the possible impact of the legislation is to look at the areas of social activity that it will affect. It is important therefore to canvass the range of areas in which racial discrimination is deemed to be unlawful.

The New South Wales Act, although containing an extensive range of particular areas in which discrimination is prohibited, does not have the wide sweep of the Commonwealth Act. In fact, it may be said that no other analogous pieces of legislation have such a broad coverage. In the main, consistent with the New South Wales approach, laws have relied basically upon the selection of areas of traditional discrimination and have legislated in respect of them alone.³²

Section 9 of the Commonwealth Act is delimited only by the discrimination formula in the Act and by the broad rights listed in Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination. Therefore, an important area covered is discrimination in the administration of justice. Discrimination in this area was exposed by the late Dr Elizabeth Eggleston³³ and the Poverty Commission Report on Law and Poverty.³⁴ The New South Wales Act leaves this type of discrimination completely untouched.

The possibilities opened by sections 9 and 10 of the Commonwealth Act are considerable. For instance, section 9 may allow the introduction of statistical evidence tending to show breach of the section. Such evidence would clearly go to the "effect" of "nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life". The section, by the wording "effect or purpose" envisages that there be a subjective and an objective basis for liability. The question at the core of the section is the characterisation of the activity as "involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin". Statistical evidence once adduced to show "effect" may be so persuasive that the activity could be so categorised. Thus, for example, in a certain firm, figures may show that no representatives of minority groups have been included in management training over a number of years where selection takes place from a mixed group of individuals. If it were proved that the qualifications of the individuals from minority groups were equivalent for the purposes of the training programme, the accumulated statistics may show that the practice had the necessary "effect", and was a practice that involved "a distinction,

³¹ Kelsey, note 2 *supra*, 70.

³² Larson, "The New Law of Race Relations" [1969] *Wis. L. Rev.* 470, 473-499.

³³ Eggleston, *Fear, Favour or Affection* (1976). See also International Convention on the Elimination of All Forms of Racial Discrimination, article 5(a).

³⁴ Sackville, *Law and Poverty in Australia: Second Main Report, Australian Government Commission of Inquiry into Poverty*, Part IV, esp. 216-243 and 262-287.

exclusion, restriction or preference based on race, colour, descent or national or ethnic origin". The avoidance of the necessity of proving specific intent would greatly facilitate the operation of both pieces of legislation.

Section 10(1) of the Commonwealth Act is a powerful provision. It places a person who has been deprived of a right by law due to that person's race, colour or national or ethnic origin in a position to enjoy the right as others do in the community. What would an Australian court do in a situation where an Aborigine brings an action because he has been refused the opportunity of purchasing a house due to a restrictive covenant on the property prohibiting a sale to Aborigines? It is to be hoped that the court would conclude that, because the covenant was enforceable at law, the prospective Aboriginal purchaser was being deprived of the right "by reason of a law". Therefore, the Aboriginal purchaser, by force of section 10, should have the same opportunity as others in the community to purchase the house. The issue is whether a court would be prepared to find that, because a racially discriminatory act was institutionally or administratively enforceable, it could be categorised as falling within section 10. Section 10(1), by force of section 109 of the Australian Constitution, will override inconsistent State legislation by placing a person in an equal position regardless of State law. This will allow courts to examine State laws in much the same way as would a constitutional provision overriding discriminatory legislation. This has important federal implications as well as far-reaching implications in assuring legal equality uniformly throughout Australia.

Section 10 should be contrasted with section 54 of the New South Wales Act. This latter section stipulates that nothing in it "affects anything done by a person in compliance with", *inter alia*, "any other Act, whether passed before or after the date of assent . . . or . . . with an instrument" under such an Act. This provision gives immunity to discriminatory acts when done under the aegis of a statute. While it may be said that this limitation provides certainty in particular activities, it can hardly be said to provide a proper degree of protection from discrimination. Australian governments have in the past, and no doubt will in the future, enact discriminatory legislation.³⁵ Indeed, one of the reasons the Australian Constitution lacks any form of "equal protection" provision was a desire by the founding fathers to keep on

³⁵ For recent examples see Aborigines Act 1971 (Qld) and Torres Strait Islanders Act 1971 (Qld). For discussion see Nettheim, *Outlawed: Queensland's Aborigines and Islanders and the Rule of Law* (1973). Certain objectionable parts of the Queensland legislation were repealed by Commonwealth exercise of power in the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth). For discussion of the racism reflected in early Commonwealth legislation, see Souter, *Lion and Kangaroo: The Initiation of Australia 1901-1919* (1976) 84-89.

foot laws that discriminated against Chinese and coloured aliens.³⁶ The exemption is cast far too widely. If certain activities are in need of legitimate protection these should be expressly stipulated.

It follows from this that, as the respective statutes stand, the Commonwealth Act has more potential than the New South Wales Act to achieve its aims of the elimination of racial discrimination. The former Act reaches into many areas of fundamental social importance. The breadth of this Act belies the characterisation accorded to it by Kelsey.³⁷ Legal proscriptions in such fundamental areas must, by bringing to bear the weight of the law, help enormously in changing attitudes and modes of behaviour.

IV SUGGESTED AMENDMENTS

Legislation of this kind requires careful and continuous review. The legislation deals with on the one hand delicate interpersonal relationships and on the other with gross denials of basic freedoms. This is not legislation that can be placed upon the statute book and left to fend for itself. It will soon be outdated and consequently lose effectiveness if this is allowed to happen. Both pieces of subject legislation provide for internal review: the New South Wales Act by the Anti-Discrimination Board, and the Commonwealth Act by the functioning of the advisory Community Relations Council. This is a recognition that the legislation exists in a dynamic area and that the legislature has a duty to scrutinise its effectiveness.

1. *Clubs*

It would seem that the subject pieces of legislation do not include clubs in their terms. The New South Wales Act specifically excludes non-statutory and non-profit bodies and clubs registered under the Liquor Act 1912 or the Gaming and Betting Act 1912 from its operation insofar as membership is restricted or "benefits, facilities or services" are provided to members.³⁸ The position under the Commonwealth Act would appear to be the same, for the decisions in *Dockers' Labour Club and Institute Ltd v. Race Relations Board*³⁹ and *Charter v. Race Relations Board*⁴⁰ may well apply in Australia to exempt private clubs from the ambit of the Act. Private clubs would not be regarded as places which a "section of the public" are allowed to enter or use, under section 11.⁴¹

³⁶ La Nauze, *The Making of the Australian Constitution* (1972) 231-232.

³⁷ Kelsey, note 2 *supra*, 70.

³⁸ S. 57.

³⁹ [1976] A.C. 285.

⁴⁰ [1973] A.C. 868.

⁴¹ See Kelsey, note 2 *supra*, 76-77 and Munro, "Racial Discrimination in Clubs" (1974) 124 *New L.J.* 205.

Private clubs raise directly the question of the boundary between unjustifiable racial discrimination and freedom of association and privacy. Where the club is a sham and has no real private elements, both the English and United States courts have had no difficulty in finding racial discrimination unjustifiable.⁴² Where the club is small, with intimate member-to-member relationships and strict membership rules, the privacy of the members and the exercise of freedom of association will allow racially discriminatory admission criteria.⁴³ The interests of privacy and freedom of assembly give way to demands of equality where clubs enter the public domain. Both the *Charter* case and the *Dockers'* case may be criticised because of the essentially public nature of those clubs.⁴⁴ It has been suggested that the Commonwealth Act be amended to apply to "large clubs".⁴⁵ A strong case could be made out that large clubs in this country, more than in others, play an integral part in our society and are drawn within the public domain.

The Commonwealth Act relies upon the Convention on the Elimination of All Forms of Racial Discrimination for constitutional validity. Although size is an important factor to determine whether the public/private line has been crossed,⁴⁶ a more satisfactory formula, both on the basis of the interests sought to be protected by the Convention and the constitutionality of the Act would be to make the Act applicable to any club or association in a community which has a significant impact on the exercise of any of the rights outlined in Article 5 of the Convention.⁴⁷ Moreover, such a provision would allow a balancing of the competing interests to be undertaken. This test is more in line

⁴² See *Panama (Piccadilly) Ltd v. Newberry* [1962] 1 W.L.R. 610; in this case the public were in substance solicited and charged membership fees as an entrance fee. See also *Daniel v. Paul* (1969) 395 U.S. 298; in this case "Lake Nixon Club . . . was simply a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs", *id.*, 301 *per* Brennan J. But compare *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163.

⁴³ For discussion see Rohr, "Association, Privacy and the Private Club: The Constitutional Conflict" (1970) 5 *Harv. Civil Rights L. Rev.* 460.

⁴⁴ An exhaustive treatment of the dividing line between private and public is not possible here. See Reed, "Section 1981 and Private Groups: The Right to Discriminate versus Freedom from Discrimination" (1975) 54 *Yale L.J.* 1441. In *Bell v. Maryland* (1964) 378 U.S. 226, Goldberg J. stated: "Prejudice and bigotry in any form are regrettable but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudice including race. These and other rights pertaining to privacy and association are themselves constitutionally protected liberties"; *id.*, 313. For problems in drawing the dividing line between the First Amendment guarantee of free speech and racial discrimination, see *Nationalist Socialist White Peoples Party v. Ringers* (1973) 473 F. 2d 1010; noted in (1973) 51 *J. Urban L.* 322.

⁴⁵ McCallum and Trindade, "Case Note: *Dockers' Labour Club & Institute Ltd v. Race Relations Board*" (1976) 10 *M.U.L.R.* 442, 445.

⁴⁶ This is the approach taken in the United Kingdom Act, s. 25.

⁴⁷ See Kelsey, note 2 *supra*, 60.

with the underlying basis for the inclusion of clubs rather than the ascribing of an arbitrary number of members.

2. *Definition: the Element of Intent*

Of basic importance is the question of the requisite intent which needs to be proven to found an action under the subject legislation. The British White Paper recognised that "one important weakness" of the Race Relations Act was "the narrowness of the definition of unlawful discrimination".⁴⁸ The White Paper states:

An unlawful motive may be inferred from the fact that a black person is treated less favourably than a white person; but, in the absence of a discriminatory motive, the present law does not cover practices and procedures which have a discriminatory effect upon members of a racial minority and which are not justifiable.⁴⁹

The United Kingdom Act follows up the recommendation with the following provision. Section 1 states:

A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if—

- (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or
- (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but—
 - (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
 - (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
 - (iii) which is to the detriment of that other because he cannot comply with it.

The courts in the United States arrived at a similar conclusion: that acts under Title VII of the Civil Rights Act 1964 (U.S.) may be found discriminatory without proof of specific intent, if they have a disproportionate impact on minority groups.⁵⁰

The pivotal section of the New South Wales Act is section 7, defining "racial discrimination". The section is silent on the intent necessary

⁴⁸ Note 19 *supra*, para. 35.

⁴⁹ *Ibid.*

⁵⁰ *Griggs v. Duke Power Co.* (1971) 401 U.S. 424. For discussion of U.S. courts' approaches see Cooper, "Introduction: Equal Employment Law Today" (1973) 5 *Colum. Human Rights L. Rev.* 263. Compare *Washington v. Davis* (1976) 96 S. Ct. 2040 where the Supreme Court refused to apply the *Griggs* test to the 14th Amendment of the U.S. Constitution.

for a person to be held to have discriminated. It will be crucial to the success of the subject legislation that plaintiffs are not frustrated by problems of proving the requisite intent. For, if court cases continually founder on the problem, the hand of the Commissioner under the Commonwealth Act, already weakened by the excision of certain provisions by the Senate, will be further weakened. The prospect of decisive court action is the major weapon now available to the Commissioner. If court cases are continually lost because of difficulties of proof, recalcitrant discriminators will have little reason to co-operate with the Commissioner. Similar reasoning applies to the Board and ultimately the courts under the New South Wales Act.

Section 18 of the Commonwealth Act reads as follows:

A reference in this Part to the doing of an act by reason of the race, colour or national or ethnic origin of a person includes a reference to the doing of an act for two or more reasons that include the first-mentioned reason, provided that reason is the dominant reason for the doing of the act.

This wording was introduced by the Opposition in the Senate. The provision as it came from the House of Representatives stipulated that the discriminatory reason did not have to be dominant. The framers of the legislation were particularly aware of the difficulties encountered under the South Australian Prohibition of Discrimination Act 1966 where the formula for intent was "by reason only of his race, or country of origin or the colour of his skin".⁵¹

It was suggested that the original clause 18 did not go far enough. Gareth Evans favoured the inclusion of a "reverse onus" clause. This would have provided that "once it is established that the act was done by the defendant, the burden lies on the defendant of 'proving to the reasonable satisfaction of the court' that the act was not done for a racially discriminatory reason".⁵² Such a provision would have strengthened the Act.

The present wording of the Commonwealth Act casts a heavy burden on the plaintiff; not only must he prove a discriminatory intent but he must prove the dominance of it. Although the New South Wales Act does not cast such a heavy burden of proof on the com-

⁵¹ For comment see Ligertwood, note 4 *supra*, 24. The South Australian Act 1976 overcomes this impediment to the efficacy of the legislation by providing in s. 5(2): "A person discriminates against another on the ground of his race where his decision to discriminate is motivated or influenced to a significant extent by— (a) the race of the person discriminated against; or (b) an actual or imputed racial characteristic appertaining or attributed to that person; notwithstanding that other factors motivate or influence his decision." Although this provision by no means remedies the basic flaw of the legislation, *i.e.* its criminally based approach, and is not happily drafted, it does improve the legislation by facilitating proof of racial discrimination. The Commonwealth should take note.

⁵² Evans, note 2 *supra*, 488.

plainant, the test still relies on the intent nexus; "discriminates . . . on the ground of . . ." Now that the United Kingdom Act has given the lead, there is an urgent need for a similar provision in the Commonwealth Act and the New South Wales Act along the same lines. The reverse onus clause suggested by Gareth Evans, although going a considerable way, would encounter opposition from some civil libertarians who see such clauses as destructive of common law safeguards. More fundamentally, the reverse onus clause still relies upon the element of intent and this is not as satisfactory as the objective factor approach in part adopted by the United Kingdom legislation. A focus on intent gives undue emphasis to the individual complaint; it does not recognise that the Commissioner or the Counsellor has an active role in seeking out discrimination and attempting to change the existing patterns of discrimination.

3. *Evidence Gathering Provisions*

The New South Wales Act does not give the Counsellor any evidence gathering powers. Like the Commissioner, he merely has the power to call a compulsory conference.⁵³ The Board, however, has wide powers under section 110 since it has the powers of a Royal Commission. The importance of this power to the effectiveness of conciliation is fundamental. The want of this power reduced the effectiveness of the Race Relations Acts where reliance on voluntary compliance proved to be unsatisfactory.⁵⁴ Importance has been placed on this compulsory function in Ontario and United States legislation.⁵⁵ At present the Commissioner and the Counsellor are impotent in the face of a discriminator who refuses to co-operate. The only present coercive power, the compulsory conference, although of some aid will not move an alleged discriminator to volunteer. The emphasis under the New South Wales Act is for the Counsellor to be the conciliator, therefore he should be armed with compulsory powers, otherwise a virtual by-passing of the Counsellor in favour of the Board may be witnessed.

4. *National Origin*

Fundamental to the definition of racial discrimination is the range of grounds that fall within the compendious term. The Commonwealth Act, except for section 9 which includes "descent", uses the formula: "by reason of the race, colour or national or ethnic origin . . ." The South Australian Act includes in section 3 amongst other grounds both

⁵³ S. 92(2).

⁵⁴ Street, note 3 *supra*, para. 85.1; Lester and Bindman, note 3 *supra*, 301. Note the British White Paper stated that it was unable to accept the recommendation of the Annual Report of the Race Relations Board that the Board be given "subpoena" powers for the purpose of investigating individual complaints: note 19 *supra*, para. 51.

⁵⁵ Tarnopolsky, note 3 *supra*, 578; Witherspoon, *Administrative Implementation of Civil Rights* (1968) 153-154.

“nationality” and “ancestry”. Section 6 of the New South Wales Act defines the word as including: “colour, nationality and ethnic or national origin.” The framers of the New South Wales Act have in this definition taken note, it is assumed, of the line of cases in both the United Kingdom and the United States restricting the meaning of “national origin” to, as Mr Justice Marshall stated it, “[T]he country where a person was born, or, more broadly, the country from which his or her ancestors came”.⁵⁶

The House of Lords in *Ealing London Borough Council v. Race Relations Board*⁵⁷ decided similarly that “national origin” did not include “nationality”. It is clear that a court interpreting the Commonwealth Act will delimit “national origin” so as not to include “nationality”. This result would be more assured when it is considered that the International Convention on the Elimination of All Forms of Racial Discrimination, the genesis of the Act, is limited in a like manner.

The non-inclusion of nationality, except insofar as discrimination on the basis of immigrant status under section 5 is concerned, represents a weakness in the Commonwealth Act as compared with the New South Wales Act and the South Australian Act. If the constitutionality of the inclusion of nationality is a concern, the provision could be put in a severable section, as in section 5.

5. Access to the Courts

As discussed earlier, both the Commonwealth and the New South Wales Acts provide for a preliminary administrative screening process before redress may be sought in a court of law.⁵⁸ This approach, especially the two-tiered New South Wales scheme, should be compared with the words of the British White Paper:

[T]he requirement that all complaints should be investigated in this way [*i.e.*, by the Race Relations Board] may create resentment and hostility among those it is designed to assist. The process may seem cumbersome and protracted. The complainant may feel aggrieved at being denied the right to seek legal redress while his complaint is being processed. If his complaint is not upheld, he is likely to resent the fact that he is denied direct access to legal remedies. Even if it is upheld, he may feel aggrieved because, in his view, the Board or conciliation committee has accepted a settlement or assurance which he regards as inadequate; or, worse still, because after conciliation has failed, the Board has

⁵⁶ *Espinoza v. Farah Manufacturing Co.* (1973) 414 U.S. 86, 88. But note the strong dissent of Douglas J.

⁵⁷ [1972] 2 W.L.R. 71.

⁵⁸ See text at note 22 *supra*.

decided not to bring legal proceedings, whether because it considered that it had insufficient prospects of proving the case in court or for some other reason.⁵⁹

There is merit in allowing a parallel system to exist by which an aggrieved person has a choice either to go directly to court or to go through administrative processes. The right to be free from racial discrimination should be seen to have equal standing with other rights that may be enforced and defended directly in court.

The New South Wales Act allows representative suits before the Board.⁶⁰ By doing so, it lessens the need for an official representative to initiate actions. Much of the possible success of these class actions depends upon the existence of organised representative groups in the community. These are scarce at the present time and, moreover, the right to bring a class action may well be illusory if the disincentive of costs prevents all but wealthy organisations from bringing actions in court. In order to overcome this obstacle the Counsellor or the Board should be provided with a fund on which such organisations could draw. Until these problems are overcome class actions will be no substitute for the ability of either the Counsellor or Commissioner to bring an action on behalf of deserving individuals.⁶¹ The Acts should be amended to allow for this as well as for class actions.

V REMEDIES

1. Damages

The powers given to a court under section 25 of the Commonwealth Act are wide and allow relief to be appropriately moulded. Briefly, the remedies are restraining and mandatory injunctions, rescission of contract, damages and other relief as the court sees fit. Of importance is section 25(d) which allows damages in respect of:

- (i) loss suffered by the person aggrieved by the relevant act, including loss of any benefit that that person might reasonably have been expected to obtain if the relevant act had not been done; and
- (ii) loss of dignity by, humiliation to, or injury to the feelings of, a person aggrieved by the relevant act.⁶²

The ordinary rules of measure of damages will often result in only nominal damages where a discriminatory act has occurred. While

⁵⁹ Note 19 *supra*, para. 40.

⁶⁰ Ss 102, 103.

⁶¹ See text at notes 13 to 31 *supra*.

⁶² For discussion of the justification for this head of damage, see Duda, "Damages for Mental Suffering in Discrimination Cases" (1966) 15 *Clev.-Mar. L. Rev.* 1; Brewer, "Torts—Mental Distress Damages for Racial Discrimination" (1970) 49 *N.C.L. Rev.* 221.

little material damage may have been suffered, the damage to feelings is often substantial.⁶³ The New South Wales Act fails to provide expressly for this special head of damage. The Board may order damages to be paid not exceeding \$20,000 "by way of compensation for any loss or damage suffered by reason of the respondent's conduct".⁶⁴ An aggrieved party may be hard-pressed to have damages for humiliation and loss of dignity included in this formula. The Act should be amended accordingly.

2. Injunctions

An incidental amendment which may have a significant bearing on discriminatory situations would be to grant a court the ability to make an injunction to preserve a present state of affairs. A major weakness in the Commonwealth Act is that there is no power to keep in abeyance a job vacancy or housing facility about which there has been received a complaint of discrimination. The person against whom the complaint is filed is free under the Act to give the job or housing facility to someone else. This means that the Commissioner is deprived of any adequate remedy upon conciliation if it is proved that the complainant's grievance was justified. On this point Witherspoon contends:

Since a conciliation agreement is almost the only disposition most commissioners are willing to make use of in dealing with justified grievances, the impact of their lack of authority to preserve the job or housing in issue is often devastating.⁶⁵

From his analysis, Witherspoon finds a great percentage of jobs and housing facilities are never offered to an aggrieved person. In most cases, the job has been filled and the housing facility sold or let.⁶⁶ On the other hand, he found that States permitting temporary injunctions recorded a great percentage of satisfactory settlements. For instance in 1965, in New York, 48 per cent of the Commissioner's satisfactory adjustments involved an offer to the injured party of the dwelling house in issue.⁶⁷

Injunctive relief generally takes one of two forms. The first is that authority may be granted to the Commission to file an action for a temporary restraining order and an injunction pending the disposition of the complaint. The second is that, prior to a final administrative determination on the merits of the complaint, a respondent is pro-

⁶³ *E.g. Bradmore Working Club Wolverhampton* (1970) 8 *Race Relations* 1, where the court ordered 5 shillings damages. See also the famous case of *Constantine v. Imperial Hotels Ltd* [1944] K.B. 693, where Lord Constantine, a West Indian cricketer, was awarded only 5 guineas when he and his family were refused accommodation at a London hotel on racial grounds.

⁶⁴ S. 113(b)(i).

⁶⁵ Witherspoon, note 55 *supra*, 190.

⁶⁶ *Id.*, 190-192.

⁶⁷ *Id.*, 196.

hibited from taking any action with intent to defeat the purpose of the Statute. Oregon has adopted this latter method.⁶⁸ Massachusetts and several other States have adopted varying versions of the former scheme and generally this is the more common of the two.⁶⁹

The New South Wales legislation makes provision for the Board to make an "interim order" to preserve the status quo. The Board may at or after lodgement of the complaint:

... make an interim order to preserve—

- (a) the status quo between the parties to the complaint; or
- (b) the rights of the parties to the complaint, pending determination of the matter the subject of the complaint.⁷⁰

Protection is necessary not only for the aggrieved party but for the respondent. However, the Board would in most circumstances be loath to grant interim relief unless it knew that if the respondent were not at fault, he or she would be able to obtain relief for any damage caused to him or her by the injunction. Protection in this manner would act to safeguard the respondent and the process itself from vexatious and malicious complaints. This result could be achieved in both Acts by espousal of clause 703(b)(1)(2) of the United States Model Anti-Discrimination Act⁷¹ which restricts the issuance of the temporary injunction to five days and entitles the respondent where the complaint is dismissed to obtain damages from the State when loss results from the granting of temporary relief.

The incorporation of this power in the legislation would not only make relief more satisfactory, but also would strengthen the hand of the Commissioner in the conciliating role. The Commissioner would be conciliating from a position of strength and could ensure that the conciliation process did not become a sham because of the filling of a job vacancy or the disposal of property during the course of investigation.

3. *Judicial Enforcement and Supervision of Conciliation Agreements*

The Commonwealth Act does not consider the problem which arises when an agreement reached by conciliation is subsequently broken. It would seem that in this situation the Commissioner is driven back to square one and must proceed under the Act as if the settlement had not been reached. It would be preferable to require that when settlement is reached a conciliation agreement be drawn up outlining the rights and duties of the various parties. Such a conciliation agreement should then be enforceable in court. The Commissioner should

⁶⁸ (1965) Ore. Rev. Stat. s. 659.055.

⁶⁹ Mayhew, note 28 *supra*, 115.

⁷⁰ S. 112.

⁷¹ See (1967) 4 *Harv. J. Legis.* 224, 257-258.

be under an obligation, especially in respect of self-initiated matters, to ascertain at a later date whether a settlement had been honoured.⁷²

The New South Wales Act does not suffer to the same extent from this defect because of the powers of the Board in making and enforcing Orders. Section 116 applies a penalty of \$1,000 for refusal or neglect to comply with an Order of the Board (in cases which are dealt with only by the Counsellor there is no enforcement mechanism and the position is on all fours with that under the Commonwealth Act). However, the New South Wales Act does not provide for any supervisory function by the Board and it is suggested that follow-up powers be granted. This will be particularly important in the class action situation and also if the amendments suggested earlier in respect of self-initiation are adopted.

Conciliation agreements should be judicially enforceable. This would provide the conciliation mechanism with final sanction and would be in line with Tarnopolsky's theme that "if persuasion and conciliation fails, then the law must be upheld, and the law requires equality of access and equality of opportunity. This is the 'iron hand in the velvet glove' ".⁷³

The failure to provide for judicial enforcement in the United States is cited as a weakness by Witherspoon in his extensive survey of civil rights legislation. He says:

Since commissions are so prone to rely upon conciliation agreements to settle cases, it appears that one salutary improvement in the individual case method could be effectuated by granting commissions the authority to obtain judicial enforcement of these agreements. This would both protect what value there is in commission emphasis upon the use of these agreements and make these agreements more effective in the long run for achieving elimination of discrimination.⁷⁴

Professor Tarnopolsky suggests that provision be made for filing a recommendation with a court and that thereupon this be enforceable as a court order.⁷⁵ There does not seem to be a good reason why the Commonwealth and New South Wales Acts could not be amended to provide for such supervision and for the issuing of an injunction in case of breach. The provision would stipulate that any conciliation agreement be embodied in writing and filed with a court of competent jurisdiction, or with the Board under the New South Wales Act.

⁷² The British White Paper, note 19 *supra*, para. 114 recommended that the Commissioner be enabled in the case of a non-discrimination notice to undertake a further investigation at any time within five years from the date of that notice to ascertain whether the respondent had complied with its terms.

⁷³ Tarnopolsky, note 3 *supra*, 573.

⁷⁴ Witherspoon, note 55 *supra*, 199.

⁷⁵ Tarnopolsky, note 3 *supra*, 584.

The agreement would then be enforceable as an order of the court, or of the Board.

VI ENFORCEMENT OF THE LEGISLATION

The success of the subject legislation will depend not so much on the powers given to its enforcement bodies or the range of discrimination proscribed, as on the administration of the legislation and the full support of the responsible governments. The *Street Report* was convinced:

[t]hat the law is an acceptable and appropriate instrument for handling the problem. At the same time we emphasise that the mere enactment of laws, however well thought out, is likely to be quite ineffective unless other factors are present. Control of racial discrimination is necessarily a complex and detailed administrative task, and no law will work unless it is supported by a governmental determination that it shall succeed. This whole-hearted support from the Government requires financial backing adequate to man the structure with competent and sufficient personnel. There is no necessary correlation between the quality of the drafting of a code concerning racial discrimination and the effectiveness of that code in operation. The machinery to implement the law is as important as the substantive law itself.⁷⁶

Similarly in the United States, a thorough analysis concluded that a Commissioner "must be given a comprehensive civil rights legislative program to administer together with ample procedural authority, staff and budget for carrying out [the] program".⁷⁷ Further to this, it was recommended that there be three kinds of functions assigned to a Commission:

- (a) the processing of individual complaints about all forms of harmful discrimination, through investigation, conciliation hearings, issuance of cease and desist orders and judicial-enforcement actions were necessary;
- (b) the negotiation from a position of strength with wide sectors of business, union organisations, professions, government agencies and private organisations for the taking of action by them to improve opportunities available to minority groups; and
- (c) the engagement in constructive official action designed to create the attitudes, conditions, and actions essential in each community for moving its majority and minority groups to confront and to resolve all of its serious problems of inter-group relations.⁷⁸

⁷⁶ Street, note 3 *supra*, para. 119.1.

⁷⁷ Witherspoon, note 55 *supra*, 289.

⁷⁸ *Ibid.*

Although an analysis of the legislation will show that it complies broadly with these criteria, the adoption of the suggested amendments will bring it further into line.

An additional problem in New South Wales in the efficient administration of the subject legislation will be the coexistence of two pieces of racial discrimination legislation.⁷⁹ This may well lead to a degree of forum shopping by prospective complainants. The detrimental effect of competing jurisdictions will be further exacerbated by the peculiarly sensitive nature of this legislation in the community. Minority groups, in a powerless position in any case, could well be confused by having two available avenues of redress. Inconsistent determinations will be highlighted and will tend to bring the legislation into ill-repute. This would be disastrous for, if any area of law calls out for clear and precise availability of relief, it is racial discrimination.

Putting aside a resolution of the problem of competing jurisdictions by a successful constitutional challenge to the validity of the Commonwealth Act,⁸⁰ it is imperative that the Commissioner for Community Relations (or his successor) co-ordinate activities with the Counsellor and the Board. Proper co-operation could ensure the most beneficial allocation of resources and consistent application of principles. Educational and promotional activities should also be marshalled to lessen confusion and promote effectiveness. If this co-operation does not take place and narrow-minded, jealous, bureaucratic empire building should occur, the possible benefits of the legislation will be lost.⁸¹ New South Wales' minority groups will continue to suffer inequalities and Kelsey's pessimistic message will ring true.⁸² The legal structure exists to make a significant start in the elimination of racial discrimination in our society. The problems of official apathy and lack of realisation in the community are of vital importance; they must be primary targets. The administrative bodies under the subject legislation must vigorously exercise their powers. With the backing of government real progress may yet be made.

⁷⁹ The dual operation of the South Australian Act and the Commonwealth Act in South Australia does not pose problems of the same magnitude. The philosophies of the two Acts operating in South Australia are quite different, and there will not exist the competing conciliation, educational and promotional aspects. However, unfortunate consequences could follow if the activities of the Commission for Community Relations were to be interrupted during conciliation by the prosecution of a party under the South Australian Act. It is apparent that a *modus vivendi* needs to be established for the parallel operation of the two Acts.

⁸⁰ See note 1 *supra*.

⁸¹ A vehicle for achieving co-operation is the proposed Human Rights Commission to be established under the Human Rights Commission Bill 1977. However the negative response of the States to joining such a scheme does not auger well for a rationalisation of functions. See the Attorney-General's Second Reading Speech on the Bill: "[M]ost of the States have indicated that at this stage they would not propose to join in a scheme that involved functions relating to State legislation and State practices being vested in a Commonwealth commission." H.R. Deb. 1977, Vol. II, 2293.

⁸² See Kelsey, note 2 *supra*, 94.