Australian Asian Lawyers Association Speech

Introduction

- Good evening, thank you for inviting me to this, the occasion of the Australian Asian Lawyers Association Annual General Meeting 2016, taking place simultaneously in all eastern seaboard cities in Melbourne, Sydney and Brisbane.
- AALA made its mark in the legal industry over the past two years, the release of its landmark research, growth to nearly 500 members, has its event sponsored by key major law firms.
- AALA has developed a significant & powerful presence in the legal community with monthly forums and events
- AALA made an impact in its mentoring development program now launched annually in Melbourne and Sydney
- AALA - an array of great resources in people across its organization

I note that the Hon. Michael Kirby is your patron. An outstanding jurist and humanitarian, committed to the cause of social liberalisation and progress, through a more realistic and responsive law. His judgments informed by creative innovation, but always underpinned by rigorous and quality legal reasoning. Often criticised for 'judicial activism', highlights the truth of our system – the practise of law, whether as a solicitor, barrister or a judge, is an art, not a science. The fact a matter has reached an appellate court discloses it is not a simple matter, with an impirical truth, but a complex array of conflicting interests to be resolved not only by application of legal principles (common law, equitable or statute) but by the process of legal reasoning and interpretation. In many, perhaps most cases, informed and reasonable minds can disagree on the appropriate outcome. Hence the need – in my humble view – not only for practitioners and appointments of the highest quality –

and I note the observation by a former Queensland Court of Appeal Justice Geoffrey Davis that "[n]o word is more used or abused in this context [the criteria for judicial appointment] than 'merit'."[1]

[1] Geoffrey Davies, 'Appointment of Judges', Speech delivered at the QUT Faculty of Law – Free Lecture Series, Banco Court, Brisbane, 31 August 2006, http://www.law.qut.edu.au/about/AppointmentofJudges.pdf

… but when we focus on what we mean by *'quality'* or *'merit'* we include a proper appreciation of the nature and composition of the society to be served, not only the particular combination of our own interests and biases.

Purpose of the speech

Building and acknowledging the relationship between AALA and both government and key political parties – the ones that will form the governments of this State and nation.

The NSW Labor Party is the oldest political movement in Australia, formed in the wake of the maritime strikes of the early 1890's and the desire for ordinary, working people to have their lives improved through action in Parliament, secured by direct representation of working persons by those from those communities. An audacious and creative innovation not before seen, I think, in the world to that time.

The Queensland Labor Government of **Anderson Dawson**, that lasted only for one week (1–7 December) in 1899, was not only the first Australian Labor Party Government; it was the first parliamentary socialist government anywhere in the world, and it attracted international newspaper coverage.[2] The four month Labor Government of Prime Minister John Christian Watson in 1904 was the first such national government in the world.

Who I am?

I speak to you this evening as the Leader of the Labor Party, and the Leader of the Opposition, in the NSW Legislative Council, the upper house of the State Parliament, which was itself the first legislative chamber in Australia. I am a Shadow Minister, with responsibility for Industry, Resources, Energy and Industrial Relations – the world of work. I also represent the Shadow Attorney General in the upper house on legislation.

I am also a practicing barrister, coming to the Bar in 2000, specialising in industrial, employment, work safety, constitutional, administrative law, and

[2] Blainey, Geoffrey (2000). *A shorter history of Australia.* Milsons Point, N.S.W.: Vintage. p. 263

more recently matters involving Australia's international legal obligations under the Refugee Convention and for complementary protection.

Before coming to the Bar I was the Chief of Staff to the then NSW Attorney General, the late Hon. J.W. Shaw Q.C. whose 5 years in office was marked by an outpouring of creative, progressive and technically competent law reform … a new and comprehensive framework to provide fair wages for working people, including what in my view remains the best and most effective mechanisms for addressing pay equity for women … the first legislation dealing with administrative law reform in the State, particularly addressing the rule in *Osmond v Public Service Board of NSW* (1989) 159 CLR 656 and the requirement for an administrative decision-maker in NSW to give reasons to a party affected by the decision in question …

- Mr Osmond was employed under the *Public Service Act 1979 (NSW)*. He applied for a promotion but was not recommended for the position. He requested reasons for the Board's decision but was refused. There was no statutory duty on the Board to provide reasons.
- Held: there was no general rule of the common law or principle of natural justice which required that reasons for decisions be given.
  - Gibbs CJ noted that this was the case even when decisions "have been made in the exercise of statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations of other persons."
  - He rejected Kirby P's contention in the appeal court that a right could be founded upon the judicial incident of providing reasons. "...there is no justification for regarding rules which govern the exercise of judicial function as necessarily applicable to administrative functions."
  - He held that even if such a right would be desirable, it was not the role of the courts to introduce one, instead it was the province of parliament.
  - Furthermore, even under the assumption that in special circumstances, natural justice may require reasons to be given, Gibbs CJ found that the present case was not such a case.

… special laws to ensure those suffering from asbestos and other related disease can have their claims quickly and properly dealt with, giving them peace of mind and securing their families … the first comprehensive Privacy law regime, the *Privacy and Personal Information Protection Act* … laws to ensure that all bona fide domestic relationships were recognised and protected in terms of property rights and other associated matters … The list is too comprehensive for tonight.

That is the legal and political tradition I come from.

I recognize the contribution made to date by AALA:-

- The AALA Cultural Diversity Analysis in April 2015 was the first research project of its kind in Australia which specifically addresses the gap in statistics on the level Asian Australian representation in the senior ranks of the legal profession – from solicitors, to barristers and the judiciary.

- Asian Australians are nearly ten per cent of Australia's population, but only 3 per cent of law firm partners, less than 2 per cent of the Bar and less than one per cent of the judiciary. Of the more than 6,000 barristers in this country, 87 junior counsel and only 7 Senior Counsel are Asian Australians.

- In terms of representation at the Bar, NSW is the second worst-performing mainland State (1.15%). In terms of representation in the judiciary, NSW is the worst-performing State ().36%). In the solicitor's profession, the picture is marginally better (1.53%). The picture improves when looking at national firms (2.94%) and international firms (3.22%). Clearly, significantly more work needs to be done and I think the formation and activism of the ALLA is an important innovation to achieve this.

- AALA provides a mentoring program that includes sitting judges, barristers and senior lawyers with it members some who are new graduates. This bridges foundation blocks in AALA with mainstream to diverse legal circles.

- Taking the issue of bringing about greater diversity in judicial appointments, there is often interest in taking the kind of approach as brought about by the Blair Labour Government in Britain: a Judicial Appointments Commission that seeks to 'depoliticise' the selection of candidates for judicial office. I note a useful contribution to this debate by SIMON EVANS* AND JOHN WILLIAMS in their article, *Appointing Australian Judges:A New Model*, Sydney Law Review Vol. 30: 295 [2008]

- Since 1988 in Canada, candidates for appointment to provincial superior courts have had to submit formal applications and be scrutinised by a Federal Commissioner of Judicial Affairs and be interviewed by provincial or territorial committees. There are special arrangements regarding appointments to the Canadian Supreme Court around the special status of the province of Quebec.

- In the US, some 24 States have Commissions that seek applications or expressions of interest from persons interested in appointment, interview them and develop short-lists for the consideration of the Governor. The degree of guidance given to such Commissions regarding what they take into account or how they undertake their task varies markedly.

- In the work of Ciara Torres-Spelliscy, Monique Chase and Emma Greenman in *Improving Judicial Diversity* a research project of the Brennan Center for Justice *at New York University School of Law* published in 2010, it was found that:

- Today, white males are overrepresented on state appellate benches by a margin of nearly two-to-one. Almost every other demographic group is underrepresented when compared to their share of the nation's population. There is also evidence that the number of black male judges is actually *decreasing*. (One study found that there were proportionately fewer black male state appellate judges in 1999 than there were in 1985.4) There are still fewer female judges than male, despite the fact that the majority of today's law students are female, as are approximately half of all recent law degree recipients. This pattern was most prevalent in states' highest courts, where women have historically been almost completely absent.

- These national trends repeated themselves in the ten States studied. For example:

- Arizona's population is 40% non-white,7 but Arizona has no minority Supreme Court justices. Minorities occupy only 18% of its Court of Appeals judgeships and 16% of its Superior Court judgeships. Despite Arizona's constitutional provision directing appointing Commissions to reflect the diversity of the state population, the diversity of the state bench falls short.
- Rhode Island's population is 21% non-white. Not withstanding the statutory requirement that the governor and nominating Commissions encourage diversity on the appointing Commissions, it has no minority Supreme Court justices and minorities hold only two of the 22 judgeships on the Superior Court.
- Utah's population is 18% non-white. Yet Utah has no minority Supreme Court justices. Minorities hold one of seven court of appeals judgeships and only four of 70 district court judgeships. Utah has no specific constitutional or statutory diversity provision.

- The problem is clear: even after years of women and minorities making strides in the legal profession, white men continue to hold a disproportionate share of judicial seats compared with their share of the general population. Looking at a sample of ten states with appointive systems, in most states racial and gender diversity on the bench lags behind the diversity of these states' general populations, bar memberships and law students. This is especially true on the highest courts; four of the ten states we examined had Supreme Courts that are all white.

- Overall, too few states have systematic recruitment efforts to attract diverse judicial applicants. We identified two particularly interesting trends from our interviews with judicial nominating Commissioners. Commissioners who thought of themselves as "headhunters" took responsibility for recruiting candidates and keeping an eye on the diversity of the applicant pool throughout the nominating process. Commissioners who conceived of their mission as purely "background-checking" spent little time actively recruiting candidates.

- To effectively increase diversity, nominating Commissions must add systematic recruitment to their repertoires. Expanding the pool of

applicants at the start of the process is a key ingredient to ensuring a diverse “short list” and ultimately a diverse bench.

- In NSW, a system of advertisements seeking expressions of interest has long been in place for the Local Court, stemming from the time it was not really seen as a judicial appointment. A selection panel comprising the Chief Magistrate, the head of the (then) Attorney General’s Department and an ‘independent’ third person would interview and develop a short-list. While not legally binding on the Attorney General and Government, selection from the list, in the order given, was more or less followed. A similar innovation now exists for the District Court.

- Federally, a similar process has been instituted for each of the Federal Court of Australia and the Federal Circuit Court.

- Personally, I do not favour efforts to define to the *nth* degree a formal, dare I say bureaucratic process to achieve desired outcomes. A better and quicker process is an activist appointments process pursued by an AG and Government.

- The ALP was the creator and facilitator of multiculturalism in Australia, for which we make no apologies.

- We are also the creators of anti-discrimination laws … starting with the 1977 Act here in NSW introduced by Premier Neville Wran, himself a noted legal practitioner and Q.C. … which was the foundation for like legislation in other jurisdictions. This included important protections against discrimination on the grounds of sex, race, marital status and other areas.

Legislative Assembly, *Hansard*, 23 November 1976 – Mr Wran, Premier:
The protection of fundamental rights and freedoms of the individual is of paramount importance to governments. The principle that all human beings are born equal, have a right to be treated with equal dignity, and a right to expect equal treatment in society is a principle firmly upheld by my Government.

One of the greatest contributions to the world unrest is the conflict of people different races, the intolerance that has prevented the peaceful co-existence of people of different nationalities and the prejudice that has blighted their mutual respect as human beings, each for the other. These intolerances and prejudices are reflected today in confrontations place in different parts of the world. This bill is an attempt, as far **as** legislation can, to end intolerance, prejudice and discrimination in our community…

I am sure that in the long these bodies will achieve a great deal in effecting positive improvement for the underprivileged and in influencing attitudes. I look to the time when people of any colour, race or sex are accorded equality without resort to the protection of the law. It is my firm view that the pervasiveness of discrimination in our society can be eradicated by positive action, particularly in the field of education. Eventually, positive programmes will be the means by which intolerance and prejudice inherent in our community will be removed. In an ideal world, no remedies for discrimination would be required. There would be no problems caused by intolerance and prejudice. Unhappily, that is not the case.

The bill deals with race and sex discrimination as well as discrimination on the ground of marital status. At the same time, the Government recognizes also the problems of persons who are unjustly treated by reason of other areas of discrimination. Accordingly, in addition to discrimination on the grounds of race, colour, descent, national or ethnic origin, and of sex or marital status, the bill also defines discrimination on the grounds of age, religious or political convictions, physical handicap or condition, mental disability and homosexuality. These provisions are highly innovative and their effect will be to provide for the first time a relief to persons who have been subjected to unjust discrimination on any of these grounds.

- Not everything in the original Bill was enacted at that time, but the breadth of vision was clear.

- We are committed to work with you to facilitate cultural diversity in the profession – at all levels, including the judiciary … examining ways how best to bring community and cultural diversity factors into proper consideration.

- Work with AALA to explore positive pathways to bring cultural diversity opportunities into the profession.

- The importance of anti-discrimination laws is enormous: it sets out the hopes and aspirations of society, the goal it wishes to achieve, the fairer society it aspires to be. The enactment of legislation proscribing race discrimination was an important plank of multicultural policy in

Australia. It evinced an ostensible commitment to equality and tolerance in accordance with the values of liberal legalism.

- Margaret Thornton, *The Liberal Promise: Anti-discrimination legislation in Australia* (1990) engaged in a detailed critique of anti-discrimination measures in Australia. Chief charge is that anti-discrimination legislation is capable of addressing only those acts of direct discrimination close to the surface, not systemic discrimination, that is, the racism (or sexism or homophobia or disable-ism) deeply embedded in the social psyche. If complainants allege discriminatory harms of a systemic kind, their complaints are likely to fail because of the limitations of legal form and the seemingly rational explanations that serve to legitimise the discriminatory conduct. This is played out dramatically in the world of work, where respondent employers have recourse to an arsenal of stock responses that have rational explanatory value, such as the construction of 'the best person for the job', 'merit', 'qualifications' and 'experience', which are adduced as though they consist of a descriptive component alone and do not have to be interpreted in a particular context: Margaret Thornton, 'Affirmative Action, Merit and the Liberal State' (1985) 2 *Australian Journal of Law and Society* .

- Nine legislative instruments, which operate concurrently, proscribe discrimination in Australia on the ground of (inter alia) race in specified areas of public and quasi-public life, including employment. The model prevailing in all Australian federal, State and Territory jurisdictions is a civil, compensatory model, although a short-lived criminal law model was initially adopted in South Australia. As a complaint-based system, the legislative schema depends on an individual identifying the discriminatory harm and assuming responsibility for lodging a complaint with an agency and pursuing the complaint to a tribunal or court if not conciliated, where the impugned conduct must be proven to the requisite standard. Although there may be provision for representative complaints and inquiries into organisational practices by agencies and commissioners, it is notable that these initiatives, which represent a nod in the direction of the systemic nature of racism, are rarely used. The

procedures not only exacerbate the burden confronted by individual complainants but neutralise the racism inherent in the conduct.

- There has been a paucity of empirical research and not a lot of scholarly attention paid to the field of race discrimination in employment in Australia. Nevertheless, existing critiques have highlighted key issues, including: the inherent problems with legal form, the challenges in demonstrating indirect discrimination; the burden of proof; the use of a normative white comparator; and the track record of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') in addressing discrimination.[3] It was 20 years before a substantial review of the *RDA* was conducted[4], and a comparative international analysis of its effectiveness was only conducted in 2008.[5]

- The *Racial Discrimination Act* 1975 (Cth) (RDA) was Australia's first federal law dealing with human rights and implemented a basic principle of international law: the principle prohibiting discrimination against people on the basis of their race, colour, or national or ethnic origin.
- The RDA declared unambiguously to the Australian people that racism and discrimination were no longer acceptable in our society. Since 1975, thousands of individuals and organisations have used the RDA to address racism, either by making complaints of discrimination, or by negotiating policy changes based on the broader principles of racial equality. The legislation has also made possible important developments in the area of Indigenous land rights, culminating in the recognition of native title in 1993.
- While these are important achievements, there is still a long way to go before people from all backgrounds are able to participate fully in the life of our nation. For this reason it is important that the RDA continues to be reviewed against the goals it seeks to achieve; equality and non-discrimination. Hence the HREOC (as it then was) review in 2008.
- This paper examined how the RDA compares to similar race discrimination laws in four other national and multinational jurisdictions: Canada, the United Kingdom (U.K.), the United States (U.S.) and the

[3] Beth Gaze, 'Has the *Racial Discrimination Act* Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–04' (2005) 11 *Australian Journal of Human Rights*

[4] Race Discrimination Commissioner (ed), *Racial Discrimination Act: A Review* (1995).

[5] Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975, Background Paper No 1* (2008).

European Union (E.U.). While all four of the national jurisdictions considered in this paper apply a higher standard of evidence (or require a higher standard of proof) for the most serious of civil claims, this higher standard is not commonly applied outside of Australia, to allegations of racial discrimination. The practical effect of this difference is hard to quantify. As most discrimination cases involve complex issues of credibility and evidence, it is hard to compare outcomes across jurisdictions, and state with any degree of certainty that a case decided one way in a particular court would have been decided differently in another. Nonetheless, it seems clear that the Australian courts are alone amongst the jurisdictions considered in expressly applying a higher standard of evidence to some, if perhaps not all, allegations of racial discrimination. When this is combined with the inflexible nature of the burden of proof, which remains on the plaintiff throughout, it is unsurprising that claims of discrimination have proved difficult to establish.

- According to Margaret Thornton and Trish Luker[6] a notable feature of the jurisdiction of racial discrimination is the generally lower percentage of complaints lodged in comparison with other grounds, such as disability. For example, in 2008–09, 980 complaints were received under the *Disability Discrimination Act 1992* (Cth) ('*DDA*'), 40 per cent of which were in the area of employment, compared to 396 complaints received under the *RDA* (encompassing all racial backgrounds), 54 per cent of which were employment-related. On the basis of a study of race discrimination complaints under the *RDA*, Beth Gaze found that the number of complaints lodged fell substantially over the period 2000–04.30 A longer-term analysis reveals that there was a general downturn in the number of complaints under the *RDA* post-1996, which was sustained over the subsequent decade. Despite the fact that employment is the most significant area in which complaints of discrimination are made, during the period 1988–2008, only 30–50 per cent of complaints made under the *RDA* were employment-related, in contrast to sex discrimination, where it was consistently above 80 per

[6] *The New Racism in Employment Discrimination: Tales from the Global Economy*, Sydney Law Review, Vol 32: 1, [2010] pp2-3, 6-7

cent. The relative lack of complaints of race discrimination is at variance with the social reality of Australia's increasingly racially and culturally diverse population.

- Complaints of race discrimination also have a lower rate of settlement in comparison to other grounds, such as sex and disability. Over the years 2001–07, no more than 26 per cent of complaints made under the *RDA* were finalised through conciliation, the remainder being terminated by the Human Rights and Equal Opportunity Commission (HREOC) or withdrawn by the complainant. Even where conciliation is attempted, it may not be successful and complaints of race discrimination also have a lower resolution rate overall, a situation that HREOC attributes to 'the difficulties complainants often have in demonstrating a link between their race and the alleged less favourable treatment and the associated limited case precedent in this area'. However, it is not a requirement that complainants meet a burden of proof in conciliation, and such statements illustrate the ever encroaching legalism onto the informal pyramidal base of the dispute resolution hierarchy. A complaint may be finalised because there is no reasonable prospect of conciliation, or withdrawn by the complainant as a result of factors such as frustration, fatigue and/or disillusionment with the process. Complaints which are terminated, withdrawn or unsuccessfully conciliated may proceed to a formal hearing at a tribunal or court, but only a very small proportion do so. In the federal arena, approximately 99 per cent of complaints do not proceed beyond conciliation.
- Concurrent legislative coverage is inconsistent across federal, State and Territory jurisdictions and is subject to frequent amendment, making national, comparative and historical analyses very difficult. Agencies empowered to oversee administration of legislation vary in size, structure and resourcing, and appointments to boards, committees and leadership positions reflect the political inclinations of governments of the moment. The specialist field of anti-discrimination law is now taught in only a limited number of law schools and is attracting a diminishing number of practitioners with a high degree of mobility between public agencies, private practice, decision-making bodies, and to a lesser extent academia, reflecting a contracting field of expertise.

- These matters are well explored in the paper by Thornton and Luker *The New Racism in Employment Discrimination: Tales from the Global Economy*, Sydney Law Review, Vol 32: 1, [2010]

- Like in Britain, NSW and Australia has pursued the individual complaints approach, rather than attempt a systemic attack on proscribed discrimination and its underlying causes. Perhaps this may be beyond the reach of the law, and may properly be the province of education and cultural change. Nevertheless, other jurisdictions have made efforts to take a different and more holistic approach.

- Some useful information can be found in the paper by Lois Thwaites of Newcastle University in Britain, "The British Equality Framework is Incapable of Achieving Equality in the Workforce", North East Law Review.[7]

- The 2010 British *Equality Act* sought to bring all the various grounds of discrimination under the one piece of legislation. It also attempted a shift I think from solely one focused on individual rights, complaints and remedies towards a more structural approach. However, as the recent House of Lords Select Committee on the Equality Act 2010 and Disability, "The Equality Act 2010: the impact on disabled people", 24 March 2016, suggests a range of deep-seated problems inhibiting the effectiveness of that law. Apart from concerns about abandoning issues-focussed legislation and institutions for a comprehensive one (one Equality Act, no separate Disability Commissioner) the equality duty has been found wanting. It requires authorities to "have due regard" to the need to eliminate discrimination and advance equality of opportunity, but also allows them to consider all the evidence but still pursue discriminatory policies. The duty, clearly, needs to be strengthened.

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[7] Thwaites L. (2014), „The British equality framework is incapable of achieving equality in the workforce", *North East Law Review* 2(1): 137-68.

- Equality legislation in Britain began almost fifty years ago, with the *Race Relations Act* 1965, and over the following three decades, many other anti-discrimination laws were enacted, including the *Equal Pay Act* 1970, the *Sex Discrimination Act* 1975, and the *Disability Discrimination Act* 1995. In the year 2000, the *Cambridge Review* criticised the framework of legislation for being outdated and fragmented. The law only covered race, sex and disability, and there were many inconsistencies between the protections afforded to each in terms of discrimination. Other characteristics such as age, religion and sexual orientation were not protected under these laws. Employers, and even lawyers, found the framework difficult to use.

- The *Equality Act* 2010 updated, harmonised and simplified the previous anti-discrimination legislation, to try and provide a workable framework, which both protects people from unfair treatment, and promotes a more equal society. The new Act was a significant step forward for equality in Britain, as there are now nine protected characteristics (race, sex, disability, age, religion or belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment) rather than just three previously. However, the underlying principle of formality has not changed. Nor has the process by which discrimination is dealt with.

- The main focus remains on individual complaints, with the onus on a single person to challenge discrimination. There remains a need to identify a specific perpetrator, ignoring the often systemic nature of discrimination, and any outcome is for an individual only. The logistical and financial challenges for an individual compared to an employer remain.

- The systemic change was the introduction of the 'positive action' provision allowing positive discrimination by employers to address past discrimination. However, while permitted, it is not required and its use has apparently been very limited.

- There are a range of examples of a positive obligation approach, requiring employers to take steps to identify and address systemic and historic discrimination.

- In the US, a contract compliance model was adopted by the Kennedy Government through an Executive order to improve the under-representation of disadvantaged groups in employment, directed to the actions of Federal agencies and their purchasing power from firms in the private sector. The Office of Federal Contract Compliance Programs enforcing through a range of monitoring and investigative powers, including compliance reviews, issuing improvement notices to employers and even barring an organisation from holding government contracts. This was credited with improving the representation 'black' people in employment. Date from 1974 to 1980 showed a faster employment growth rate for black males as being 3.8 per cent faster in firms contracting to the US Federal Government, and 12.3 per cent faster for black women. This approach was abandoned by the Regan Government in 1981 and the economic advances of black people stagnated and went into reverse.[8]

- In Germany, a series of three court cases established that in some circumstances positive discrimination in the form of 'flexible result quotas' for the employment of minorities was permitted by EU law. A quota system providing for automatic preference in employment for women candidates had previously been found to be unlawful and contrary to the *Equal Treatment Directive*. But a policy providing for female preference in employment, balanced by a safety valve measure to offset any disproportionate disadvantage to men, was ok.[9]

- The Netherlands, Norway, Sweden and other countries also use quotas to increase representation of disadvantaged groups in their workforces with some success, mostly imposed on the public sector.

[8] Thwaites, British Equality Framework, pp149-150
[9] Ibid. p151

- In Canada, an individual complaints based system gave way to mandatory positive action provisions under the Employment Equity Act 1995. The Employment Equity Act 1995 places obligations on employers to remedy underrepresentation of disadvantaged groups within their workforces.129 Under the Act, employers with more than 100 employees are required to review their workforces to determine the degree of representation of disadvantaged groups, and also to review all employment policies and procedures.130 They must draw up an employment equity plan, specifying goals and timetables for implementation,131 and file annual reports with the appropriate government body. The Canadian Human Rights Commission (CHRC) receives copies of all reports, and it is authorised to conduct audits of each employer. In cases of non-compliance, the Commission can request a written undertaking from the employer, and if that fails, the Commission can issue directions. If an employer ignores the Commission's directions, the case can be referred to the Employment Equity Review Tribunal. Fines of up to $50,000 can be imposed on employers.
- Statistics show that there has been an increase in women's representation in recent decades. In 2004, fifty eight per cent of women were in employment, an increase of 16 per cent since 1976 the other disadvantaged groups have not experienced the same improvements
- The 1995 Employment Equity Act only applies to employers whose activities fall under federal jurisdiction. This poses a problem, as eighty eight per cent of Canada's workforce falls under provincial jurisdiction, and most of Canada's provinces do not have alternative employment equity legislation in place. Where provinces do have such legislation in place, it can be limited in scope; such as in Quebec, where the legislation only covers public bodies.
- Another problem with Canadian employment equity relates to enforcement. The legislation does not provide the CHRC with a clearly defined role, and as the standards used by the Commission are not specifically outlined within the legislation, employers can easily

challenge the Commission's directions and referrals to the Employment Equity Review Tribunal. There is also a problem with the

- Commission's resources.

- In Northern Ireland, the Fair Employment and Treatment Order 1998 (FETO) consolidated and replaced the 1976 and 1989 Acts. The practices required of employers in Northern Ireland are much the same as in Canada. Employers are required to register with the enforcement agency;169 review their workforce and employment practices every three years; create a plan to remedy any underrepresentation, including goals and timetables, and submit annual monitoring reports to the Equality Commission for Northern Ireland (ECNI). The ECNI also has similar powers to the Commission in Canada. It can monitor employers, make recommendations as to how positive action should be taken, investigate employers, request written undertakings,serve notices containing directions on non-complaint employers, and refer cases to the Fair Employment Tribunal, which can impose fines on employers of up to £40,000.

- The mandatory positive action measures in Northern Ireland have been successful in redressing under-representation of Catholics in the workforce. In 1990, Catholic employees constituted 34.9 per cent of the monitored workforce, which was 5.1 percent less than the estimated 40 per cent who were available for work. By 2010, Catholics represented 45.9 per cent of the monitored workforce. This is a 37 per cent increase since the monitoring began, and it is very close to the percentage of Catholics that are available for work. The statutory positive action duties in Northern Ireland have been more successful than those in Canada and South Africa.

- A number of reasons may explain this. Firstly, the *Fair Employment and Treatment Order* 1998 applies to all public and private sector employers with more than ten employees. In Northern Ireland, the legislation is clear, and guidelines regarding the positive action provisions are published and distributed to employers by the Commission addition to

its monitoring and investigatory powers, the Commission in Northern Ireland is able to reach positive action agreements with employers, which include 'review of progress' clauses, so that Commission officers can liaise with employers to ensure that agreed positive action measures are in place, and that progress is being made towards fair participation in their workforces.

- A possible reason why Northern Ireland has been more successful in combating under-representation is that in Northern Ireland, annual monitoring reports, which identify employers by name, are published and made available to the general public. These reports detail the number of Catholics and Protestants in the employer's workforce. This 'naming and shaming' strategy could also explain employers' willingness to enter into voluntary agreements, so that they can (with the Commission's involvement) more effectively combat under-representation within their workforces.

- A final factor which may explain why the Northern Irish positive action measures have been more successful than those in Canada and South Africa, relates to Commission resources.

- Also, the general changes in Northern Irish society leading to and fostered by the Good Friday Peace accord, the ceasing of conflict with the IRA and the devolved, multi-party government for the province would, I think, have positively affected this social change.

- The question for us, as lawyers, and as social activists, is whether the current framework is leading society towards the desired goals as quickly as we would like, or whether we should look at making changes to the way the matters are approached under law.

- Of course, progress can always be put in jeopardy as the ongoing controversy regarding s18C of the RDA shows.

- Section 18C of the *Racial Discrimination Act* 1975 (Cth) ("the *RDA*") makes it unlawful for someone to do an act that is reasonably likely to *"offend, insult, humiliate or intimidate"* someone because of their race or ethnicity.

- Section 18D contains exemptions which protect freedom of speech. These ensure that artistic works, scientific debate and fair comment on matters of public interest are exempt from section 18C, providing they are said or done reasonably and in good faith.

- These laws were introduced in response to recommendations of major inquiries including the *National Inquiry into Racist Violence* and the *Royal Commission into Aboriginal Deaths in Custody*. These inquiries found that racial hatred and vilification can cause emotional and psychological harm to their targets, and reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can soften the environment for more severe acts of harassment, intimidation or violence by impliedly condoning such acts.

- Echoing these inquiries, the Australian Law Reform Commission published the 1992 report, *Multiculturalism and the Law*, which recommended the introduction of legislation to deal with racial hatred.

- These laws, which protect the community from racial vilification, have been under threat from the Abbott Government and from right-wing elements in the Liberal and National Parties. Despite the Abbott Government abandoning its plans to repeal 18C[10], real threats to it remain.[11] These have resurfaced under the current Prime Minister, Malcolm Turnbull, a supposed "liberal" post the close-run 2016 election. This has created uncertainty and fear in the community, including for those of a non-English speaking background.

[10] http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d65l.html
[11] http://www.smh.com.au/federal-politics/political-news/abbott-government-senators-prepared-to-cross-floor-over-racial-discrimination-act-20150213-13cvvn.html

- Research conducted by the Australian Human Rights Commission in 2012 for the National Anti-Racism Strategy found that almost two thirds of respondents had experienced racism and almost 90 per cent considered racism an extremely or very important issue in Australia.[12]

- The racial vilification provisions of the Commonwealth Racial Discrimination Act (RDA) (principally s 18C, contained in Part IIA of the RDA) are presently superior, in effectiveness, to the provisions of Division 3A of the *Anti Discrimination Act* 1977 (NSW).

- The RDA makes racially offensive behaviour unlawful, but does not include any requirement to *incite*- in contrast to the New South Wales legislation. The requirement to prove incitement creates a significant barrier to the effectiveness of the NSW ADA provisions and explains the preference of victims to make their complaints under the RDA. Under the RDA, it is only necessary to establish that a person would be reasonably likely to take offence at the words or conduct on the ground of race.

- The current provisions remain under attack from the conservative elements of the Liberal and National Parties at a Commonwealth level, which may well prevail in due course.

- It is clear that there is very strong community support for a strong racial vilification framework, as demonstrated by the very successful campaign against the proposed changes. The laws address a matter of very significant concern for many of those who are always at risk of being marginalised in society by the small but vocal group of intolerant and hateful Australians.

- The *RDA* allows State laws dealing with the same subject matter to operate. This provides an opportunity for positive action at a State level. Earlier this year NSW Labor introduced a private member's bill to the NSW Parliament to remedy the fact there has never been a prosecution

[12] Racial vilification law in New South Wales / Standing Committee on Law and Justice. [Sydney, N.S.W.] : the Committee, 2013. – [xiv, 118] p. ; 30 cm. (Report ; no. 50) at [2.1]

under s20 of the *Anti-Discrimination Act* for racial vilification. The *Crimes and Anti-Discrimination Legislation Amendment (Vilification) Bill* 2016 included the following provisions:

- Moving the offence from the Anti-Discrimination Act to the Crimes Act;

  · Lowering the test from *incite* to *promote*;

  · Clarifying which public acts are included;

  · Removing the requirement for the Attorney General's consent for prosecution;

  · Extending the time for commencing prosecutions from 6 to twelve months;

  · Moving investigations and prosecutions to the police, not the Anti-Discrimination Board.

Despite widespread agreement on the inadequacy of current anti-vilification law, the Government has introduced no legislation and has taken no action to deal with the issues raised in this bill. It has taken no action over hate speech. The object of this bill is to make amendments to the *Crimes Act* 1990 and the *Anti-Discrimination Act* 1977 in relation to racial, transgender, homosexual and HIV-AIDS vilification.

The bill has two broad components. One is to implement unanimous legislative recommendations of the report of the Legislative Council Standing Committee on Law and Justice entitled "Racial vilification law in New South Wales", dated December 2013—three years ago. The second relates to a number of policy commitments made by the Opposition in October last year.

The target of this bill is hate speech. It is directed at people who promote or advocate violence based on race, gender or sexual orientation. There are, of course, legislative provisions presently in place. Racial vilification, for example, is targeted by section 20D of the Ant-Discrimination Act, which criminalises serious racial vilification.

There has never been a prosecution or conviction under this section. That is despite the many years that it has been on the statute books, and despite

more than 30 referrals to the Director of Public Prosecutions [DPP] under this section.

Contemporary Australia is a complex, diverse society. Its diversity on a racial and cultural basis is as broad as it is anywhere in the world. It functions, I think, remarkably well. However, this comparative success does not exist purely by luck or happenstance. It requires appropriate institutions and appropriate legislative frameworks. As to vilification and discrimination on the basis of gender or sexuality, I think contemporary Australia is a better place than it used be, but with much further still to go. Most obviously one of the reasons for progress to date is legislative change—changing the laws to support the type of diverse and inclusive society most of us wish to live in and which my party champions.

These are the reasons that legislation dealing with hate speech is central to contemporary Australia. The report of the Standing Committee on Law and Justice, "Racial vilification in New South Wales", was released in December 2013. The inquiry was referred to the committee by then Premier O'Farrell in November 2012. The committee received 45 submissions and held public hearings. Its sensible and reasonable recommendations were adopted unanimously. The Government's response to this sweet reason has been a resounding silence. A Government response to the committee report was due in six months, at 3 June 2014. A response was received at 4.49 p.m. on that day—literally as the clock ran down. The response is worth citing in its entirety:

> The NSW Government continues to consider the Report by the Legislative Council Standing Committee on Law and Justice on its inquiry into *Racial Vilification law in NSW*.
> The Government is considering the important issues raised in the Report and is liaising with responsible agencies in determining its response.
> The Government thanks the Committee together with those who made a submission to the inquiry for their efforts.

The current NSW Government is clearly frightened of or controlled by the extremist forces that dress up their attachment to unfair privilege, discrimination and vilification behind declarations about the importance of free speech. Every society has had some restrictions on speech. The question is always what the limits are and where boundaries should be drawn. By its inaction, the Government has demonstrated that it does not require effective barriers to hate speech in this State. We in the Labor Opposition have a different view.

We think effective laws against hate speech are essential. The fact that section 20D of the Anti-Discrimination Act, for example, is on the books but there have been no prosecutions speaks volumes. It is, of course, preposterous to argue that there have been no examples of hate speech while the provision has been in force. Clearly there have been, but section 20D has not been able to be utilised. The obvious response is to make alterations to section 20D so that it can be used. That is what this bill does.

Specifically, the bill moves the offence of serious racial, transgender, homosexual or HIV-AIDS vilification by means of threat or incitement of physical harm into the *Crimes Act* 1990 from the *Anti-Discrimination Act* 1977.

The bill also removes the requirement for the Attorney General to give consent to a prosecution for that offence. Additionally, the bill extends the time within which prosecutions for such offences may be commenced from 6 months to not later than 12 months from the date when the offence was alleged to have been committed. The practical difficulties of the present provision were seen in *Simon Margan v Director of Public Prosecutions & Anor* [2013] NSWSC 44. This provision will now be contained in a new section 91N (3) of the Crimes Act.

The objects also include bringing together into a new part—proposed part 4H—all the provisions of the *Anti-Discrimination Act* 1977 dealing with racial, transgender, homosexual and HIV-AIDS vilification and makes those provision consistent. It provides that unlawful vilification under the *Anti-Discrimination Act* 1977 occurs when a person, by a public act, intentionally or recklessly promotes—rather than incites—hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on racial, transgender, homosexual and HIV-AIDS grounds.

The bill clarifies which public acts constitute such unlawful vilification. It provides that the proposed part applies whether or not the person or members of the group vilified have the characteristic that was the ground for the promotion of hatred, contempt or ridicule concerned. It also provides that the president of the Anti-Discrimination Board, after accepting a vilification complaint under the *Anti-Discrimination Act* 1977, is to refer the complaint to the Commissioner of Police if the president considers that the offence of serious racial, transgender, homosexual or HIV-AIDS vilification may have been committed, rather than investigating the complaint first and then referring such a complaint to the Attorney General.

Recommendation 11 of the Law and Justice Committee Report provided for the President of the ADB to directly refer serious racial vilification complaints to the NSW Police Force. This is contained in a new section 94D of the *Anti-Discrimination Act*. Committee recommendation 12 allows the police to prepare a brief of evidence for the Director of Public Prosecutions [DPP] following referral of a complaint, as normally happens in a traditional prosecution. That can now occur as a result of this bill.

There is currently no mechanism in place for the development of a brief to the DPP. The board has limited powers to investigate, in contrast to the police, to say nothing of expertise and experience in investigation. There is also the issue of lack of ADB resources, especially granted the Government's approach to funding them. Recommendation 1 of the committee report recommends that, for the sake of clarity, the legislation provide that the offence covers communications in quasi-public places. The most obvious example of this is the lobby of a strata title apartment block or a company title apartment block. This recommendation is reflected in a new section 50AA of the Anti-Discrimination Act [ADA] in the bill. The problem otherwise is how to draw the difficult line between public and private, with the risk that the balance falls on a point that is too restrictive.

Flowing from this discussion and bearing in mind this is about criminal liability is the proposal that the offence not include conduct that a defendant could prove was intended to be in private. The obvious example is of what is clearly a private conversation on private premises accidently overheard by someone else. There is a precedent for this in Victorian legislation. This was recommended by the committee and is adopted in the bill. The bill's provisions on these issues create a new section 50AA (3) and (4) of the ADA. There has been doubt and discussion as to the level of necessary intent—the *mens rea* necessary to establish the elements of the offence under section 20D. The committee recommended, and I have included in this bill, a provision that proof of recklessness is sufficient to establish intention. This is in line with general common law legal principles and has the support of several stakeholders. This is specifically seen in the new section 50AB (1).

Another recommendation of the committee included in the bill is that persons of presumed race are included in the bill. There are already similar provisions, for example, regarding people who are presumed homosexual. Obviously, people of a presumed race are equally affected by vilification. The committee

notes an example of a Korean woman verbally abused in public but not able to pursue a complaint because the abuser incorrectly identified her as Japanese. This proposal is reflected in the bill in a new section 50AB (2).

Apart from the agreed recommendations of the parliamentary committee, Labor has also included some other proposals in this bill. Most significantly, in relation to the substantive offence, Labor proposes replacing the word "incite" with the word "promote". That is contained in section 50AB of the ADA and section 91N of the Crimes Act. The intention of this change is very clear—Labor wishes to lower the current bar for prosecution. There have been no prosecutions at all under section 20D, so the case for lowering the bar is powerful. Moreover, the behaviour that is criminalised by this change is certainly worthy of sanction.

There has been an acknowledgment for some time of the real difficulties of ever being able to prove "incitement". In that regard, I note the 2009 paper on the topic by Nicholas Cowdery, AM, QC. There has been some debate around these terms for some time. However, I think it is clear that "promote" is a lower bar than "incite". Additionally, the bill proposes placing the operative section of the criminal offence into the Crimes Act and removing it from the Anti-Discrimination Act. That is seen in schedule 1 to the bill, which establishes division 15C of part 3 of the Crimes Act, creating section 91N, which is the offence of serious racial, transgender, homosexual or HIV-AIDS vilification. Certainly the legal effect of a provision should be the same whether it is located in the Crimes Act or in the Anti-Discrimination Act. However, there is significant symbolism in the provision being located in the Crimes Act in the new section 91N.

The proposal to locate the provision in the Crimes Act has been frequently discussed. It is time it was done. Having it in the Crimes Act is consistent with the other changes made in this bill emphasising the role of the police. It is also consistent with the situation in other jurisdictions: Western Australia, the Commonwealth, the United Kingdom and Canada. Earlier reviews have recommended this.

The *Civil Remedies for Serious Invasions of Privacy Bill* 2016 aims to implement the legislative recommendations of a report of the Legislative Council Standing Committee on Law and Justice. The report is entitled "Remedies for the Serious Invasion of Privacy in New South Wales", and was published in March 2016.

The recommendations in that report that form the basis for the bill were adopted unanimously. They were bipartisan. The objects of the bill are to provide for the substantial adoption of the legislative proposals made in report No. 123 of 2014 by the Australian Legal Reform Commission concerning the creation of a statutory cause of action for serious invasion of personal privacy; to confer jurisdiction upon the NSW Civil and Administrative Tribunal [NCAT] to entertain proceedings for enforcement of such statutory actions, in addition to the existing jurisdiction of the District Court and the Supreme Court; and to confer power upon the Privacy Commissioner to receive and deal with complaints about the serious invasion of personal privacy, including the power to issue take-down orders.

Despite the widespread support for the report and its contents, NSW Government is yet to take action on the recommendations of the parliamentary committee. While the delay is not as acute as, for example, the three-year wait for action concerning racial vilification, this is still disappointing. The Government has issued a discussion paper. Issuing a discussion paper rather than actually doing something such as introducing legislation is another typical response from the Government. The discussion paper relates to the possible future introduction of a criminal offence aimed at the unauthorised release of intimate images—colloquially known as "revenge porn".
However, it is not what the committee recommended. The discussion paper proposal for take-down mechanisms only follows a conviction. That may well take some time, especially with current delays in the District Court, and will be lengthy, more confronting, and more time consuming than the take-down provisions included in this bill. In addition, it deals with only part of the field covered by the committee report.

The Standing Committee on Law and Justice inquiry was established on 24 June 2015. Its report, released in March this year, contained a number of recommendations relevant to this debate. Recommendation 3 was to introduce a statutory cause of action for serious invasions of privacy. Recommendation 4 provided the statutory cause of action be based on the Australian Law Reform Commission model in its 2014 report. Recommendation 5 incorporates a fault element of intent, recklessness and negligence for governments and corporations, and a fault element of intent and recklessness for natural persons in a statutory cause of action. Recommendation 7 was to confer jurisdiction on the NCAT to enable it to hear claims, in addition to ordinary civil courts, arising out of the statutory cause of

action. Recommendation 6 was to broaden the scope of the NSW Privacy Commissioner's jurisdiction, and to empower the NSW Privacy Commissioner to make determinations that involve non-financial forms of redress, including apologies, take-down orders, and cease-and-desist orders.

It also recommended that the NSW Privacy Commissioner be empowered to refer a complaint on behalf of a complainant to the NCAT for hearing for a statutory cause of action where there is a failure to act on a non-financial form of redress, including apologies, take-down orders and cease-and-desist orders. There were several factors driving the committee's recommendations and this bill. The invasion of privacy is a profoundly serious issue for our society. There is very real and entirely reasonable community concern about the issue. That problem and the concern about it is increasing. Recent decades have seen the rapid development of technology, and the overwhelming presence of social media. Most spectacularly, that is manifested in the phenomenon colloquially known as "revenge porn", which is probably better described as unauthorised sharing of intimate images. However, the bill is broader than that.

There are several current legal avenues to deal with these issues. None is adequate. They are complex, uncertain and not effective. Left to its own devices, common law may evolve an adequate mechanism in due course. However, we do not need to wait for that. The legislature should intervene with its own solutions. Doctrines such as an equitable action for breach of confidence do not provide adequate recourse. Criminal sanctions are sometimes used in relation to intimate images. However, there are two problems with that approach. There is a conceptual problem with arguing that images are indecent when they are created between consenting parties. There is sometimes a certain reluctance in victims wanting to expose themselves to the full panoply of criminal proceedings. That is notoriously the case with sexual assault, which is under reported and has a lower rate of prosecution. Simply relying upon the criminal law to deal with these issues is inadequate.

Civil law remedies need to be reformed and improved. However, we need other remedies, which is why this bill, following the committee report, expands the role of the Privacy Commissioner. By the way, the Government should get on with appointing a person to that position because the term shortly expires. The impact of a breach of privacy can be catastrophic for the individual victim. This is graphically obvious in the case of victims of unauthorised sharing of intimate images. Current technological developments of other types have increased the level of concern and the frequency of incidents. This includes the

increasing use of drones and the unauthorised release of personal data increasingly held by corporate and governmental entities.

The first element in this bill is the introduction of a statutory cause of action for a serious breach of privacy. There has been a long line of recommendations for the introduction of this type of remedy. These include the 2008 Australian Law Reform Commission report "For Your Information: Privacy Law and Practice"; the 2009 NSW Law Reform Commission report "Invasion of Privacy"; the 2010 Victorian Law Reform Commission reporting "Surveillance in Public Places"; and the 2014 Australian Law Reform Commission report "Serious Invasions of Privacy in the Digital Era". The first of these reports is now years old. The implications of the digital age and increasing public concern mean that it is time to take action. It is time to adopt the multiple recommendations for a separate cause of action. Slightly different models are proposed in the reports. The model recommended in the committee report and which I have adopted in this bill is that proposed in the 2014 ALRC report. This has the obvious virtue of encouraging national consistency.

This focuses on two categories of invasion of privacy. One is misuse of private information. The other is intrusion upon seclusion. This is the narrowest of the available models and certainly narrower than the New South Wales Law Reform Commission [LRC] formulation. There is a variance in the models in relation to the fault element. The committee solution with which I agree and which is contained in this bill is to incorporate a fault element of intent, recklessness and negligence for governments and corporations and a fault element of intent or recklessness for natural persons. The jurisdiction for such claims would be the Supreme Court and District Court. Principles of common law assessment of damages would apply.

There is also merit in looking beyond the traditional courts to hear these types of claims. That holds the hope of being simpler and at lower cost. For that reason the committee recommended that jurisdiction be extended to the NCAT to allow it to hear claims in this field. This bill proposes that as well. I note that the NCAT already has jurisdiction to consider other types of claims between private persons as well as dealing with non-solved disputes with government agencies.

The introduction of a statutory cause of action is a very important tool for people who have been the subject of a serious invasion of privacy. However, there also need to be other mechanisms that are not simply aimed at recovering damages after injuries have been inflicted. There also needs to be a

mechanism to cauterise the damage. For that reason the bill adopts the committee's unanimous recommendations concerning the Privacy Commissioner. This pursues a complaints mechanism rather than damages claims or indeed a criminal prosecution to provide redress. This will allow a private complaint to the Privacy Commissioner. That office will have to be adequately resourced. It will also need appropriate powers. The commission should be able to receive and determine complaints relating to a serious invasion of privacy. The commissioner should be able to deal with non-financial redress. This would include apologies, cease-and-desist orders and take-down orders.

Turning to the provisions of the bill, part 1 provides preliminary and definitional provisions. Part 2 establishes a cause of action for serious invasion of privacy. It makes clear that the statutory cause of action is an action in tort. People under 18 years of age are excluded as defendants. Limitation periods are controlled by currently existing law. Clause 9 makes clear that the invasion of privacy is either an intrusion upon seclusion or a misuse of private information. An action only lies under clause 10 where there is a reasonable expectation of privacy. Circumstances relevant to this are set out in 10 (2). Clause 11 sets out the fault element to which I earlier alluded. Clause 12 provides such actions must only involve serious breaches of privacy. Clause 13 importantly provides that a successful action must establish that the public interest in privacy outweighs any countervailing public interest. Clause 14 provides a single publication rule.

Division 3 of part 2 provides statutory defences against the statutory cause of action. These include lawful conduct, necessity and consent, protection of person or property, absolute privilege, publication of public document and fair report of proceedings of public concern, many of which already arise under the provisions of the Defamation Act. Division 4 provides for remedies in broad common law terms, subject to jurisdictional limits of the relevant court. Aggravated damages are prohibited. Exemplary damages are available in exceptional circumstances only. Non-economic loss damages are subject to the same limits as pursuant to the Defamation Act. The courts will also have power to issue injunctive and declaratory relief. The court may also order delivery and destruction of articles, documents or material. It may also make an order for the publication of a correction, the making of an apology or other non-monetary relief.

Division 5 clarifies the relationship of the cause of action to other rights and clause 21 ensures the cause of action does not survive for the plaintiff's estate. Part 3 establishes the jurisdiction for causes of serious invasion of privacy for the NCAT. The limitation periods are set out in clause 26. The provisions concerning the nature of the claim and defences follow those in part 2. The jurisdictional limits for monetary relief mirror those of the District Court. Part 4 of the bill deals with the role of the Privacy Commissioner. Clause 40 sets out the commissioner's role, including proceedings in the NCAT. Division 3 of part 4 provides for the making of complaints and how they are dealt with, including a preliminary assessment and conciliation.

Clause 47 sets out the mechanism for the determination of complaints. The commissioner can make various declarations including that the respondent must take specified steps, that the respondent must make an apology, or that relevant material be taken down. Should the declaration not be complied with, clause 48 provides that the determination can be enforced through the NCAT. Clause 54 provides the Act does not apply to invasion of privacy committed before the Act commences. Clause 55 provides for a statutory review of the Act five years after commencement. This bill responds to the unanimous bipartisan recommendations of a parliamentary committee in the way the Government should have but did not.

These are but two examples of improving rights for people pursued by Labor in NSW.

I hope this is the beginning of a useful and productive dialogue with your organisation, its members and the wider Australian-Asian legal community.