FEDERAL COURT OF AUSTRALIA

Elliott v Nanda & Commonwealth [2001] FCA 418

HUMAN RIGHTS – sex discrimination – sexual harassment – whether sexual harassment may constitute sex discrimination – applicant employed as medical receptionist/secretary at doctor's surgery – claim against doctor

HUMAN RIGHTS – sex discrimination – enforcement of determination by Human Rights and Equal Opportunity Commission ("HREOC") – hearing *de novo* – whether scope of application to Federal Court is limited by determination of HREOC

HUMAN RIGHTS – sex discrimination – employment agency – Commonwealth Employment Service ("CES") – whether CES "permitted" sex discrimination against applicant by doctor – where CES referred applicant to doctor for employment – where CES had earlier received complaints from several women about sexual harassment by doctor at previous surgery

HUMAN RIGHTS – sex discrimination – compensation – damages – whether Federal Court bound by quantum of damages awarded by HREOC – aggravated damages – where doctor did not appear at inquiry before HREOC

WORDS AND PHRASES – *"permit"*

Sex Discrimination Act 1984 (Cth) ss 5, 14, 22, 26, 28A, 28B, 83A, 105
Human Rights and Equal Opportunity Commission Act 1986 (Cth) s 46PO

Commonwealth v Sex Discrimination Commissioner (1998) 90 FCR 179 referred to
Flower & Hart (a firm) v White Industries (Qld) Pty Ltd (1999) 87 FCR 134 referred to
Aldridge v Booth (1988) 80 ALR 1 applied
D'Antuono v Minister of Health (1997) 80 FCR 226 referred to
O'Callaghan v Loder [1983] 3 NSWLR 89 applied
Hall v A & A Sheiban Pty Ltd (1988) 20 FCR 217 considered
Gilroy v Angelov [2000] FCA 1775 considered
Cooper v Human Rights and Equal Opportunity Commission (1999) 93 FCR 481 considered
Adelaide City Corporation v Australasian Performing Rights Association Ltd (1928) 40 CLR 481 referred to
Evans v Accident Insurance Mutual Holdings Ltd [1998] 2 Qd R 350 referred to
Young v Australian Workers' Union (1974) 5 ALR 347 referred to
Krakowski v Eurolynx Properties Ltd (1995) 183 CLR 563 applied
Re Chisum Services Pty Ltd (1982) 7 ACLR 641 referred to
Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133 referred to
Triggell v Pheeney (1951) 82 CLR 497 referred to
Coyne v Citizen Finance Limited (1991) 172 CLR 211 referred to
Whittle v Paulette (1994) EOC 92-621 referred to
Greenhalgh v National Australia Bank Ltd (1997) EOC 92-884 referred to

McIntyre v Tully (1999) 90 IR 9 referred to
John v M G N Ltd [1997] QB 586 referred to
Spautz v Butterworth (1996) 41 NSWLR 1 referred to
Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151 referred to

LEANNE ELLIOTT v PREM NANDA AND COMMONWEALTH OF AUSTRALIA
N 720 OF 1999

LEANNE ELLIOTT v COMMONWEALTH OF AUSTRALIA
N 478 OF 2000

MOORE J
11 APRIL 2001
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 720 OF 1999**

BETWEEN: **LEANNE ELLIOTT**
APPLICANT

AND: **PREM NANDA**
FIRST RESPONDENT

COMMONWEALTH OF AUSTRALIA
SECOND RESPONDENT

JUDGE: **MOORE J**
DATE OF ORDER: **11 APRIL 2001**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The proceeding be stood over for directions on 27 April 2001 at 9.30am.

2. The parties file and serve written submissions within 10 days of the publication of these reasons dealing with what orders should be made concerning the payment of compensation and costs.

NOTE: (i) On 22 June 2000 the Court made the following order:

1. The Court orders that the names, any contact details or any other means of identifying named jobseekers and previous employees of Dr Nanda or the Terrace Medical Centre not be published. This order does not apply to the Applicant or Renae Mathews or any person called to give evidence in the proceedings.

(ii) On 23 August 2000 the above order was varied by the following order:

1. The name of Belinda Plumb, any contact details or any other means of identifying her not be published.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

Introduction

1 These proceedings involve two applications brought by Ms Leanne Elliott ("the applicant"). One is an application brought under s 83A of the *Sex Discrimination Act 1984* (Cth) ("S D Act") against Dr Prem Nanda ("the respondent") for whom the applicant worked as a receptionist in late 1995 and early 1996 ("the employment proceeding"). The applicant alleges that the respondent sexually harassed her in contravention of the S D Act and seeks to enforce against the respondent a determination of the Human Rights and Equal Opportunity Commission ("HREOC"). The other application is brought under s 46PO of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ("HREOC Act") against the

Commonwealth of Australia alleging contravention of the S D Act in several respects discussed in more detail later ("the agency proceeding"). The contravention by the Commonwealth is said to arise through dealings the applicant had with the Commonwealth Employment Service ("CES") when she obtained employment with the respondent. All parties accepted that one set of reasons could be given when judgment was given in each application.

Background

2 On 8 May 1996, the applicant lodged with HREOC a complaint, in the form of a letter, of "sexual harassment and intimidation" against the respondent and Terrace Medical Centre. Though the applicant may have been employed by the respondent and his wife (who are partners) or a service company of which they were directors, the matter has proceeded in this Court on the basis that what was in issue was the liability of the respondent. That is, no submissions were made by the respondent putting in issue what was asserted by the applicant, namely that the respondent had been the applicant's employer at all material times for the purposes of the S D Act.

3 After the complaint was lodged, it was investigated by the Sex Discrimination Commissioner ("S D Commissioner"). During the investigation, the S D Commissioner formed the view that the Department of Employment, Education, Training and Youth Affairs ("DEETYA") should be joined as a respondent to the complaint. The S D Commissioner, by letter dated 18 February 1997, advised DEETYA of this view and invited submissions from DEETYA on whether it should be a respondent. By letter dated 15 April 1997, DEETYA submitted that it ought not be joined. By letter dated 6 June 1997, an officer of the S D Commissioner advised DEETYA that the S D Commissioner remained of the view that the investigation should continue with DEETYA as a respondent.

4 On 30 September 1997, the S D Commissioner referred the complaint to HREOC under s 57(1)(b) of the S D Act for inquiry with DEETYA named as a respondent. The report of the S D Commissioner set out the complaint as follows:

> *"1. THE COMPLAINT:*
>
> *The complainant alleges that she was sexually harassed during her employment at Terrace Medical Centre by the Director, Dr Prem Nanda,*

between 4 September 1995 and 24 February 1996, when she resigned her employment due to the alleged harassment.

Further, the complainant claims that she was referred for employment with Dr Prem Nanda by the Commonwealth Employment Service (CES), Department of Employment, Education, Training and Youth Affairs (DEETYA). The complainant claims that CES had received previous complaints of sexual harassment by Dr Nanda from CES clients. The complainant therefore claims that DEETYA discriminated against her on the basis of her sex by placing her in a sexually hostile working environment."

5 On 16 March 1998, the matter came before Inquiry Commissioner Innes at HREOC ("the Commissioner"). DEETYA sought a direction from the Commissioner under s 77(1) of the S D Act that it need not appear at the inquiry. The Commissioner refused the application.

6 On 21 April 1998, the Commonwealth applied to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for review of, first, the purported referral to HREOC by the S D Commissioner of a complaint against DEETYA and, secondly, the refusal of the Commissioner to make the direction sought. On 17 December 1998 the application was determined by Branson J: see *Commonwealth v Sex Discrimination Commissioner* (1998) 90 FCR 179. Her Honour held that the referral by the S D Commissioner did not involve a reviewable decision, and that the Commissioner did not err in refusing the DEETYA's application, given the manner in which it was framed. However, her Honour concluded that, on the proper construction of the S D Act, the S D Commissioner had no authority to refer a complaint against DEETYA to HREOC, and accordingly declared that the purported referral did not give HREOC jurisdiction to inquire into any complaint by the applicant against the Commonwealth. In the meantime, on 30 April 1998, the applicant lodged a fresh complaint with HREOC against DEETYA.

7 On 12 April 1999, the Commissioner conducted an inquiry into the complaint against the respondent. The respondent did not appear. The circumstances in which the inquiry proceeded in the respondent's absence were set out by the Commissioner in his reasons:

"The matter was set down for hearing against Dr Nanda and the Terrace Medical Centre from 12-15 April 1999 in Raymond Terrace.

At a directions hearing on 12 March 1999, Dr Nanda sought an adjournment of the hearing because he was having difficulty arranging for all of his

witnesses to be available. The respondent's solicitor indicated that if the adjournment was not granted Dr Nanda might not appear at the hearing.

In considering this request I noted that on 11 February 1999, the respondents' solicitor had been asked whether the proposed dates for hearing, that is 12-15 April 1999, were acceptable. On 3 March 1999, having previously attempted to contact the respondent's solicitor on a number of occasions, the Commission's hearing solicitor sent a facsimile to the respondent's solicitor indicating that the matter would be listed for hearing on 12-15 April 1999.

Taking into account that the matter has been underway for some time, that both parties had been informed of the proposed hearing dates on or about 11 February 1999, and given that Dr Nanda was unable to provide any evidence or information at the directions hearing to suggest that his witnesses would be any more readily available at a later date, I declined to grant the adjournment.

On 8 April 1999, the respondents' solicitor advised the Commission in writing that Dr Nanda would not be appearing at the hearing. The hearing solicitor handling the file drew to their attention in writing s. 63(2) of the Act which allows the Commission to proceed with a hearing in a party's absence if notice of that hearing has been given to the party. On 9 April 1999, Dr Nanda's solicitors confirmed in writing that they had received the s. 63 notice.

When the complainant became aware that it was Dr Nanda's intention not to appear she made an application that the hearing should take place in Sydney, rather than Raymond Terrace, as this would reduce the complainant's costs. As I did not want to limit the respondents' opportunity to participate in the inquiry by changing the venue, I instructed the hearing solicitor to contact the respondents' solicitors. Only on the receipt of confirmation that the respondents did not intend to appear did I accede to the complainant's request for a change of venue.

The hearing took place in Sydney on 12 April 1999."

8 The Commissioner gave an *ex tempore* decision, and published his written reasons on 21 May 1999. He found that the incidents complained of occurred as the applicant had described them. He determined that they amounted to sexual harrassment within the meaning of s 28A of the S D Act, and that the respondent had contravened s 28B. Because of those findings, he did not consider whether the respondent had also contravened ss 5 and 14. He directed the respondent to pay the applicant, within 28 days, $15,000 in general damages for hurt and humiliation, and $100 in special damages (representing the cost of five counselling sessions the applicant had taken).

9 The respondent did not comply with this direction. In 1995, s 83A was inserted into the S D Act by the *Human Rights Legislation Amendment Act 1995* (Cth), following the judgment of the High Court in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. That section enabled a complainant to commence proceedings in the Federal Court to enforce a determination of HREOC. On 26 July 1999 the applicant filed an application under s 83A.

10 At that stage, HREOC had not yet held an inquiry into the applicant's complaint against DEETYA. Later, the HREOC Act was amended by the *Human Rights Legislation (Amendment) Act No. 1 1999* (Cth) ("HRLA Act"). Section 12 of the HRLA Act, which came into force on 13 April 2000, relevantly provided that a complaint into which an inquiry had not yet been held was taken to have been terminated by HREOC on that day. Accordingly, the applicant's complaint against DEETYA was terminated under s 12. The new s 46PO of the HREOC Act enabled a person whose complaint had been terminated in this way to apply to the Federal Court alleging unlawful discrimination: defined to mean, relevantly, unlawful conduct prescribed by Part II of the S D Act. On 11 May 2000, the applicant filed, under s 46PO, an application in the Federal Court against the Commonwealth.

11 On 12 May 2000, the applicant filed a notice of motion seeking orders that the proceedings against Dr Nanda and the Commonwealth be consolidated or tried together. The motion was heard on 30 May 2000 and was opposed by both the respondent and the Commonwealth. On 5 June 2000, I made orders to the effect that:

(i) the employment proceeding and the agency proceeding would be heard together;

(ii) evidence in one proceeding would be evidence in the other, subject to the following order;

(iii) evidence led in the agency proceeding concerning complaints about the conduct of the respondent by persons other than the applicant would not be treated as evidence in the employment proceeding; and

(iv) time would be specially fixed to hear submissions in the agency proceeding on the scope and operation of ss 105 and 106 of the S D Act.

12 On 19 June 2000, on the application of the Commonwealth, I revoked the second order in the preceding paragraph (that evidence in one matter would be evidence in the other), and instead made orders formulated by the Commonwealth (which were not opposed) to the following effect:

(i) documentary evidence of the applicant that was to be tendered in both proceedings should be tendered separately as against the respective respondent (Dr Nanda and the Commonwealth) in each proceeding;

(ii) the applicant was to indicate to the Court whether she sought to rely on any oral evidence given in the employment proceeding as evidence-in-chief in her case against the Commonwealth;

(iii) in relation to the oral evidence relied on by the applicant in both matters:

(a) the respective respondent in each matter (Dr Nanda and the Commonwealth) should raise any objections to the applicant's oral evidence during the course of that evidence, and the objections as to the admissibility of the evidence in each matter would be ruled on;

(b) the respondent (Dr Nanda) was to cross-examine any witness, and if there was to be any re-examination of the witness, this would occur after any cross-examination by the Commonwealth;

(iv) submissions should be made by the applicant and the respondent in the employment proceeding, before submissions were made by the applicant and the Commonwealth in the agency proceeding.

13 I should note that during final submissions, counsel for the applicant indicated that she had felt unable, because of the order originally made (on 5 June 2000) concerning the evidence about complaints about the conduct of the respondent by other young female employees, to lead propensity evidence from other young female employees against the respondent in the employment proceeding. I then explained that it had never been my intention to limit the applicant this way. I also explained that the purpose of the order was to

ensure that evidence of complaints by other young female employees led against the Commonwealth in the agency proceeding would not, without more, be evidence against the respondent in the employment proceeding.

14 Towards the conclusion of the hearing (on 3 October 2000), an issue arose concerning the status in the agency proceeding of any finding of unlawful conduct on the part of the respondent in the employment proceeding. That is, whether the Commonwealth would be bound by any finding that the respondent had acted unlawfully. This was an important issue because the liability of the Commonwealth was said, on one basis, to arise because it permitted the respondent to engage in unlawful conduct: see s 105 of the S D Act. It was an issue that had been addressed when the applicant commenced to call her evidence on 22 June 2000. There was discussion then about whether it was necessary for the applicant to prove, as against the Commonwealth, that the respondent engaged in unlawful conduct. At the conclusion of the discussion counsel for the Commonwealth accepted a proposition to the effect that if the applicant was successful against the respondent then, subject to argument about the scope of the sections that were said to give rise to accessorial liability, the applicant could rely on the success against the respondent in its case against the Commonwealth. When, contrary to my understanding that the issue was settled, it arose again on 3 October 2000 I made an order joining the Commonwealth as a party in the employment proceeding. I did so to enable the Commonwealth to make submissions in that proceeding (over the opposition of counsel for the applicant) and to bind the Commonwealth to any decision or order made in that proceeding.

Witnesses

15 It is convenient, at this point, to identify the individuals who gave evidence (apart from the applicant and the respondent). The applicant called evidence from the following witnesses:

- Ms Renae Mathews: Mathews was employed by the respondent at the Terrace Medical Centre as a medical receptionist/secretary during July and August 1995.

- Ms Janelle Cooper: Cooper was employed by the respondent at his surgery at 29 High Street, Greta ("the Greta surgery"), as a medical receptionist/secretary during July and August 1985. Her evidence was led in the agency proceeding only.

- Ms Z: Ms Z was employed by the respondent at the Greta surgery as a medical receptionist from November 1985 to Christmas 1986. I include Ms Z in his list though ultimately her evidence (which, by direction of the Court, was to be called in reply) was not read.

- Ms Catherine Elliott: Eliott is the applicant's mother.

- Ms Louise Cox: Cox is the applicant's aunt.

- Dr Philippa Kennedy: Kennedy is a general practitioner with a surgery in Merewether with whom the applicant has had a number of consultations since March 1995.

- Ms Yvonne Pacey: Pacey is a counsellor employed by Relationships Australia (NSW) who counselled the applicant on five occasions in 1996.

16 The respondent called evidence from the following witnesses:

- Ms Joleen Peacock: Peacock worked intermittently at the respondent's Raymond Terrace surgery as a receptionist/secretary from May 1994 to December 1997.

- Ms Tonia Griffin: Griffin worked intermittently at the respondent's Raymond Terrace surgery as a receptionist/secretary from August 1995 for approximately three years.

- Mr Stephen Bates: Bates is a real estate agent who has had a professional relationship with the respondent for approximately five years.

- Mr Peter Sarroff: Sarroff is a real estate agent who has had a professional relationship with the respondent for approximately fifteen years, and is a personal friend of the respondent.

- Mr Liudvikas Prazauskas: Prazauskas has been a patient of the respondent for approximately sixteen years and is a close personal friend.

- Mr Thomas Quigley: Quigley has been a patient of the respondent for twelve years and also is a friend.

- Mr Robert Richards: Mr Richards has been a patient of the respondent since about 1991 and is a close personal friend.

- Mrs Alice Richards: Mrs Richards has been a patient of the respondent since about 1987 and is a close personal friend. Since moving to Sydney four years ago, Mrs Richards has continued to visit the respondent occasionally for medical treatment.

17 The Commonwealth called evidence from one witness, Mr Peter Taylor. Taylor commenced employment with the former Department of Employment and Industrial Relations, in a position at the CES Broadmeadow. In 1993, he was made Branch Manager at the CES in Newcastle, and later at the CES in Hamilton. In 1996, he moved to the CES Hunter Area Office where he worked on policy and CES administration issues. Taylor was involved in dealing with the complaint made by the applicant about the respondent to the CES.

The evidence in the employment proceeding and findings concerning the allegations of sexual harassment

18 The alleged conduct of the respondent that gave rise to the complaint against him was detailed by the applicant in two documents she prepared comparatively shortly after she left the respondent's employment. One was a statement given to an officer of the CES on 6 March 1996 (probably made on 5 March 1996) and the other was the letter sent to HREOC on 8 May 1996. It is convenient to describe the complaints by setting out the allegations in the second of those documents:

> *"8 May 1996*
>
> *To The Assistant Secretary*
>
> *STATEMENT OF SEXUAL HARASSMENT AND INTIMIDATION PERPETRATED BY DR. PREM RATTAN NANDA AT THE TERRACE MEDICAL CENTRE, 13 WILLIAM STREET, RAYMOND TERRACE, NEW SOUTH WALES.*
>
> *I wish to draw your attention to the conduct of Dr. Nanda, my former employer, at his medical practice in Raymond Terrace. From the time I commenced work as a medical receptionist/secretary on 4 September 1995 until my resignation on 2 March 1996, Dr. Nanda subjected me to sexual harassment and intimidation, details of which are outlined in this statement.*

I clearly recall the following incidents and begin my statement with excerpts from my diary.

18 September 1995: Dr. Nanda stated that to get out of a speeding fine you just 'suck the coppers off because they blow in 5 minutes anyway'.

20 September 1995: Dr. Nanda grabbed my breasts twice while showing me how to use the ECG machine.

16 October 1995: Dr. Nanda complained that Joleen (a former receptionist) couldn't do much work because she'd had sex with the stud (Joleen's boyfriend) 5 times over the weekend and that 'her pussy was on fire'.

19 October 1995: Dr Nanda informed me that he liked big tits and told me about three girls on the corner who give blow jobs for a flagon of wine.

21 October 1995: Dr. Nanda scrutinized my breast in a manner which I found highly offensive.

23 October 1995: Dr. Nanda said that one of his tenants should pay rent by sleeping with him.

26 October 1995: Dr. Nanda stated that his tenant, Susan Boyce, should 'root' him if she couldn't afford to pay the rent and wanted to keep living in his flat.

7 February 1996: Dr. Nanda recounted his many affairs with patients and asked me 'what the chances were of me going to the cops if he locked up the surgery, threw me on the floor, sucked my tits, sucked me down below and then fucked me.' He told me that Belinda played with his dick and that if she hadn't involved her parents they could have fucked the day she turned sixteen.

8 February 1996: Dr. Nanda boasted that he had screwed about 200 women and told me about an African girl he'd paid to have sex with. He also related how he'd forced Kelly a former receptionist, to buy groceries for this girl and to collect her from the TOCAL College.

Dr. Nanda informed me that he and a friend, Peter Scharoff, were trying to get women to 'root' them and that he had set Peter up with a patient. He also told me how he wanted to 'root' one of his patients, Melinda Gorton.

Dr. Nanda also took home 8 sample boxes of Noversyl for his personal use.

12 February 1996: Dr. Nanda patted me on the bottom and tried to kiss me. He also asked Joleen to 'suck his cock'.

13 February 1996: Dr. Nanda brushed up against my breasts at least 4 times. When Peter Scharoff called into the surgery, he and Dr. Nanda discussed the latter's visit to a massage parlor. Dr. Nanda continued the

discussion with me after Peter Scharoff left. He told me how he had gone to the parlor, picked out a girl, and then recognised her as a former patient from Greta, a female he had 'rooted' a number of times before. He'd asked her if he had to use a cap (condom) and she'd said 'yes'. She had then introduced him to a female friend with whom she had just performed a lesbian act for some other man. Dr. Nanda then told me that 'she massaged me with her tits, sucked me until I was hard, and jumped on top of me. I slipped it into her and she loved every minute of it because she was screaming and jumping up and down'.

14 February 1996: Dr. Nanda informed me that if anyone did the wrong thing by him or threatened his career, reputation or family, they'd be found floating dead in a river. I took this as a warning to me.

On one occasion Dr. Nanda told Joleen that if she gave him 'a suck' she could have a Traineeship and that if she paid him 5 cents a day he would massage her 'tits' so that they would become bigger.

Another time, he told me that he loved women with 'big tits'.

Once, when I was going out to lunch, he asked me to tell him if I got raped or anything so that he could join in.

Dr. Nanda massaged my shoulders on 4 or 5 occasions.

Dr. Nanda told me that he'd given a 14 year old girl a trail bike for sleeping with him.

One day, when I couldn't find a patient's file, he hit me on the back in the patient's presence and laughed at my protests. Later that day he gave me his car keys and told me to take the car for a spin.

Dr. Nanda complained that his wife was 'stale in bed' because she wouldn't give him oral sex. He said that he liked Aussie girls because they 'give very good oral sex.'

He often taunted me about my weight, telling me that I was getting fat and that my 'arse' was huge. He questioned my morals and accused my parents of not raising me properly because I went out at weekends to nightclubs and was involved in a sexual relationship outside marriage with my boyfriend of three years.

When Dr. Nanda introduced me to Lou, an acquaintance from Greta, he asked me to call him 'Uncle Lou' and told me how well all his other receptionists had got on with 'Uncle Lou'. One day 'Uncle Lou' asked me how much it would take for me to do favors for Dr. Nanda.

One day, during the early weeks of my employment, Dr. Nanda returned from lunch with a button missing from his pants and told me to sew it back on. I agreed, thinking that he'd wait until the next day when he wouldn't be

wearing the pants. However, he produced the sewing kit and stood there while I knelt on the floor and sewed it on, with the zipper on the pants down.

When I had no money to register my car Dr. Nanda told me about all the women who slept with him for money to pay their bills, register their cars, and buy clothes etc. He suggested that by sleeping with him I could earn more money and register my car without having to borrow money from my parents. I responded by telling him that I had more respect for myself.

In describing what happened to the 'comfort' women in Japan [during] *the war he related the following:*

- *One of the comfort women contracted VD and infected about 50 soldiers so they opened up her legs and shoved a red hot branding iron into her 'pussy'.*
- *Another 'comfort' woman who bit a soldier on the arm was rolled around on a board of nails, mutilated and then decapitated.*
- *A 'comfort' woman who protested was burnt in the 'pussy' and 'clitty'.*

Dr. Nanda undermined my relationship with my boyfriend, an apprentice mechanic, by telling me that I should marry a professional like him who could provide me with a good car and home. He stated that 'love has nothing to do with marriage and that a car doesn't run on spunk'.

Dr. Nanda pushed me to take an active role in surgical procedures and on one occasion required me to remove a patient's stitches. Once, after taking a pap smear from a patient he told me that next time he'd be getting me to clean the lady's cervix with an instrument. I also assisted in removal of moles, warts, cysts. I felt very unsure and uncomfortable about such practices and was concerned about ethical and legal implications.

Dr. Nanda frequents the local supermarket where one of his former receptionists is working. He consistently walks through her checkout without purchasing anything and returns to the surgery feeling proud of intimidating her.

During the amount of time that I worked for Dr. Nanda was the worst working experience that I have had in the three years I have been part of the work force. Along with all of the intimidation and sexual harrasment were threats made at me, Dr. Nanda being a so called respected member of the public I have had to give a lot of consideration to lodging this complaint. I left the position of receptionist secretary with very low self esteem and self worth, I had very little confidence in myself."

19 Generally the applicant's evidence in these proceedings was that these events took place as described in this letter. At the time of these events, the applicant was 17 years old. The evidence of the respondent was that either the events simply did not occur or that, in some instances, they did not occur in the way described by the applicant and, effectively, if

they did occur they did not involve improper or inappropriate conduct on his part. Several witnesses called by the respondent either directly contradicted the evidence of the applicant or cast doubt on its veracity.

20 Before descending into detail, it should be observed that on the applicant's account, she was subjected to various forms of sexual harassment by the respondent which commenced shortly after she began working for him, and that she made a contemporaneous record of many of the instances of harassment in two diaries and also detailed them in the complaints given to the CES and HREOC. At least implicit in the defence of the respondent is that the applicant's evidence about some of the incidents is fabricated and her account about others is a deliberate distortion of what, in fact, occurred. It is also at least implicit in the defence that the entries in the diary which is in evidence were falsely made either on the day in question or later. The import of the defence is also that when the written complaint was given to the CES in March 1996 the applicant knew that its contents were false and the applicant also knew that the letter of complaint to HREOC was false when it was sent in May 1996. Some evidence led by the respondent was to the effect that at least one reason the applicant made the false allegations in 1996 (and, by implication, has pursued them since (including by giving false evidence)) was to extract money from the respondent.

21 I should, at this stage, say something about my impressions of the central witnesses. They are the applicant, the respondent and Peacock. I include Peacock because she gave evidence that directly contradicted the evidence of the applicant about some incidents of alleged sexual harassment where Peacock was said by the applicant to have been present.

22 The applicant did not appear to be giving a false account of events as she then recalled them. She was prepared to concede comparatively readily that evidence earlier given was or might be wrong and that things she had said about the incidents that founded her complaint might not be or were not consistent. Indeed, at times, she appeared prepared to make concessions rather too readily because she did not have the strength to join issue with the cross-examiner. She was cross-examined for over a day and her evidence was constantly challenged often by reference to matters of detail that may have been forgotten or obscured with the passage of time. As the cross-examination continued it became obvious that the applicant was quite distressed when giving evidence. There were several occasions when she broke down crying. There could, of course, be several explanations for this (alone or in

combination). One may be that she was affronted and distressed that counsel for the respondent was challenging her account of what had occurred even though it was true. Another may be that her account was false (either in whole or in part) and she was distressed because it was being challenged and, she thought, exposed as false. It may have simply been the stress associated with giving evidence in circumstances where she has been pursuing her complaint for over four years, the success she had in HREOC has proved to be illusory and she has had to give yet another account of what she says occurred. It is probable the last matter was at least one factor causing her distress. There may be other explanations including her general emotional state (having regard to the evidence of Dr Kennedy). However my overall impression of the applicant as a witness was as a witness of truth trying, as best she could, to recall details of events that occurred several years earlier.

23 The respondent on the other hand did not impress me at all. There were many occasions when I gained the impression that he was constructing an answer to a question designed to place his case in the most favourable light. He gave his evidence in a studied way. He was, overall, not an impressive witness.

24 Peacock, unlike the applicant and the respondent, did not have an obvious and direct interest in the proceedings that would cause her to tailor her evidence or give false evidence. However I did gain the impression that she felt a strong loyalty to the respondent and had a strong (and negative) view about the applicant because she had made and pursued the complaint about the respondent commencing with the statement to the CES in March 1996. In that statement and the letter to HREOC in May 1996 the applicant alleged that on 20 September 1995 the respondent had grabbed her breasts while showing her how to use an ECG machine. In his response to HREOC in a letter dated 25 September 1996, the respondent assumed this was a reference to an occasion on 20 September 1995 when he had demonstrated the use of the machine on Quigley in the presence of the applicant and Peacock. In that letter the respondent said "Both [Peacock and Quigley] have expressed their astonishment and have given me letters that nothing happened in their presence". In a written response dated 23 October 1996, the applicant did not deny that there may have been a demonstration of the machine involving Quigley. She simply stated the incident she was describing was "a different time".

25 However Peacock had, presumably acting on the belief the respondent had about the occasion the applicant was referring to (and probably after speaking to the respondent), prepared a statement dated 5 August 1996 denying that the respondent touched "our breasts" during the demonstration involving Quigley. In that statement Peacock said, "I am disappointed that Leanne could accuse the doctor of such a low thing. The doctor behaved in a very professional manner". During cross-examination, Peacock was asked by the applicant's counsel a question (in several parts) that had been asked of a number of other witnesses. The import of the question was that the witness would be prepared to do anything for the respondent. Peacock agreed she was anxious to defend the respondent and would go out of her way to do so though she said she would not lie. She spoke quite passionately when she gave this evidence which was consistent with her having a strong sense of loyalty to him. Indeed she had earlier said that he was "a fine boss". Both the answer and the way it was given were consistent with my general impression that her evidence was not impartial or dispassionate. I return to the issue of Peacock's credit later in these reasons.

26 It is convenient to commence an analysis of the evidence by considering the evidence led by the respondent about the applicant's motives. Evidence about this matter was given by Peacock and Griffin and related to a conversation with Mathews on 2 August 1996 at the Spinning Wheel Hotel in Raymond Terrace (though there was other evidence about a statement the applicant had made concerning remarks of her aunt about getting compensation for sexual harassment). Mathews gave evidence about the conversation at the Spinning Wheel Hotel as well.

27 I should, at this stage, say something about the status of the evidence of Mathews more generally. The material filed by the applicant included a lengthy affidavit of Mr Michael Jaloussis, a solicitor who had the carriage of the matter for the applicant, which had annexed to it the exhibits tendered at the HREOC hearing. One exhibit (folios 195 to 197 of the affidavit) was an unsigned statement of Mathews which annexed a letter dated 13 March 1996 forwarded to CES. That letter contained a number of allegations by Mathews of sexual harassment by the respondent. At the hearing on 22 June 2000 in these proceedings there was a debate about the admissibility of folios 195 to 197 and an affidavit of Ms Z. I understood the evidence to be led by the applicant as demonstrating (as described by counsel), inter alia, "the uncanny similarities of the way in which the [respondent] treated all three women [the applicant, Mathews and Ms Z]". Thus, I understood the evidence to be

relied on to establish, amongst other things, the respondent's tendency to act in a particular way. Counsel for the respondent appeared to share this understanding and raised s 97 of the *Evidence Act 1995* (Cth) in opposition to the tender of the evidence. I ruled (transcript p 38) that the affidavit and statement should be admitted subject to determining whether notice had been given as contemplated by s 97(1)(a).

28 The hearing of the matter did not conclude during days fixed in June 2000 and Ms Mathews actually gave evidence on 21 August 2000. She was examined in chief and cross-examined on the assumption that her statement (and the annexed letter of complaint) were in evidence. Indeed counsel for the applicant asked her whether the matters that were set out in a letter were true and correct. She said they were. On one view, this evidence was led to prove that the harassment alleged in the letter (and other incidents set out in it) had, in fact, taken place. One incident described in the letter was a request made to Mathews when she was initially interviewed by the respondent to wear to work "a short skirt with no panties and a see through blouse". On 23 August 2000 (after the respondent had given evidence and had been cross-examined) counsel for the respondent sought to ask Peacock questions about what the respondent had said at the initial interview of Mathews (Peacock had been present) about work clothing. Counsel for the applicant then made it plain that she did not rely on Mathews' written complaint (and, I infer, answers to questions concerning the truth of its contents) as proof that the matters complained off had, in fact, occurred. On that basis counsel for the respondent withdrew an application to ask Peacock questions about what was said at the initial interview. When explaining the limited use the applicant intended to make of the written complaint (that a complaint had been made and what the contents of the complaint were), counsel for the applicant drew attention to the fact that she had not cross-examined the respondent about any of Mathews' allegations. In view of these remarks I propose to treat folios 195 to 197 as proving no more than a complaint was made by Mathews and what the complaint contained.

29 I return to the evidence concerning the conversation at the Water Wheel Hotel. Mathews' account is, in part, contained in a letter dated 23 October 1996 to HREOC responding to a letter of the respondent. She also gave oral evidence about this incident. Mathews had approached Peacock at the hotel to ask if she would help the applicant and her with their complaints against the respondent. Mathews had lodged a complaint with HREOC on the same day as the applicant, namely 8 May 1996. Mathews accepted in

cross-examination that she told Peacock that she was taking the respondent to court on sexual harassment charges and that there was "money in the court case". She also accepted that she told Peacock that there would be money in it for her if she helped the applicant and herself though at a later point appeared to resile from that evidence. She denied mentioning a figure of $4000. I should note that Mathews also gave evidence that she had been initially approached by the applicant but denied, in substance, that they collaborated in preparing their complaints in so far as the contents were concerned. She said the applicant had typed out one version of her complaint (the letter to HREOC of 8 May 1996). In the letter of 23 October 1996, Mathews commented on what Peacock said about the truth of Mathews' allegations (that every part was true) and what she said about wanting to help but been scared of the respondent. However the letter is cast in terms that makes it unclear whether, on Mathews' account, Peacock said these things directly to Mathews at that time.

30 The import of Mathews' evidence was that after speaking to Peacock she was approached by Griffin. There was a discussion about whether Mathews had put in a "statement against Dr Nanda". Griffin indicated that he had "never been sleazy towards her". Mathews indicated that the respondent would not be stupid enough to do anything (against Griffin) because she had a case against him. Griffin indicated that the respondent did not want Mathews involved because he was going to drag it through the courts and his view was that the applicant was influencing Mathews. Griffin asked Mathews why she was doing it and she replied that she did not think the respondent should be able to get away with what he had done. Mathews denied saying that she wanted to "get out of this business with [the applicant]". Mathews then left Griffin.

31 Griffin's evidence about this conversation with Mathews accorded with Mathews' evidence in some respects but not others. Griffin accepted that she told Mathews that the respondent had not been sleazy towards her, that she asked Mathews why she was doing it and that Mathews said she thought the respondent should not be able to get away with what he had done. Griffin did not accept the other aspects of the conversation as recounted by Mathews. Griffin said Mathews had said she wanted to get out of the business with the applicant.

32 Peacock's account was that Mathews approached her and indicated that she should join the applicant, that they were going to get good compensation from the respondent for

sexual harassment and that she mentioned a figure of $4000. Peacock denied saying that Mathews' complaints were true or that she was scared of the respondent.

33 For present purposes, it is unnecessary to resolve which of the accounts should be preferred as to some matters of detail. It was common ground that Mathews asked Peacock to help her and the applicant in furtherance of their complaints against the respondent and, in the context of making that request, indicated that there would be money in it for Peacock. It is also clear from Mathews' evidence that she and the applicant worked comparatively closely together, at least in the middle to latter part of 1996, in pursuing their complaints against the respondent. Mathews' motives were, in my opinion, mixed. There is no doubt that one objective was to obtain compensation from the respondent. However the statement to Griffin that she did not believe the respondent should be able to get away with it is consistent with the pursuit of complaint also for reasons of principle as well. It is true that Mathews withdrew her complaint in early 1997. However I am satisfied that she did so for legitimate reasons which included that she received advice from solicitors that led her to believe that her exposure to costs did not justify the pursuit of the complaint.

34 I have little doubt that the applicant's motives for making and pursuing her complaint, in common with Mathews, also included obtaining compensation from the respondent though that was never directly put to her in cross-examination. It was, however, a matter relied on by counsel for the respondent to discredit the applicant in final submissions and reference was made to evidence that suggested, indirectly, that this was what motivated the applicant. However even accepting that this was one matter which motivated the applicant, it is, in my opinion, a matter that does not do any real damage to the applicant's credit. The law may afford a person an opportunity created by the unlawful conduct of another person to obtain compensation from that person. This is recognised in the statutory scheme in the S D Act which confers a right to make a complaint which can lead to the remedy of compensation.

35 Whether I should ultimately accept or reject the account of the applicant and reject or accept the evidence of the respondent (and the evidence of the witnesses supportive of the respondent's account including the evidence of Peacock) involves a more detailed consideration of the evidence of the witnesses and the documentary evidence. In final submissions counsel for the respondent and counsel for the Commonwealth referred to several matters emerging in the applicant's evidence concerning her credit. Of some

significance was the evidence of the applicant concerning diaries she said she kept during the period of her employment with the respondent in which she recorded many of the incidents set out in her written complaint to the CES and later HREOC.

36 In evidence is a 1995 diary with a day to a page (about A4 in size). It is a diary that relatively clearly, in my opinion, the applicant kept during that year (for example it contains a note of when she started working for Forgacs in early 1995 (20 February 1995)) though on some of the pages for days in February the day and year has been altered to create an ad hoc diary for February 1996. On the pages for 16, 17, 18, 19, 20, 21, 24, 25, and 26 October 1995, 4 and 9 November 1995 and on the reconstructed pages for 7, 8, 12, 13 and 14 February 1996 there are entries in a code constituted by symbols in substitution for letters of the alphabet. A translation of the code is set out on a page towards the beginning of the diary. It is to be recalled that the first incident recorded in the written complaint to HREOC for which a date was given was 18 September 1995. The first eight entries in the diary in code (that is, before the entry on 26 October 1995) do not describe incidents of alleged sexual harassment. Indeed the first six entries in code simply record the time the applicant arrived at work. Thus there is no entry in code (or at all) in this diary relating to the incidents involving sexual harassment which the applicant said occurred on 18 and 20 September 1995 and 16, 17, 19, 21 and 23 October 1995 even though there is, for some of these days, an entry in code about the time of arrival at work. However there is an entry in code concerning each incident particularised in the written complaints (and given a date) following (and including) the incident on 26 October 1995.

37 Several obvious questions arise about this diary and evidence concerning it, given that it might constitute a contemporaneous record of the incidents of sexual harassment and a source of information when the first written complaint was prepared in March 1996. The first is why there are no entries in the diary concerning the first seven dated incidents of sexual harassment (as well as the trouser sewing incident which occurred early in the applicant's employment) even though there are some entries in code on the days in question. The second is what was the source of the information concerning the incidents on these days used by the applicant in compiling the complaints.

38 In her evidence the applicant said she used the code (which had been used by her and friends at school) to ensure the respondent did not understand what the entries meant. The

diary was taken by her to work and she feared the respondent might look through it. This explanation is plausible (particularly given other evidence about a letter the applicant wrote to a young man which is discussed later) though it is difficult to understand why the entries concerning late arrival were in code. However the applicant was not asked to explain why they were. The applicant was cross-examined about the absence of entries in code for the first seven dated incidents of sexual harassment in her complaint. She said she had maintained another pocket diary which contained information about those incidents and to which she had recourse when preparing her first written complaint (to the CES in March 1996). It was a 1994 pocket diary used to make entries for days in 1995 (in the same way she used the larger 1995 diary to make entries for days in 1996). The applicant said she had thrown out the pocket diary though said she could not recall why she did so. She said this occurred when she was cleaning out her room. She accepted that she was careful to keep the 1995 diary because it might be relevant at some stage. I accept that it is curious that, on the applicant's account, she retained one diary but not the other given that both would have been of at least similar importance. However the critical question is whether her evidence concerning the existence of the pocket diary and what it contained is false.

39 In cross-examination, counsel for the respondent sought to establish that it was false by pointing out that the existence of this diary was raised only in cross-examination and was inconsistent, if not at odds, with evidence given in chief and evidence given to HREOC. It is true that the existence of the pocket diary was not adverted to in evidence in chief. However the questions asked of the applicant by counsel were directed to the 1995 diary as a prelude to its tender. The 1995 diary was tendered as a contemporaneous record of some the events in the written complaint and it was necessary to ask questions about it to found the tender. The existence of the pocket diary might have been raised during the applicant's evidence in chief, though there was no forensic imperative that required its existence to be raised.

40 In her evidence before HREOC (given in April 1999) the applicant was asked questions about a diary. It is to be recalled that there was no contradictor in those proceedings as the respondent did not appear to contest them. The applicant said she kept a diary of things that were said and done. She agreed with her counsel that she had set out the dates in her statement because she had had an opportunity to look at the diary. She then said the diary was in her bedroom at home. I accept that this evidence could reasonably be viewed as implying that the applicant had one diary that she still retained. Later evidence

given to the Commissioner could also reasonably be viewed as implying that there was one diary. However the applicant later said in response to a proposition put by the Commissioner that the first entry in the diary would have been for 18 September [1995] and that it was in code. It is probable that the applicant would have then known that the 1995 diary contained no such entry. Given that the proceedings were not contested, there was no particular reason for the applicant to lie to or mislead the Commissioner about that matter. Notwithstanding what might be inferred from her earlier evidence to HREOC, this latter evidence is consistent with the existence of a diary which had contained entries concerning the first seven incidents of harassment (including the one on 18 September 1995).

41 When confronted with this evidence (to the Commissioner) in cross-examination in these proceedings, the applicant explained that she understood the questions to relate in general to the diary she had kept when working for the respondent. Were it not for one other piece of evidence, I would be somewhat sceptical about the evidence the applicant has given in these proceedings on this question of what she had earlier meant and whether, in fact, there had been another diary. It is to be recalled that in the letter dated 8 May 1996 to HREOC, the incidents of sexual harassment were set out in two parts. The first part contained a list of incidents that are said to have occurred on nominated dates. The second contained another list of incidents occurring at unspecified times (other than as to the trouser sewing incident which was said to have occurred during the early weeks of her employment). The evidence of the applicant in these proceedings was that the first part of the statement prepared in March 1996 and given to CES had been compiled by reference to both diaries. She did not have recourse to the diaries when preparing the May 1996 letter to HREOC because "I'd already translated from them ... to the CESs complaint". That is, the transposition of the information from the diaries into letter form had taken place in March 1996 and had been copied in May 1996.

42 In the letter of 8 May 1996 (set out above in par 18) the applicant said in the second paragraph (as a prelude to what I am describing as the first part) that she clearly recalled the following incidents and would "begin my statement with excerpts from my diary". It is highly unlikely, in my opinion, that the applicant would have commenced a letter to a statutory body which was likely to investigate the matters referred to in the letter with a statement that would have been false (with the attendant risk that the falsehood would be

exposed) if there had been no diary entry concerning each incident. To make such a false statement would have been a foolish and unnecessary thing to do.

43 Moreover if, contrary to the applicant's evidence, there had been no pocket diary, then it would appear to follow, on the respondent's thesis, that the applicant simply made up the dates of the first seven incidents, first set out in the statement of March 1996, which extended back six months. It is not in issue that there were occasions when some of what is described in the first seven incidents actually occurred (the discussion of the speeding fine, the demonstration of the ECG and the discussion of the exchange of alcohol for sexual favours) though the context and detail was in issue. It is highly improbable that the applicant could have recalled, in March 1996, the dates on which events occurred up to six months earlier including the events about which there was some common ground. As just noted, one would be driven to conclude that, in the absence a written record of when the events occurred, the dates were simply made up by the applicant. It is difficult to comprehend why the applicant would have followed such a course particularly when no dates were given for the incidents in the second part of the complaint. It may be thought that it was done to give an air of authority or veracity to the complaint. However, in my opinion, it is far more likely that the complaint as originally framed in March 1996 and later reproduced in May 1996 was based, as the May 1996 letter said, on excerpts from a diary. I am satisfied that the applicant had two diaries in which she entered contemporaneous notes concerning events at the workplace which included notes about the conduct of the respondent. This finding does not exclude the possibility that the entries themselves were false. Whether they were requires further consideration of the evidence given by the various witnesses and other documentary evidence. However the contemporaneous notes (at least as recorded in the 1995 diary) are themselves credible evidence of the events referred to in them.

44 Before embarking on a consideration of the evidence more generally, it is convenient to discuss some of the evidence of the respondent. It is evidence which, in my opinion, provides some illumination of where the truth lies. I consider four matters.

45 The first matter concerns an occasion on which a chocolate penis the respondent purchased came into the possession of a young female receptionist who was then working for him. I am conscious that the receptionist, Cooper, gave evidence in this matter but that the evidence was led only in the agency proceeding. It is not evidence in the employment

proceeding. The following discussion is based only on the evidence given by the respondent in cross-examination by counsel for the applicant and in re-examination and answers to a number of questions I asked. This was evidence given in the employment proceeding.

46 The respondent's evidence was as follows. He acknowledged he was giving his evidence about this incident after he had heard Cooper give evidence about it. He went to the supermarket in 1984 or 1985 (he was not sure exactly when) and someone sold him some chocolate penises. It was Easter time. He came back to the surgery after lunch. He then had "it" all wrapped up. It is not clear whether this part of his evidence is a reference to one or several chocolate penises even though he spoke of purchasing chocolate penises in the plural. Cooper, the receptionist, wanted to know what was in the packet. He refused to show her. She then persuaded him to let her have a look. He did let her have a look. Cooper then asked the respondent to sell "it" (I understand this to be a reference to one and not several chocolate penises) as she wanted to give it to her girlfriend. The respondent said he "very reluctantly sold it to her". The respondent then spoke of his understanding of what then happened, namely that Cooper took the chocolate home and put in the fridge where Cooper's mother saw it. The mother asked what it was and Cooper said that the "Doctor gave it to me". The mother came to the surgery the following day or the day after. She told the respondent that she wanted take her daughter away from the surgery and that she was not very happy with what he had done.

47 The respondent then said in evidence that a complaint was made to the CES but that one or two days later Cooper confessed to the mother that it was not the respondent's fault. Cooper said it was her who forced the respondent to sell it to her. As a result the mother withdrew the complaint the next day. The respondent later said that he did not buy the chocolate penis at a supermarket but at Darrell Lea. In re-examination he said he had bought them for two of his good friends who were medical practitioners.

48 It can be inferred that Cooper was a young woman at the time of this incident having regard to the relationship between Cooper and her mother evident from the events described by the respondent. I find it difficult to accept that an object of the type described by the respondent would have been sold either by a supermarket or at Darrell Lea. However, more significantly, I also find it extremely difficult to accept that a young female employed as a receptionist would make, let alone persist in, a request to a medical practitioner who was her

employer to open a packet (when the employee did not know what was in it) that the practitioner brought back to the surgery. I also find it extremely difficult to accept that even if (in the unlikely event) the persistent request was made, a responsible medical practitioner and employer would open the packet (knowing what was in it) and show its contents to a young female receptionist. I also find it extremely difficult to accept that a responsible medical practitioner and employer would then sell the contents (a chocolate penis) to the young female receptionist because she said she wanted buy it. In my opinion this evidence involves a kernel of truth, namely that the respondent brought about a situation where Cooper had in her possession a chocolate penis he had provided to her which Cooper's mother came to know about and which led to Cooper leaving the respondent's employment and a complaint being made. The remainder of the evidence of the respondent is, in my opinion, a transparent fabrication designed to explain an incident about which evidence was given in the agency proceeding which the respondent heard being given. This evidence of the respondent reflects adversely on his credit.

49 I should conclude my discussion of this question by noting one further matter. At one point, counsel for the respondent submitted that his client had been prejudiced because the evidence of Cooper was led against the Commonwealth only and he did not cross-examine Cooper. Had he known the respondent would be asked questions about Cooper, he could have cross-examined Cooper to have her corroborate his client's version of events. However the evidence of the respondent on the Cooper incident was elicited by counsel for the applicant to test the respondent's credit. At least in the ordinary course, counsel for the respondent would have had some difficulty in demonstrating that he could elicit other evidence from another witness for the sole purpose of demonstrating that his client was a credible witness. Prima facie such evidence is not relevant: see s 102 of the *Evidence Act 1995* (Cth), and I doubt that it was intended that s 103 of that Act would allow such evidence to be led.

50 The second of the four matters concerns a letter written by the applicant to a young man. In his letter of 25 September 1996 to HREOC, the respondent effectively set out his defence or answer to the allegations made by the applicant in her letter to HREOC of 8 May 1996. One of the allegations (set out above) concerned an incident on 13 February 1996 in which the respondent discussed with Sarroff (and then the applicant) him attending a massage parlour and having sex with a woman there. In his September 1996 letter the respondent

denied this incident and denied using the language the applicant said had been used. The respondent concluded his answer or defence concerning this incident by saying:

> *"On the other hand, this is her language. Please refer to the pornographic letter she wrote to a 'boyfriend' in my time and on my stationary. I will send this on request."*

51 For my part, I see no logical connection between the "pornographic letter" and the allegation. However, the significance of what the respondent wrote was that it revealed he had, in September 1996, a personal letter (or a copy of it) written by the applicant during her employment with him which had concluded over six months earlier. There is evidence that suggests it was written in November 1995 (notes in code in the 1995 diary of the respondent indicate she was corresponding with the young man at that time) though the evidence of the respondent was that he saw the letter in January 1996. When it was written is not presently material.

52 A photocopy of the personal letter is in evidence. It contains, in part, a quite explicit description of how the applicant was sexually aroused by seeing the young man, a description of how and in what way the applicant would like to have a sexual encounter with him and an expressed desire to know whether and in what way the young man was being sexually aroused by reading the letter. In an affidavit sworn on 12 October 1999, the respondent explained how a copy of the letter had been in his possession. He annexed a copy of the letter to the affidavit. He said that he was in his surgery, heard a bang outside and left the surgery to provide medical attention for what he believed might have been a motor vehicle accident. When he returned to the surgery he noticed the letter on the applicant's desk and that it was on his letterhead. He noted the letter did not relate to any part of the applicant's employment duties. He made a copy of the letter but did not raise it with the applicant. His explanation for copying the letter was:

> *"I did not want to embarrass the girl but I decided that it would be prudent to take a copy should I become aware that she was continuing to write personal letters on my letterhead."*

53 The copy in evidence is a photocopy constituted by two sheets of paper. The letter commences on one page which appears to be plain paper and concludes on the second page. At the head of the second page is letterhead of the "TERRACE MEDICAL CENTRE". Beneath that description of the business are the names of two medical practitioners (not the

respondent and his wife but the medical practitioners from whom they bought the medical practice) and an address of the practice which was not then the current address (it was an address two doors down the street).

54 There was an issue about what paper the letter had been written on and how it came into the possession of the respondent. I have already described what the respondent said were the circumstances in which he saw and copied the letter. As to the physical form of the original letter, the import of the respondent's evidence was that the letter was on paper as I have just described it though on one but not two sheets (that is, on a single sheet which had letterhead on one side but not on the other). In a letter dated 23 October 1996 to HREOC, the applicant said (as part of a general response to the 25 September 1996 letter of the respondent) the letter had been written by her in her lunch hour on "his stationary that I retrieved from the recycling bin". As to what happened immediately after she had written the letter, the applicant said she saw the letter on the photocopier even though after writing it she had placed it in her handbag. She noticed her handbag had been moved. A week later she found a photocopy of the letter amongst the respondent's medical books. She ripped up the copy. In an affidavit of 31 October 1999 the applicant denied that the letter had been on the letterhead of the Terrace Medical Centre. This statement was made by the applicant with knowledge of the form the copy annexed to the affidavit (of 12 October 1999) of the respondent took (that is, it had a letterhead referring to the "TERRACE MEDICAL CENTRE"). In cross-examination the applicant said that the letter was written on stationery provided by a representative of a drug company. The paper had come from a pad which was kept in a storage cupboard. The clear import of her evidence was that at the top of the pages of the pad was promotional material of the drug company. I will refer to it, as counsel for the applicant did in cross-examination, as letterhead of the drug company.

55 During cross-examination the applicant agreed with a proposition put to her that the account given in cross-examination was "completely different" to the account she gave in her letter of 23 October 1996. For my part I do not view them as completely different. During cross-examination the applicant used the word stationery to describe paper provided to the surgery by the drug company. The use of the word in this way is unexceptionable and consistent with its ordinary meaning. It is the same description given by the applicant in the letter of 23 October 1996. It is true that in that letter the applicant spoke of "retriev[ing the stationary] from the recycling bin" and in cross-examination spoke of it having come from a

storage cupboard where, it would appear, pads given to the surgery by various sales representatives were stored. It is not a perverse use of the language to describe such a repository as a "recycling bin". Agreement to the proposition that her evidence was "completely different" then led the applicant to agree that when she wrote the 23 October 1996 letter to HREOC she had no recollection of writing letters on letterhead of the drug company. It also led the cross-examiner to suggest that her oral evidence that it had been drug company letterhead was a fabrication, a lie and a false allegation that the respondent had knowingly falsified a document.

56 This cross-examination took place towards the end of the second day on which the applicant was cross-examined. By then she had broken down distressed on several occasions. During the cross-examination and before she agreed to these propositions, it was suggested to her that she was lying. In my opinion, the evidence of the applicant was credible evidence notwithstanding the concession (which I do not believe should have been made and was made to oblige the cross-examiner) that her oral evidence was "completely different" with what she had written earlier. It is true that the applicant had not mentioned earlier that the paper on which she wrote the personal letter contained the letterhead of a drug company but nothing, in my opinion, turns on that particularly when she denied in her affidavit of 31 October 1999 that the letter had been on Terrace Medical Centre letterhead which was the fact being asserted by the respondent.

57 On the other hand, the evidence of the respondent does not have the ring of truth to it. It would be most extraordinary, in my opinion, for an employer in a workplace the size of the surgery, to photocopy a personal letter which was on old letterhead (on the respondent's version, it was old letterhead of the practice run by the doctors who sold it to respondent and his wife at a different address) and say nothing to the employee because it would provide the foundation for later rebuking or disciplining the employee if there was further use of letterhead of the surgery at some time in the future. Moreover while I make no finding that the photocopy annexed to the affidavit of the respondent has been tampered with, it contains a line through the opening salutation ("Dear Aaron") which cuts of the top of one of the letters (the "D") in a way that would be consistent with the top of the letter having been masked or covered over during photocopying. I refer to this to indicate that I reject the photocopy annexed to the affidavit of the respondent as evidence of sufficient weight to displace the oral evidence of the applicant about the form of the paper on which she wrote the

letter. I accept the evidence of the applicant concerning the circumstances in which the personal letter was written, the type of paper it was written on and the circumstances in which it was copied and the copy found.

58 In my opinion, the respondent's account of this incident is false and reflects adversely on his credit. It may be that the respondent's motives for making a copy (indeed probably making several copies of the letter) related to its contents. That is, it constituted a graphic and titillating revelation of the sexual fantasies of a young woman though, it must be accepted, that this was never put directly to the respondent: see *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134 at 148.

59 The third matter concerns a joke the respondent concedes he told. One of the incidents particularised by the applicant in her letter of 8 May 1996 was an event on 17 February 1996. It involved the respondent asking the applicant whether she would go to the police if, in substance, he raped her. It is a matter recorded in code in her 1995 diary. In his letter of 25 September 1996, the respondent said that the substance of the incident had been embodied in a joke the respondent had told "another friend". The storyline of the joke was that an employer (a male) asked his employee (a female) if she would report him if he raped her. After the employee said she probably would, the employer said he would go to jail, the office would be closed and the employee would be out of a job. The apparent punchline was that the employee then said, "Shit! I didn't realise that". The respondent then said in his letter that after telling the joke "we all burst out laughing". He then said in the letter "Remember this is in private. She came in on some pretext, heard it and twisted it around and made it as if it was said to her with all the spicy bits". The respondent added in his affidavit of 12 October 1999 that the joke was told to Mr and Mrs Richards. Mrs Richards gave evidence in an affidavit dated 12 October 1999 that a joke to this effect had been told. Mrs Richards was unable to say that the applicant was present or near by. In an affidavit of the same day, Mr Richards referred to "conversations concerning employers and employees and whether complaints would be made by a female employee" but was not able, in cross-examination, to recall any jokes concerning rape by an employer. I accept, as Mrs Richards said, that the respondent recounted a joke of the type he spoke of in his letter and about which he later gave evidence. However what it really illustrates is that the respondent cannot claim the high moral ground that, on many occasions, he sought to take during cross-examination when he rejected the suggestion that he had used certain language or spoke

of certain matters because to do so would have been out of character. The joke is base and now accepted by the respondent to be tasteless. It is not at odds, in my opinion, with an attitude to women and sexual relationships consistent with the allegations made against him by the applicant. Moreover it is not a large step to conclude that a person who knew of such a joke, told it to friends, and thought it was funny would at some other time use its contents as a vehicle to make a lewd comment to a young female employee either because the person thought doing so was itself funny (or perhaps even titillating) or because it was part of a crude course of conduct designed to secure or elicit sexual favours from the employee.

60 The fourth and last matter concerns what I have earlier described as the trouser sewing incident. One of the matters complained of by the applicant in her letter of 8 May 1996 to HREOC (set out above) was an incident in the early weeks of her employment when, on her account, she was told to sew a button back onto the respondent's trousers. On the applicant's account set out in the letter it was a button, she knelt on the floor to sew it on and, at the time, the zipper of the pants was down. In her evidence before HREOC, the applicant said she was asked to sew the button on but assumed the respondent would bring the trousers in the next day. However he called her into the back surgery and produced a small sewing kit, undid his fly, stood there and asked the applicant to kneel on the ground and sew his button back on. She did so. She described the incident as pretty horrible and said it made her feel terrible and dirty. In response to a question from the Commissioner, the applicant said the missing button was at the top of the zipper. He also said that she initially sat on the arm of a chair to start but was asked by the respondent to kneel on the ground to sew on the button. It took a minute or two to sew the button on. When she was doing it, the applicant's head was about level with the respondent's waist.

61 During cross-examination on 23 June 2000 in these proceedings, the applicant rejected the suggestion that what she had been asked to sew back on was a metal clip "over towards the right hip". She did, however, concede that she had a little doubt about that matter and conceded that she had some doubt (at the time of cross-examination) about the accuracy of her recollection.

62 The respondent's first account of this incident was in his letter dated 25 September 1996 (approximately a year after the event) to HREOC. The respondent said that the clip had accidentally broken and the applicant offered to sew it back on. He said that the clip

was on the "far right hand side away from the main button or zipper". In the letter he offered to produce the trousers. He said he had his pants firmly on (in her written response dated 23 October 1996 to this letter, the applicant repeated her earlier assertion that a button had been involved and the zipper was undone and took issue with whether the "button" had been on the far right hand side of the pants). In cross-examination in these proceedings, the respondent said that the clip had broken in the sense that the top part of it had broken so that it did not hold. The respondent said the flap from the pants was coming out and was flapping. He said it did make the pants "loose a bit". He said he was looking for a pin and the applicant offered to sew it. He indicated that he was quite capable of sewing it himself but he did not on that occasion because the applicant offered to do it.

63 During the re-examination of the respondent a pair of trousers was tendered which he identified as the trousers in question. They had not been shown to the applicant during her evidence so that she could say whether they were the trousers. The trousers have a zipper fly. They also have a button approximately 4.5 cm to the right of the fly (looking at the trousers from the external front). Approximately 8.5 cm to the left of the zipper is a small flat metal bar on the waistband. The waistband to the right of the fly continues past the fly to the left as a flap and on the back of that flap is a hook which hooks behind the bar to secure the flap against the left-hand side of the waistband. It is approximately 15 cm from the metal bar to the centre of the fly (the vertical midpoint of the fly). The metal bar is approximately 4 mm wide and 25 mm long (top to bottom). At the top and the bottom of bar is a hole to enable the bar to be sewn onto a garment. On the trousers in evidence the bar has been resewn in a fairly crude way. The top hole has been resewn twice (once in a light coloured thread and later in a black thread which overlaps the white) and the button hole once (in black thread). In his evidence, the respondent said that the applicant sewed the top of the bar and added later in his evidence that he thought that she had sewed the bottom as well because it was very loose. In describing how the applicant sewed, the respondent indicated that she placed her left thumb down behind the waistband (this would have meant the end of her thumb was of the order of 10 to 12 cm from the vertical midpoint of the fly).

64 If the trousers tendered by the respondent at the hearing in August 2000 were, in fact, the trousers he had been wearing sometime probably in September 1995, then the respondent's account as to what was sewn on is plausible. The button at the top of a fly appears not to have been resewn (other than perhaps professionally) while the metal bar

plainly has been. Moreover the first written account of this incident made by the applicant (the March 1996 statement - the incident is not referred to in the applicant's 1995 diary nor did she suggest that it was one of the matters recorded in her pocket diary to which a date was given in the statement) was made almost six months after the event. It is quite possible that by then the applicant's recollection was imperfect and she recalled sewing on a button whereas, in fact, it had been the metal bar. Understandably she thereafter repeated that version of the event. Indeed, as earlier noted, she conceded in cross-examination she had some doubts about the accuracy of her present recollection (June 2000) of the incident (about the question of whether she offered to sew it back on or was asked).

65 Though in one sense it is a minor matter, of some importance, in my opinion, is where the sewing kit came from. The respondent was cross-examined about it:

> *"But you were happy to accept her invitation to sew it back on?--- She knew we had a sewing kit in the surgery so she said---*
> *Well, I can I just---? Yes, sorry.*
> *You then went into the second room of surgery?--- Yes.*
> *The kitchen area?--- Yes.*
> *You were there for a few minutes?--- Yes.*
> *And you came out and you produced a small sewing kit?--- I didn't have-it was in the second room anyway in the draw so she was sitting in the coffee room and she said: look, it would only take 2 minutes. So I said you don't have to but if you want to do it thanks very much."*

66 The respondent was adamant that this was the conversation that took place even though it had not been referred to, in these terms, in his letter of 25 September 1996 to HREOC nor his affidavit of 10 October 1999. About 10 questions later it was again put to the respondent that he had collected the sewing kit as one of several things he did, and he did not deny or put that assertion in issue. The applicant was not asked in cross-examination whether she knew, at the time of this incident, that there was a sewing kit in the surgery. The applicant first said that the respondent had got the kit in her letter of 8 May 1996. That fact was not put in issue by the respondent in his response of 25 September 1996. In my opinion, it is more likely, having regard to the totality of this evidence, that the respondent produced the sewing kit. It is also more likely that this occurred in a context where the respondent asked the applicant to sew something back onto his trousers, he knowing there was a sewing kit in the surgery, and she did not volunteer it (her doubts about this matter during cross-examination evidenced, in my opinion, an honest (and understandable) response

six years after the event). In my opinion, the account of the applicant is more credible and I accept it. I have one reservation and that is whether the applicant was asked to sew back on, and did sew back on, a button or the metal bar. While I do not find affirmatively that the trousers tendered by the respondent were the trousers in question, they do constitute evidence that raises sufficient doubt in my mind about whether the applicant sewed on a button or not. However even accepting that what was sewn on was the metal bar, it occurred in circumstances where the respondent's fly was open, the applicant was asked to, and did, kneel in front of the respondent to sew on the metal bar and to do so, had to insert her thumb behind the waistband no more than 15 cm (or thereabouts) from the vertical midpoint of the respondent's fly (and, in all probability, his genitals).

67 Even if I were to accept the respondent's account in its entirety (which I do not), it nonetheless would manifest, in my opinion, quite extraordinary behaviour that would reflect adversely on the respondent's credit. The respondent would have it that in the first few weeks of the applicant's employment, he acquiesced (viewing it most beneficially to the respondent) in a young female secretary/receptionist effecting a repair to his trousers (which were not in pressing need of attention) which involved close physical contact between him and the young female secretary/receptionist which included her inserting her thumb down behind his waistband near his fly to enable the sewing to be done while he remained in the trousers.

68 Whether ultimately I should accept the evidence of the applicant in preference to the evidence of the respondent about any of the central events depends, in part, whether there is cogent evidence corroborative of the evidence of the respondent. Thus, it is necessary to consider the evidence advanced by the respondent which may be of that character.

69 It is to be recalled that the applicant alleges that on 13 February 1996 the respondent and Sarroff were discussing how the respondent had gone to a massage parlour. The applicant made an entry in her 1995 diary about this incident. Sarroff gave evidence that, first, he had never had any conversation with the respondent regarding visits to massage parlours by the respondent and, secondly, that on 13 February 1996 he did not visit the respondent's surgery. In support of this latter evidence he produced a photocopy of a page of a diary for 13 February 1996. I accept that it is an extract from his diary of that date. He gave evidence, which is inherently plausible, that he did not record every occasion he visited

the respondent. The left hand side of the printed page contains a column of times commencing at 7:30 am and concluding at 6 pm. Against the time of 10 am there is an entry which may well be an abbreviation of Newcastle followed by the word "inspect" and another word which may be the name of a person or place though what it says is really unclear. Against the time of 2.15 pm there is the word "meeting", another word (one word hyphenated or two words) and the word "Warabrook". Sarroff gave evidence that Warabrook was a suburb of Newcastle. Against the time of 5.30 pm is the entry "Credit Union".

70 Sarroff's evidence in chief was:

> *"Well, from my diary entries that I do keep I was in Warabrook which is a suburb of Newcastle for most of that morning to which, in turn, from there I was at Cessnock looking at buildings and then I returned to Maitland to which I attended a directors meeting at a local financial institution."*

He was not asked to explain, in chief, why the diary entries supported this account of what he did that day nor was he cross-examined about it. However the entries in the diary do not, in my opinion, support his account. Rather they suggest that he was in Newcastle in the morning inspecting something, attended a meeting at a suburb in Newcastle, Warabrook, in the early afternoon and did something concerning a credit union at 5.30 pm. It may be that the entries mean something else but, on their face, they give rise with varying degrees of confidence (as to particular events) to an inference that the day occurred as I have just described it. In my opinion, they do not, on their face, support the account of Sarroff.

71 Sarroff was reluctant to concede that without these entries he could not recall what he did on 13 February 1996 though he conceded in relation to a day five days earlier (8 February 1996) he could not independently recall what he had done (without reference to his diary note). I am satisfied that Sarroff could not recall, when giving evidence in these proceedings, what he did on 13 February 1996. His evidence was a reconstruction of what appeared in the diary and, in my opinion, it is probably a distorted one.

72 In his affidavit Sarroff said he had never been introduced to "a Leanne Elliott" and when asked in evidence in chief whether he knew or came to know Leanne Elliott, he said "Well, no I-no, definitely not." In cross-examination he did not accept that he had said he had never been introduced to Leanne Elliott, declined to change his evidence (though later equivocated) and explained that he meant he had not been introduced to her on 13 February

1996 because he had not been there. I find this evidence difficult to reconcile and the explanation is, in my opinion, implausible having regard to what was said in the affidavit and during evidence in chief. It reflects adversely on Sarroff as a witness. I do not accept his evidence and I do not view it as probative evidence which is corroborative of the evidence of the respondent that the event described by the applicant as having occurred on 13 February 1996, did not occur. I would prefer the evidence of the applicant that it did to that of Sarroff and the respondent.

73 The next matter where the respondent called evidence corroborative of his evidence concerns an incident referred to by the applicant in her letter of 8 May 1996 to HREOC. It had not been mentioned in her statement of 5 March 1996 nor was it referred to in her outline of evidence for the HREOC hearing. The applicant wrote in the letter that Prazauskas had asked her how much it would take for her to do favours for the respondent. Prazauskas denied having ever said such a thing. During cross-examination the applicant said that statement had been made by Prazauskas in the presence of the respondent. She accepted that the fact that the respondent had been present was not a matter she had mentioned before.

74 It is difficult to reconcile the evidence of Prazauskas and the applicant. Plainly Prazauskas would have an interest in denying the allegation as it would reflect poorly on him. He might also deny it because of his close friendship with the respondent. I find it difficult to accept Prazauskas's evidence that he never discussed sexual matters with the respondent even in the context of discussing matters of current affairs. Even the respondent was prepared to accept that matters of this character had been discussed (though not specifically with Prazauskas) in the discussions he had with friends that took place at the surgery. In addition, his evidence about being called "Uncle Lou" was curious. He rejected the suggestion that secretaries or receptionists employed by the respondent had called him "Uncle Lou". Yet the respondent had said (in his written response (dated 25 September 1996) to an allegation of the applicant in her letter of 8 May 1996 that he, the respondent, had asked the applicant to call Prazauskas "Uncle Lou") that his former receptionists called him "Uncle Lou". This was a matter about which the respondent had no reason to embellish or falsify his account. Perhaps the explanation for the apparent inconsistency between what the respondent said and the evidence of Prazauskas is that the respondent had been speaking only about the relationship between Prazauskas and former receptionists (and what they called him) after they had left the respondent's employment in contradistinction to what they had

called him while employed with the respondent. It is, however, a not entirely satisfactory way of reconciling the evidence particularly when the import of the oral evidence of respondent, during cross-examination, was that secretaries had called Prazauskas "Uncle Lou" while employed by the respondent.

75 On the other hand, I do not view the evidence of the applicant on this incident involving Prazauskas as entirely reliable either. Her oral evidence was based on her present recollection of an event that would have taken place at least four years ago and, having regard to the way Prazauskas was cross-examined about this issue, may have been a light-hearted comment on-flowing from a conversation about a film. To the extent that the applicant's evidence is based on some earlier note of the incident, it was a note made anywhere between two and eight months after the incident. While I do not accept that the evidence of Prazauskas is sufficiently compelling to justify a finding that this incident did not occur, I am not affirmatively satisfied that it did. That is not because I consider the account in the letter of 8 May 1996 or the oral evidence of the applicant in these proceedings was deliberately false. Rather the note was made and the evidence given at a time where the applicant's recollection was imperfect.

76 The next matter involves an incident that has been discussed earlier in these reasons. It is the occasion on which, the applicant alleges, the respondent touched her breast or breasts while demonstrating how to use an ECG machine. It was said to have occurred on 20 September 1995. It is not mentioned in the 1995 diary. It is to be recalled that the applicant has maintained since her letter of 23 October 1996 that the occasion referred to in her original complaint was not one involving Quigley. In that letter she said that the occasion she named in her complaint was one which involved only her and the respondent. In that letter the applicant said that when the respondent referred to the occasion involving Quigley he was "thinking of a different time". In the same letter she described the demonstration involving Quigley as "a totally different incident" while, in substance, acknowledging she had been involved in a demonstration on Quigley. However, when asked questions about this incident while giving evidence to HREOC, the applicant said that she and the respondent had been alone but that after she told the respondent she felt uncomfortable and would prefer the respondent to show her on a patient, the respondent went and got Bates to come in to show her where the ECG points were to be put. This, the applicant said, occurred on the same day (20 September 1995). The applicant volunteered

this information about Bates and it was not, strictly speaking, responsive to the question she was asked. The transcript before HREOC records:

> *"THE COMMISSIONER: On 20 September, when Dr Nanda was showing you the ECG machine, who else was present in the surgery at that time?*
> *MS ELLIOTT: Just Dr Nanda and myself.*
> *THE COMMISSIONER: There were no patients there, waiting?*
> *MS ELLIOTT: No.*
> *THE COMMISSIONER: When you said you were uncomfortable and you would rather him show you how the points were placed on a patient, you meant that that should occur at some other time, when there was a patient?*
> *MS ELLIOTT: He actually went to the real estate office at the front and got Stephen Bates, who is a real estate agent, to come in, to show me where the points were to be put. That happened on the same day."*

77 The applicant was cross-examined about this matter in these proceedings. She adhered to her version of events, namely that on 20 September 1995 there was occasion on which Bates was used as a test patient to demonstrate the use of the ECG machine. She also rejected the suggestion that Quigley was used as a test patient on that date. In re-examination, the applicant said she remembered Bates because he did not want to have his chest shaved to enable the leads to be attached.

78 Bates gave evidence in these proceedings. In an affidavit sworn 12 October 1999, Bates said that sometime "in 1994 and (sic) 1995" the respondent had purchased an ECG machine. Bates said that the respondent asked him to act as a patient so that the (sales) representative could show the respondent where the points should be placed. Bates agreed. Bates said that shortly after he attended the surgery of the respondent, he removed his shirt and lay down. The representative placed the points on various parts of his upper body. He said:

> *"At that time, the only persons present were myself, Dr Nanda and the sales representative. My best recollection is that Leanne Elliott was not present at that time."*

79 The qualification "best recollection" is a curious one given what is said, in an unqualified way, in the preceding sentence. When giving oral evidence in chief, he repeated that there was no one else present apart from the respondent and the representative. He described his relationship with the respondent as a professional one, given that he was a real estate agent. I infer from this answer that Bates had some dealings with the respondent

concerning the sale, purchase or leasing of real estate (more remotely, he was a patient of the respondent). In cross-examination Bates said he could not recall the applicant being present. Of some significance, in my opinion, was his cross-examination about whether the applicant had ever discussed with him the conduct of the respondent towards her. He generally agreed that such conversations took place but refused, in my opinion deliberately, to be drawn into what was said. He said he could not specifically recall saying anything to the applicant about the respondent:

> *"When you say, 'not specifically', you don't recall any particular words that you said or that you could have said something but you don't remember what it is?--- I can't remember any exact conversations that we've had word for word.*
> *But to the best of your recollection you recall having some conversations with her about Dr Nanda?-- Yes, I could say that.*
> *And to the best of your recollection, some of those conversations involved Dr Nanda's behaviour?--- I suppose it depends on what you mean by his behaviour-his actions within the office or?*
> *His actions within the office in relation to Leanne?--- If you could be more specific about the conversations that took place.*
> *Whether she's talked to you or you have talked her about Dr Nanda being known to be sleazy with his receptionists?--- I can't recall those exact words.*
> *But that could have been said?--- I can't recall it being said.*
> *But you can't say that it was definitely not said or never said?--- well, I suppose you can't say-no."*

80 My clear impression was that Bates was answering this line of questioning in a way that was deliberately designed to protect the respondent by not revealing the conversation or conversations he had with the applicant about the conduct of the respondent. In my opinion, Bates was tailoring his evidence to assist the respondent. When it was suggested in cross-examination that he may have acted as a dummy patient with the ECG machine on more than one occasion, his answer was he did not recall it. His explanation for recalling the incident he gave evidence about was that it was an occasion when the machine would not work on him. That answer allows for the possibility that there was another occasion when the machine did work. He fairly emphatically rejected the suggestion that there had been an occasion when he had been asked to be a dummy patient but indicated he did not want his chest shaved. In evidence is a credit note dated 20 September 1994 which the respondent said was a credit note for an ECG machine he traded in for one purchased at that time, namely September 1994.

81 Quigley gave affidavit evidence but was not cross-examined. He was a patient of long standing of the respondent and had met the respondent socially on numerous occasions at their respective homes and the homes of mutual friends. His evidence was that on 20 September 1995 he attended the respondent's surgery and was used as a model to demonstrate to the applicant and Peacock how a cardiograph was taken. Quigley said he never saw the respondent place his hands on any part of the applicant. In evidence is Quigley's medical card showing he attended the surgery on 20 September 1995. However from the time the respondent raised the occasion on which Quigley was used as a dummy patient (in his letter of 25 September 1996), the applicant has said that the occasion on which Quigley was used in this way was not the occasion when the respondent touched her breast or breasts while demonstrating the ECG. I am satisfied that Quigley was used to demonstrate the ECG on 20 September 1995.

82 The critical question is whether, also on 20 September 1995, the respondent sought to demonstrate to the applicant how the points of an ECG machine should be placed and, in so doing, fondled her breast or breasts. There is nothing inherently unlikely about the respondent doing what was alleged by the applicant and Quigley being used as a dummy patient on the same day. Both incidents would be consistent with the respondent wishing to demonstrate how the machine operated and, as to the occasion on that day when the respondent and the applicant were alone, taking advantage of the demonstration on the applicant as a means of making some sort of sexual advance to her. However the evidence of the applicant goes further. On her account, after she was fondled, the respondent called in Bates and he was used to demonstrate to the applicant how the ECG machine operated.

83 The explanation for this evidence may be that the applicant is lying about the incident and her evidence to HREOC about Bates was a deliberate fabrication probably designed to give her evidence a greater air of authority. However it is a fabricated account that she has been prepared to defend by giving evidence to the same effect in these proceedings. But, on this approach, the applicant has done so (during her cross-examination) knowing full well that Bates would give conflicting evidence in the proceedings (his affidavit was sworn on 12 October 1999). It would have been simple for the applicant, if she was prepared to fabricate evidence, to have proffered some explanation in these proceedings about what she had said in evidence HREOC. She could have sought to explain that evidence by drawing attention to the passage of time between when the incident took place (September 1995) and when she

gave evidence (12 April 1999). However, she has not done so. One curious aspect of this evidence is, if the only occasion that Bates was used as a dummy patient was September 1994, how the applicant knew about it given that she started employment in September 1995. It is improbable that the applicant gave evidence about the incident at HREOC (even if fabricated) unless she knew Bates had acted as a dummy patient. Bates did not give evidence that he discussed the matter with the applicant nor was the applicant cross-examined with a view to establishing how she knew Bates may have been used as a dummy patient.

84 In my opinion, the better view of this evidence is that Bates was used as a dummy patient on more than one occasion and was used on an occasion when the applicant was present. However it is unlikely that this occurred on 20 September 1995. It is likely that the applicant was mistaken when she gave evidence to HREOC that on 20 September 1995, Bates was used as a dummy patient. However, in my opinion, the applicant then believed the events had occurred as she described them and, since then, has maintained or developed a conviction that Bates was called in after the incident described, in all probability, in her pocket diary and that Quigley was not involved in any demonstration on 20 September 1995.

85 I should mention that the applicant was cross-examined about the use of the word "breast" or the word "breasts" in various accounts she has given of this incident and whether her evidence was that one of her breasts had been fondled or both had been. The cross-examination elicited a confused, and on one view, contradictory account (so much appears to have been conceded by the applicant). However, in my opinion, nothing really turns on this point. Her substantial evidence was that the respondent fondled her left breast at least twice. Her first complaint of the incident in the statement to CES spoke of "breast". Later written accounts spoke of "breasts". At one stage in her cross-examination she said the use of the plural may have been a typing error. It may have been or it may be that no particular distinction was drawn by her when using the word "breasts" as a description of what happened. I rather think that the concessions she made in cross-examination were made because she was upset, confused and wanted to placate the cross-examiner. I would prefer her evidence that her left breast was fondled at least twice by the respondent on 20 September 1995 to the evidence of the respondent that it did not occur.

86 I turn now to the evidence of Peacock in which she rejected that the incidents in which she was said to have been involved (about which the applicant gave evidence) actually

occurred. They were the incident on 12 February 1996, another occasion when there was a discussion of Peacock giving sexual favours for a traineeship and a discussion about the respondent massaging Peacock's breasts, the incident on 18 September 1995 when the respondent discussed women offering sexual favours to avoid being fined for speeding, at least one occasion when the respondent massaged the applicant's shoulders and at least some of the occasions on which the respondent discussed his sexual relationship with a female patient.

87 I have already referred to my general impressions of Peacock. I should refer to one other matter. The import of the evidence of the applicant, if accepted, was that there had been a measure of intimacy in the relationship between the respondent and Peacock. The intimacy suggested by the evidence of the applicant, if accepted, would probably have been no more than a relationship in which a middle-aged man could make sexual allusions to or even about a young attractive receptionist (Peacock) then working for him without offending or upsetting her. The nature of the relationship between the respondent and Peacock was therefore an important issue in determining whether the applicant's account or the account of both the respondent and Peacock should be accepted. Up to a point, the respondent had committed himself to a version of the relationship with Peacock in his letter of 26 September 1996 to HREOC. In responding to the allegation about what happened on 12 February 1996 (that he asked Peacock to "suck his cock") the respondent wrote:

> *"*[Peacock] *is a good friend and we have respect for each other. We have never had such type of discussions."*

It is probable that the respondent, at this stage, was describing honestly the nature of the relationship when he described Peacock as a "good friend".

88 He was cross-examined about what he meant by "good friend". He resiled from his earlier statement by saying that he would not describe her as a good friend "in the true sense of the word" but later said they were "very friendly" and had a "good amicable relationship". In this context the respondent agreed that from time to time he told jokes to her, they joked with each other and sometimes he teased her. The picture painted by the respondent was not at odds with the type of relationship that might have existed in which the intimacy earlier referred to could have arisen.

89 Peacock painted a different picture. Her cross examination included:

"Over the time that you worked for Dr Nanda you became good friends?---- With who?
Dr Nanda?---- On a professional basis, yes."

and later:

"He was good at telling jokes?---- No, I never recall him joking.
Does he like to tell jokes?---- Not that I can recall.
You never recall him telling a joke ever?---- No."

90 I accept that the answers of the respondent about his relationship with Peacock may have related to both the period when Peacock was employed and the period afterwards when they kept in contact or, on one view of the answers he gave, only the period afterwards. I also accept that some of the answers given by Peacock concerned the nature of the relationship with the respondent during the period of her employment. However the last two questions quoted above were not limited to the period when she worked for the respondent. Her answers to those two questions, and in particular last question, are at odds with the evidence of the respondent on what is, and would be likely to have been known to Peacock to be, an important issue in this proceeding namely the nature of their relationship. In my opinion, Peacock deliberately misstated the character of her relationship with the respondent. Peacock was not, in my view, a reliable witness and I would prefer the evidence of the applicant to that of Peacock. It is likely that the relationship during the period Peacock worked for the respondent, at least by the time the applicant took up employment with him, was a sufficiently friendly one in which the respondent felt he could make jokes or sexual allusions in front of and about Peacock and he did so. I would prefer the evidence of the applicant to the evidence of Peacock and the respondent.

91 I should mention two specific matters that, potentially, bear adversely on the credit of the applicant. The first is that during the period of her employment with the respondent, the applicant consulted the respondent in his capacity as a medical practitioner. In cross-examination, the applicant accepted that she twice consulted the respondent. One occasion was on 15 September 1995 when the applicant had a migraine headache and the respondent prescribed medication. The other occasion was on 9 February 1996 when the respondent took the applicant's blood pressure and pulse. Three other occasions were put to the applicant in cross-examination but, in substance, she could not recall them. The respondent did not otherwise seek to prove that the consultations (apart from those agreed to by the applicant) had taken place. The consultation in September 1995 is entirely

unexceptionable. It was early in the applicant's employment and concerned a matter where immediate attention was probably necessary. This cannot be said of the incident on 9 February 1996. It is, I accept, curious that the applicant saw the respondent in his capacity as a medical practitioner a month or so before she left his employment. It involved a procedure where physical contact probably occurred. The consultation took place after several months of incidents, on the applicant's account, involving direct physical contact of a sexual nature and other, less direct, sexual harassment. The applicant was not asked by either counsel for the respondent or her own counsel what the circumstances were that led to the consultation. There may have been some pressing need for the applicant to have her blood pressure taken at the time though, equally, there may not have been. However in the absence of evidence concerning why the consultation took place, I do not view the mere fact there was a consultation as reflecting adversely on the credit of the applicant.

92 The other specific matter concerning the applicant's credit, relates to the terms of her letter of resignation. In that letter (dated 24 February 1996) the applicant said: "I am forced to hand in my resignation due to intolerable working conditions". Mrs Richards gave evidence that on 26 February 1996 she had a conversation with the applicant in which the applicant said:

> *"I am resigning because Dr Nanda is going to put me on to a casual basis and I am not happy about it. I have found another job close to where I live in Maitland. It's good because I don't have to get up early to travel to Raymond Terrace."*

The applicant denied having this conversation and did so in an affidavit filed 4 November 1999. She also said that she had never lived in Maitland and did not gain further employment until after her last day of working for the respondent. Mrs Richards was adamant, during cross-examination, that the applicant had spoken of living at Maitland. There is no reason to doubt the evidence of the applicant that she has never lived there and her evidence on this question was not challenged in cross-examination. I accept the applicant's evidence that she has never lived at Maitland and it is difficult, for this reason, to accept the evidence of Mrs Richards about the conversation that she said she had with the applicant.

93 The applicant was, however, cross-examined about the resignation letter and whether she resigned because her hours were going to be reduced (which was the fact - it was

proposed that the applicant's hours be reduced to working two days a week). The applicant accepted in cross-examination that she would not be able to live on two days work a week though denied that the reduction in hours formed any part of her reasons for resigning. The import of some of the evidence of the applicant to HREOC was that the reduction in hours was "another reason on top of many for me to resign". I accept that the applicant's evidence given to HREOC is not entirely compatible with the evidence she gave in these proceedings. However the evidence to HREOC was not clear and does not found, in my opinion, a basis for concluding that her evidence in these proceedings is false and/or that the reasons for resigning were her dissatisfaction with the impending changes to her working hours.

94 I am satisfied that generally the applicant's account of the matters referred to in her letter of 8 May 1996 should be accepted. Several qualifications need to be made to this conclusion. I have already referred to some and, in particular, I have already discussed, in detail, what I consider happened in relation to the trouser sewing incident and generally the circumstances of the occasion on which the respondent touched the applicant's breast when demonstrating the ECG.

95 In relation to the incident on 19 October 1995, the applicant's account was that the respondent had talked to her about three girls who gave "blow jobs" for a flagon of wine. In her statement of evidence to HREOC she put it in terms of the girls giving the respondent "blow jobs". The applicant accepted in cross-examination that this statement was false and explained that she must not have read the statement sufficiently clearly. I accept her explanation and I am satisfied that this matter was discussed with her in the way she said.

96 The respondent's evidence was that he talked about this general matter in the surgery to others but denied speaking to the applicant in the way she claimed. The fact that the respondent may have discussed the same general subject matter with others does not provide an answer to the allegation that he spoke to the applicant about it. That other discussions may have occurred would simply demonstrate that the topic was a matter the respondent had an interest in and was disposed to talking about. The fact that the respondent had discussed such matters with others would raise a question about the veracity of the applicant's account if I were to conclude that the applicant had simply overheard such conversations and then, by reference to the subject matter, fabricated an account of conversations the respondent had with her. I do not accept that she did. The same can be said of several of the other matters

about which the complainant gave evidence and in relation to which the respondent led evidence that he discussed them with others in the surgery but said he did not discuss them with the applicant. However the applicant did appear to say in cross-examination, in general terms, that she had been involved in conversations that the respondent had with his friends on matters of current interest though she rejected the suggestion that she had overheard them. This raises the question of whether the respondent knew or ought to have known that discussions he had with the applicant about current topics, albeit topics of a sexual nature, were unwelcome. I refer to this matter again later.

97 In relation to some of the incidents, the applicant has given accounts on several occasions where there are, on one view of the accounts, some inconsistencies. An example is the sequence in which the events occurred on 12 February 1996. That is, the order in which the applicant's bottom was patted, the respondent endeavoured to kiss her and the respondent made a request to Peacock about oral sex. On one view of the statement to the CES in March 1996, the applicant ascribed one order to these events (pat, kiss then request) (but it is by no means clear that the events are set out in the order in which they occurred), she clearly did so in her letter of reply dated 23 October 1996 to HREOC (kiss, pat then request) and also fairly clearly did so when giving evidence to HREOC in April 1999 (request then kiss). However at the time the later accounts were being given (October 1996 and particularly in April 1999) it is unlikely the applicant would have had (certainly in April 1999) a reliable independent recollection of the events in February 1996. Given the time that had by then elapsed, this is not surprising. Unless these differing accounts are viewed as reflecting adversely on the applicant's credit (in the sense that the accounts are deliberately false), then the order in which the events occurred is not significant. I do not consider that the differing accounts reflect adversely on the applicant's credit (in the way just discussed) and I am satisfied that the events did occur as described by the applicant in her diary entry for 12 February 1996 (the year in the diary having been altered in hand).

98 I am satisfied that the applicant has demonstrated, on the balance of probabilities and having regard to the seriousness of the allegations made against the respondent (see *Briginshaw v Briginshaw* (1938) 60 CLR 336), that generally the events took place as she described them in her complaint and later evidence to HREOC and this Court. I will not repeat what the applicant said about each incident and express it as a finding. The substance of each of the incidents is set out in the letter to HREOC dated 6 May 1996 and it is this

account which I accept subject to the more detailed discussion about particular incidents earlier in these reasons.

99 It is now necessary to consider whether the applicant has demonstrated that the respondent engaged in proscribed conduct constituting either sexual harassment or sexual discrimination.

The legal character of the claims against the respondent

100 Before considering whether the applicant has, by reference to these findings, made out her application in the employment proceeding, it is necessary to deal with a legal issue concerning the scope of the application. It is to be recalled that the application against the respondent was for the enforcement of a determination of HREOC. The application was filed in this Court on 26 July 1999 and described the matter as an application for the enforcement of a determination of HREOC under s 83A of the S D Act. Under the heading "details of the claim", the application sought a declaration that the respondent had sexually harassed the applicant. That declaration was sought "pursuant to section 81 (1) (b) (i)" of the S D Act. The application also sought damages "pursuant to section 81 (1) (b) (iv)".

101 At the commencement of the hearing on 22 June 2000, counsel for the applicant sought to amend the application by seeking a further declaration, namely that the respondent discriminated against the applicant in her employment. The applicant sought to raise the question of whether there had been unlawful discrimination of the type proscribed by s 14 of the S D Act. The application to amend was opposed. I gave leave to amend but did so conditionally. During submissions concerning the application to amend, an issue was raised about what had been determined by HREOC and the scope of any proceedings enforcing that determination. The condition was that I could later satisfy myself in that the Court could entertain, in enforcement proceedings, an allegation of particular contravention of, relevantly, the S D Act if there had been no express determination by HREOC that there had been such a contravention.

102 The issue arises this way. The characterisation by the S D Commissioner of the applicant's complaint is set out in par 4 above. The complaint was, as against the respondent, that she had been sexually harassed. As noted earlier, the determination by

HREOC was made, *ex tempore*, at the conclusion of the hearing on 12 April 1999. Written reasons were published on 21 May 1999. There was no material difference between what the Commissioner said on 12 April 1999 and his published reasons. The Commissioner, at the beginning of those reasons, characterised the complaint lodged on 20 May 1996 against the respondent as one involving a complaint of sex discrimination and sexual harassment alleging breaches of ss 5, 14, 28A and 28B of the S D Act. The Commissioner then dealt, in the reasons, with the evidence and made findings. At several points he referred to the material before him as relating to whether the incidents complained of would constitute sexual harassment and sex discrimination. He set out the relevant parts of ss 5, 14, 28A and 28B of the S D Act. Under a section of the reasons headed "The Law", the Commissioner described his task. He commenced by saying:

> *"I must now decide whether the incidents set out by Ms Elliot (sic) constitute breaches of the Act. I have firstly considered Sexual Harassment."*

The Commissioner then expressed his conclusion that the incidents constituted "some of the clearest examples of sexual harassment that I have experienced as [a Commissioner]". The Commissioner set out his reasons for reaching this conclusion. He then said:

> *"Because of these findings I have not considered whether Dr Nanda's actions also constituted discrimination against Ms Elliot on the ground of sex in terms of sections 5 and 14 of the Act."*

The Commissioner then dealt with the question of damages. He was doing so by reference to the finding that there had been sexual harassment. No damages were awarded because the respondent had discriminated against the applicant in contravention of the S D Act.

103 Section 83A provides:

> *"(1) The Commission, the complainant, or a trade union acting on behalf of the complainant, may commence proceedings in the Federal Court for an order to enforce a determination made under subsection 80(1) or 81(1) after the commencement of this Division, except where the respondent to the determination is a Commonwealth agency or the principal executive of a Commonwealth agency.*
>
> *(2) If the Court is satisfied that the respondent has engaged in conduct or committed an act that is unlawful under this Act, the Court may make such orders (including a declaration of right) as it thinks fit.*

(3) The Court may, if it thinks fit, grant an interim injunction pending the determination of the proceedings.

(4) The Court is not to require a person, as a condition of granting an interim injunction, to give an undertaking as to damages.

(5) In the proceedings, the question whether the respondent has engaged in conduct or committed an act that is unlawful under this Act, is to be dealt with by the Court by way of a hearing de novo*, but the Court may receive as evidence any of the following:*

(a) a copy of the Commission's written reasons for the determination;
(b) a copy of any document that was before the Commission;
(c) a copy of the record (including any tape recording) of the Commission's inquiry into the complaint.

(6) In this section:

'complainant':

(a) in relation to a representative complaint – means any of the class members; and
(b) in relation to a complaint made by a trade union on behalf of a person, not being a representative complaint – means the person on whose behalf the complaint was made;

***'trade union'** has the same meaning as in section 50."*

104 On a fair reading of what the Commissioner said on 12 April 1999 (and repeated in his written reasons), he made a determination that the respondent had contravened s 28B and a determination that the respondent pay the applicant damages by way of compensation. Those determinations were, for the purposes of s 83A, the determination made by the Commissioner. In the absence of a determination having been made that the respondent had contravened s 14, the determination did not involve a finding or determination that the respondent had discriminated against the applicant on the grounds of her sex. In my opinion, s 83A, properly construed, enables the applicant to make an application to enforce the determination actually made, namely the determination that there had been sexual harassment and that compensation should be paid. As there had been no determination that there had been sexual discrimination, there could be no application to enforce such a determination under the section.

105 However there remains the question of whether, if an application to enforce a determination is made, the Court has power to consider whether the respondent has

contravened the S D Act in a way alleged by the complainant in the original complaint even though no finding or declaration of contravention was made by the Commissioner as part of a determination made under ss 80 or 81. It is to be recalled that s 83A(5) directs the Court to deal with the question of whether the respondent has engaged in conduct or committed an act that is unlawful, by way of a hearing *de novo*. The nature of such a hearing was discussed by Spender J in *Aldridge v Booth* (1988) 80 ALR 1 in relation to a legislative antecedent of s 83A. It was also discussed by a Full Court, in a difference statutory context, in *D'Antuono v Minister of Health* (1997) 80 FCR 226. In my opinion an application to enforce a determination exposes for consideration by the Court afresh the question referred to in s 83A(5), namely whether the respondent has engaged in conduct or committed an act that is unlawful under the S D Act. What limits the scope of the inquiry is not the determination made by HREOC but the complaint made by the applicant in so far as the complaint can be taken to identify the "matter" that is referred to HREOC under, relevantly, s 57(1)(b) of the S D Act: see *Commonwealth v Sex Discrimination Commissioner* (1998) 90 FCR 179 at 189-190. Accordingly it is open to the applicant, in my opinion, to invite the Court to declare that the respondent has discriminated against the applicant because of her sex even though no determination to this effect was made by HREOC.

Conclusions on the allegation of sexual harassment by Dr Nanda

106 Section 28A of the S D Act identifies what conduct constitutes sexual harassment. The section provides:

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

107 Section 28B proscribes sexual harassment by, inter alia, an employer. It can be seen that the conduct must be unwelcome. There can be little doubt, in my opinion, that much of

the conduct of the respondent was unwelcome. Some of it involved either direct physical contact with the applicant or sexual allusions or propositions directed to her. It is to be recalled that the applicant was, at the time, a teenager and the respondent a middle-aged medical practitioner. In that context it is difficult to avoid the conclusion that conduct of the respondent involving touching the applicant (fondling her breast, patting her on the bottom, trying to kiss her, massaging her shoulders and brushing against her breasts and I include here the trouser sewing incident), was unwelcome as were the sexual references or allusions specifically directed to the applicant (the incident on 7 February 1996 concerning "locking the door etc" and the incident when the respondent asked the applicant to tell him she was raped so he could join in). Each type of conduct is fairly clearly a sexual advance or at least conduct of a sexual nature which was unwelcome.

108 The same, in my opinion, might be said, though with less certainty, about much of the remainder of the conduct of the respondent contained in the complaint to HREOC. It was conduct of a sexual nature, which involved fairly coarse discussions about sexual matters with the applicant. However, the applicant bears the onus of establishing that the conduct was unwelcome and I entertained sufficient doubt that it would have been apparent to the respondent that these general discussions were unwelcome (particularly given that applicant did not complain about the discussions at the time and participated in general discussions the respondent had with his friends about topics of current interest) to find, affirmatively, that this conduct was unwelcome: see *O'Callaghan v Loder* [1983] 3 NSWLR 89 at 103-104.

109 Accordingly the conduct of the respondent which could constitute sexual harassment was the touching and the sexual references or allusions specifically directed to the applicant. For it to be sexual harassment in the defined sense it is necessary for a reasonable person to have anticipated that the applicant would be at least offended and humiliated by the conduct. There can be little doubt that the conduct was of this character.

110 I am satisfied that during the period of the applicant's employment with the respondent, the respondent sexually harassed the applicant in a way comprehended by s 28A and did so in contravention of s 28B.

111 An additional submission was made by counsel for the applicant that the conduct of the respondent also constituted sex discrimination of the type referred to in s 5(1) of the S D

Act. As noted earlier, HREOC did not express a concluded view about this matter. It is a significant issue in this matter, however, because one of the bases on which the applicant contends the Commonwealth is liable depends upon the respondent having discriminated against the applicant. Section 5(1) provides:

> *"5. (1) For the purposes of this Act, a person (in this subsection referred to as the "**discriminator**" discriminates against another person (in this subsection referred to as the "**aggrieved person**" on the ground of the sex of the aggrieved person if, by reason of:*
>
> *(a) the sex of the aggrieved person;*
> *(b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or*
> *(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;*
>
> *the discriminator treats the aggrieved person less favourably that, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex."*

112 The applicant alleges the respondent breached s 14(2)(a) and (d), which provides:

> *"It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex …*
>
> *(a) in the terms or conditions of employment that the employer affords the employee;*
> *(b) …*
> *(c) …*
> *(d) by subjecting the employee to any other detriment."*

113 Counsel for the applicant submitted that it is accepted that sexual harassment is a form of sex discrimination, referring to *O'Callaghan v Loder*, *Hall v A & A Sheiban Pty Ltd* (and the overseas decisions cited in those two cases), *Aldridge v Booth* and *R v Equal Opportunity Board; ex parte Burns* [1985] VR 317. The gravamen of the submission was that the conduct of the respondent was unlawful discrimination in that it created a hostile, demeaning and oppressive work environment, and accordingly subjected the applicant to a "detriment" and afforded less favourable "conditions of employment" which would not have been experienced by a male employee the same circumstances.

114 Counsel for the Commonwealth submitted that there is no broad principle that sexual harassment constitutes sex discrimination. It was conceded that *some* conduct which

constitutes sexual harassment *might also* constitute sex discrimination, but it was submitted that the conduct must be carefully analysed to see whether it meets the definition of sex discrimination in s 4.

115 Before considering the specific conduct of the respondent, it is necessary to consider the relationship between sex discrimination and sexual harassment under the S D Act. It is appropriate to refer first to *Hall v A & A Sheiban Pty Ltd* , in which the question of whether conduct that constituted sexual harassment might also constitute sex discrimination under ss 5 and 14 was raised before a Full Court of this Court.

116 At the time *Hall v A & A Sheiban Pty Ltd* was decided, sexual harassment in employment was proscribed in the S D Act by s 28:

> *28. (1) It is unlawful for a person to harass sexually-*
>
> *(a) an employee of that person;*
>
> *(b) an employee of a person by whom the first-mentioned person is employed; or*
>
> *(c) a person who is seeking employment by the first-mentioned person or by an employer of the first-mentioned person.*
>
> *(2) It is unlawful for a person to harass sexually-*
>
> *(a) a commission agent or contract worker of that person;*
>
> *(b) a commission agent or contract worker of a person of whom the first-mentioned person is a commission agent or contract worker; or*
>
> *(c) a person who is seeking to become a commission agent or contract worker of the first-mentioned person or of a person of whom the first-mentioned person is a commission agent or contract worker.*
>
> *(3) A person shall, for the purposes of this section, be taken to harass sexually another person if the first-mentioned person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or engages in other unwelcome conduct of a sexual nature in relation to the other person, and-*
>
> *(a) the other person has reasonable grounds for believing that a rejection of the advance, a refusal of the request or the taking of objection to the conduct would disadvantage the other person in any way in connection with the other person's employment or work or possible*

employment or possible work; or

(b) as a result of the other person's rejection of the advance, refusal of the request or taking of objection to the conduct, the other person is disadvantaged in any way in connection with the other person's employment or work or possible employment or possible work.

(4) A reference in sub-section (3) to conduct of a sexual nature in relation to a person includes a reference to the making, to, or in the presence of, a person, of a statement of a sexual nature concerning that person, whether the statement is made orally or in writing.

117 Sexual harassment in educational institutions was proscribed by s 29. Together these two provisions constituted Div 3 of Pt II of the S D Act. That Division was headed "Discrimination Involving Sexual Harassment".

118 In *Hall v A & A Sheiban Pty Ltd*, Lockhart J (at 235) observed that the question of whether harassment may also constitute discrimination was "not without difficulty" and had led to a division of opinion between courts and tribunals. His Honour noted that the argument that sex discrimination was not wide enough to encompass sexual harassment could not be dismissed lightly, but proposed to regard it as an open question which it unnecessary to decide in that case. His Honour then observed that *"a finding that s 14 does not include sexual harassment of the kind to which s 28 is directed would appear contrary to the trend of judicial opinion in Australia and other jurisdictions"*.

119 Wilcox J did not expressly address the question, but concluded (at 250) that, on the evidence, the impugned conduct (intrusive questioning about sexual relationships during pre-employment interviews of female job applicants) contravened s 28 but not ss 5 and 14. In reaching this conclusion, his Honour said:

"... [T]he essence of the conduct prescribed by s 14 is that it involves treatment of a person in a manner less favourable than the treatment which would, in a like situation, have been accorded to a person of the opposite sex. There is no evidence as to what course Dr Sheiban would have taken, in relation to intrusive questioning, if he had been interviewing a male applicant for employment. Counsel for the applicants invited us to find that a male interviewer, unless, perhaps, he was a homosexual, would be unlikely to ask a male applicant for employment questions about his sexual relationships. The evidence does not disclose Dr Sheiban's sexual proclivities, but I do not think that either the Commission or this Court is in a position to make such a finding. Human sexual behaviour varies immensely. A tribunal of fact should be slow to extrapolate a conclusion about other people's conduct

> *simply from its own experience. Without the benefit of some relevant evidence, I am not prepared to dismiss the possibility that Dr Sheiban may have interviewed a male applicant for employment in the same intrusive way in which he interviewed each of the present applicants.*
>
> *However, as it seems to me, the applicants are on firmer ground in relation to s 28. Section 28(3) does not depend upon any comparison of the treatment accorded to members of each sex by a particular individual."*

120 Counsel for the Commonwealth submitted that this passage reflects a correct view that there is no "simple equation" between sex discrimination and sexual harassment.

121 French J considered the question at length. After observing that one of the stated objects of the S D Act (s 3(a)) is to give effect to the Convention On The Elimination Of All Forms Of Discrimination Against Women, which contains a broad definition of discrimination, his Honour noted (at 274-275):

> *"[The Act] states one of its objects to be "to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace and in educational institutions": s 3(c). That object is pursued in Div 3, Pt II, which is headed "Discrimination Involving Sexual Harassment", a context which led Spender J to conclude, rightly in my respectful opinion, that sexual harassment is a form of discrimination under the Act:* Aldridge v Booth *(1988) 80 ALR 1 at 16."*

122 French J then considered a number of American, Canadian and English authorities which support the view that sexual harassment is a species of sex discrimination. His Honour continued (at 276):

> *"There is nothing in the concept of discrimination in s 4 of the* [S D Act] *to suggest that it should not extend to sexual harassment in the work place in the same way that it has been extended by the American and British courts."*

123 French J then referred to the conclusion of Mathews J (in her Honour's capacity as a judicial member of the NSW Equal Opportunity Tribunal) in *O'Callaghan v Loder* that sexual harassment could constitute sex discrimination under s 25 of the *Anti-Discrimination Act 1977* (NSW). His Honour commented (at 277):

> *"This exposition does not embody any distinct requirement that there be a discriminatory element in the employer's behaviour. That is implicit in the very nature of sexual harassment. The implication is also to be found in the concept of sexual harassment covered by s 28. That section puts beyond*

doubt that sexual harassment in employment is a species of unlawful sex discrimination. The requirements of s 14 relating to discriminatory treatment in the terms and conditions of employment or subjection to detriment are subsumed in the nature of the prohibited conduct. ..."

124 In 1992, Div 3 of Pt II of the S D Act was repealed and the current Div 3 was inserted by the *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth) ("the Amending Act"). The object in s 3(c), referred to by French J in *Hall v A & A Sheiban Pty Ltd*, of eliminating "discrimination involving sexual harassment" was amended to refer not only to discrimination in the workplace and educational institutions, but also in "other areas of public activity". Consistent with this object, the new Div 3 contains proscriptions against sexual harassment in employment and partnerships (s 28B), by bodies concerned with occupational qualifications (s 28C), in registered organisations (s 28D), by employment agencies (s 28E), in educational institutions (s 28F), in the provision of goods and services (s 28G), in the provision of accommodation (s 28H), in land dealings (s 28J), in clubs (s 28K) and in the administration of Commonwealth laws and programs (s 28L). The new definition of sexual harassment, in s 28A, also differed from the old in that the two requirements in s 28(3)(a) and (b) (above) were replaced with a single requirement, in s 28A(1), that a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

125 In my opinion, it is clear from the terms of the above amendments (and also from the Explanatory Memorandum and Second Reading Speech to the Amending Act) that the Amending Act was not intended to alter the relationship between 'sexual harassment' and 'sex discrimination' under the S D Act. Rather, the introduction of Div 3 in its expanded terms was intended simply to replace the test for sexual harassment and to extend the prohibition against sexual harassment into other areas of public life.

126 In making these observations I should refer to the recent decision of Wilcox J in *Gilroy v Angelov* [2000] FCA 1775. In that case, his Honour found that an employee had sexually harassed another employee within the meaning of s 28A, and that their employer was liable under s 106. The applicant employee also contended that she had been discriminated against under ss 5 and 14. At par 102, his Honour said:

"I have reservations as to whether s 14(1) or (2) applies to this case. I think these subsections are intended to deal with acts or omissions of the employer

> *that discriminate on one of the proscribed grounds. It is artificial to extend the concepts embodied in those sections in such a manner as to include the sexual harassment of one employee by another. As it seems to me, it was because s 14 did not really fit that case that s 28B was enacted. To my mind, s 28B covers this case."*

127 The circumstances his Honour was considering differed from the present case, in that the harassment was there perpetrated by an employee, not by the employer. However, to the extent that his Honour could be taken to have expressed the view that s 28B was enacted because it is artificial to extend s 14 to situations of sexual harassment, I would respectfully disagree, for the reason outlined in par 125 above. I respectfully agree with the statement of French J in *Hall v A & A Sheiban Pty Ltd* and of Spender J in *Aldridge v Booth* that s 14 is capable of extending to conduct that constitutes sexual harassment under Div 3 of Pt II. In my opinion, such a principle is consistent with the purpose and scheme of S D Act and also with the overseas jurisprudence set out in *Hall v A & A Sheiban Pty Ltd* and *O'Callaghan v Loder* on the nature and scope of 'sex discrimination'.

128 I also note that, since the Amending Act, various members of HREOC have, correctly in my opinion, proceeded on the basis that conduct is capable of constituting both sex discrimination under ss 5 and 14 and sexual harassment under Div 3 of Pt II: see, for example, *W v Abrob P/L t/a Schoonens' Computer Services & Simon Schoonens* [1996] HREOCA 11 (27 May 1996), *Phillips v Leisure Coast Removals P/L & Caunt* [1997] HREOCA 21 (9 May 1997), *Brown v Lemeki & Govt of Papua New Guinea* [1997] HREOCA 25 (27 May 1997), *Biedermann v Moss & Ors* [1998] HREOCA 7 (20 February 1998).

129 I turn now to consider whether the conduct of the respondent in this case constitutes unlawful discrimination under ss 5 and 14. In my opinion, it does.

130 I have found that the conduct of the respondent involving touching the applicant and the sexual references or allusions specifically directed to the applicant were unwelcome, offensive and humiliating to the applicant and that a reasonable person would have anticipated as much. I am therefore satisfied that they imposed a detriment, within the meaning of s 14(2)(d), on the applicant on the grounds of her sex. In light of this finding, I do not express a view about whether the work environment created by the conduct of the respondent could be described as "terms and conditions of employment" within the meaning

of s 14(2)(a).

The evidence led only against the Commonwealth in the agency proceeding

131 The evidence led only against the Commonwealth took the form of oral evidence from Cooper and several documents tendered by counsel for the applicant. Some of the applicant's evidence (an affidavit sworn 10 May 2000) was led against the Commonwealth in the agency proceeding only. The applicant was not cross-examined by counsel for the Commonwealth. In her affidavit she described how she had obtained employment with the respondent. The job vacancy with the respondent was drawn to the applicant's attention by her caseworker who was based at the Newcastle office of the CES (it appears the applicant was attending the branch at Newcastle though the job originally had been notified to the Hamilton branch). The caseworker asked the applicant whether she would be interested in medical reception work, and the applicant said yes but indicated she thought you needed experience. The caseworker indicated there was a job that did not require experience and was a suitable one for which the applicant could apply. When asked whether she was interested in applying for it, the applicant said yes. The case worker read to the applicant the job description and the gave the applicant the "job number". The applicant could not recall whether she or the caseworker rang the respondent's surgery to organise an interview. It is relatively plain that the applicant was introduced to the respondent as a prospective employee by the action of the CES caseworker. The applicant was not cross-examined by counsel for the Commonwealth with a view to demonstrating otherwise. I accept she was. I make this point because counsel for the respondent sought to suggest that the applicant obtained the position through an advertisement placed in a local newspaper.

132 Cooper gave evidence that she was born on 22 February 1968. She commenced working for the respondent in July 1985. She was then 17 years old. She worked for the respondent for approximately six weeks but left because of his advances towards her. She lodged a written complaint with the CES about the conduct of the respondent. The following week she saw solicitors in Newcastle and made a statement to them but took the matter no further because her parents thought that being 17 she was "under age to handle any more proceedings, legal proceedings, on the matter". The written complaint dated 6 September 1985 (which was not tendered to prove the truth of its contents) read:

"Telarah 2320
Ph 325521
6/09/85

The Manager: Maitland CES.

REF: Dr Prem Nanda. High St GRETA

I commenced work with Dr Nanda on Saturday 20/07/85 not 24/07/85 as stated. Everything was OK for a while then he started off at the end of the day as I was leaving. Dr Nanda would hug me and give me a peck on the cheek.

One morning on the intercome [sic] said 'have I told you I loved you.' Things accelerated gradually until this week – when on Wednesday 4/09/85, he gave me a large, chocolate penis and stated he could get the female equivalent. I was told not to tell anyone where I got it or what had been going on. Before giving it to me, he told me to shut my eyes and to hold out my hands and feel it.

He also asked what sort of wine I liked, and he wondered how much it would take to get me tipsy. If I did have too much to drink he said I could sleep it off in the old surgery next door (now used as a store room) so my mother wouldn't know the difference when I was home.

The same say he started kissing me around the neck and on my hands, he tried to kiss me on the mouth but I turned away and grabbed some papers saying I had some work to do. At one stage he had placed a hand on my bosom and one on my bottom.

When he first said everything must be kept secret I understood he meant patients records were confidential but he stressed loyalty to him and stated everything that happened in the surgery was to be kept secret.

I intended telling Dr Nanda that I am leaving his employ today 6/09/85 as I cannot work under these conditions.

Yours sincerely

[signed]

Janelle Cooper"

133 Cooper agreed in cross-examination that a complaint made to an anti-discrimination board was not followed through. In evidence was a file note from a CES file indicating that the respondent was contacted on 10 September 1985 and told of the complaint. He was informed that the complaint was being taken to the "anti discrimination committee". He was also informed that the CES would be unable "to accept his current vacancy until the

committee has made its decision". It appears this was more akin to a suspension of services by the CES pending the consideration of Cooper's complaint than a withdrawal of services. Another file note indicates that the previous day the respondent had rung the CES to "place a vacancy" and had stated Cooper had left because of transport problems. On 26 November 1985, another file note reveals, the respondent phoned the CES and had said "that it was a misunderstanding due to Janelles asking about a particular chocolate "ornament?"". The respondent also had said that he had not made advances to Cooper and she had not, in fact, gone to the anti-discrimination board. A further note records that on 2 December 1985 Cooper advised she had not gone ahead to the anti-discrimination board although her solicitor had advised her to do so.

134 On 19 August 1986 an officer of the CES in Maitland wrote to the Zone Manager at the Hunter Zone Office at Newcastle. The letter read:

> *"ZONE MANAGER*
> *HUNTER ZONE OFFICE*
> *NEWCASTLE*
>
> *As discussed with you on 18 August 1986, I am writing to confirm arrangements made to service the vacancy lodged by Dr Prem Nanda. A copy of the vacancy (No. VA 18DU567) is attached.*
>
> *The vacancy has been difficult to fill because of the age group, qualifications and JOBSTART requirements placed upon it and Dr Nanda has frequently been advised of this.*
>
> ***Over the past eight years, the office has received several complaints of sexual harassment against Dr Nanda. Two of the complainants had lodged written complaints prior to the issue of Minute M 85/305 and one complaint was made verbally recently. The recent complaint was handled in accordance with Minute M 85/305. I have discussed the situation with State Office who advise that the Minute is still in force.***
>
> *In order to ensure that Dr Nanda receives the service from the CES that he deserves, I have instructed staff that all action on this vacancy should be handled by the EOM or AEOM.*
>
> *I have refused to accede to a request for EPA as I believe that the response to the advertisement, whilst it may be large, would not provide persons eligible for JOBSTART who meet the other requirements of the position (see item 4:2:07)."* (Emphasis added.)

Taylor explained that EOM meant Employment Office Manager, AEOM meant Assistant Employment Office Manager and EPA meant Employer Paid Advertisement. The import of this letter is that notwithstanding complaints of sexual harassment having been made, the respondent would continue to receive services involving the placement of employees.

135 In evidence are CES file notes made in March 1994 concerning the employment of a MsY. Most of the notes concern whether the respondent was able to change her employment to casual employment given that she was, apparently, employed under a job start employment scheme. However one note records that Ms Y had said to the person who made the notes (I infer an officer of the CES) she did not like the inferences the "Doctor" made or the way he touched her.

136 Also in evidence and extracted from the files of the CES was an undated letter from a Ms X. It read:

> *"To the C.E.S. Maitland.*
>
> *My name is [X} and I have a complaint for Doctor Nanda of sexually attept. from Rutherford. I had finished up there before christmas because of that.*
>
> *You see every morning when I went into work I would be by myself and he would be at his other surgery in greta and every time that I got a patient well I had to ring him up to come in. Then after the patient has left well there would only be him and me their I would be out the front at the table and he would come into me grab me by the hand and take me out the back. then he would make a cup of coffee for the two of us and grab me and sit me on his lap start talking then try to kiss me and the he would cudle me of cause I wouldn't let him and then of cause he would say to me we have to get along you know cause if we don't get along then I wont be very happy working together and he also said everything that goes on in this surgery must be kept a secret it is not to be told to no one then after he said that well then I thought what could it lead to then so I left and that is all that has happened.*
>
> *[X}."*

137 The evidence of Taylor, who was called by the Commonwealth, was as follows. He commenced employment with DEETYA in August 1983 in a position at the Broadmeadow branch of the CES (Broadmeadow can, for present purposes, be treated as a suburb of Newcastle). He became Branch Manager at Newcastle in 1993. He later moved to the Hamilton branch as Branch Manager where he remained until 1996. In his evidence, Taylor

described the role of the CES which, in general terms, placed individuals in employment (from the perspective of the individual) and found employees for employers (from the perspective of the employer). It also implemented government programs to promote growth in the labour market.

138 Taylor gave evidence about the procedures within the CES to deal with complaints by job seekers. He said that in about October 1993 the CES refined and updated guidelines dealing with complaints from job seekers about employers. He said the guidelines were strictly adhered to "due to the possibility that unsubstantiated allegations could be communicated to the employer with potential for actions in defamation by the employer or other employees". In evidence was a manual apparently published in late 1993 which set out steps to be taken in the event that a complaint of, inter alia, sexual harassment was made about an employer. If the complaint was viewed as a serious one then current recruitment action had to be suspended and a decision made as to whether services to the employer would be withdrawn though, if withdrawn, they could be restored if the CES was satisfied that adequate measures to safeguard employees were in place. The manual made it clear that, in relation to a complaint that was viewed as serious, "on no account is the allegation/complaint to be investigated". The manual required that any discussions with the employer be recorded and kept in a "sensitive information register".

139 If services had been withdrawn, then steps identified in the manual were to be taken if a request was made to restore services. The manual noted:

> *"The CES must be fully satisfied that any job seekers it refers must not be disadvantaged in any way. Any restoration of service depends on the implementation of measures that provide satisfactory safeguards to protect staff."*

In a section concerning "Adequate Measures to Safeguard Employees", the manual described the difficulties associated with small businesses and identified steps that might be taken as "the minimum requirements" to demonstrate adequate measures to safeguard employees. Those requirements were that the employer take steps to become familiar with the legal obligations concerning employment practices, demonstrate to the satisfaction of an officer of the CES that they understand those obligations, a formal record be maintained of discussions and undertakings given by the employer, the employer sign the record and the officer of the CES sign the record and give the employer a copy. Taylor said that the suspension of

services following a serious complaint could be lifted where the employer demonstrated an understanding of the relevant legal obligations concerning sexual harassment and had put measures into place to ensure that these were adhered to.

140 It is clear from the evidence of Taylor (and to be inferred from the manual) that the CES would not investigate a complaint itself and would direct the complainant to the appropriate agency. It would ask for any complaint to be put in writing. Taylor said:

> *"In my experience most complaints were oral and the complainants were not interested in taking the matter any further. In this situation the CES could not take the matter any further. Such allegations could only be treated as unsubstantiated allegations."*

141 In evidence is a document containing file notes about the complaint of Cooper. The notes are written below what appears to be an extract from a manual which, relevantly, deals with complaints of sexual harassment. It can be inferred that it was the policy in place in 1985. The extract discloses that the prevailing policy was relevantly, to encourage the complainant (and where appropriate to assist the complainant) to take the complaint to a body described as "the Employment Discrimination Committee" (the status of that committee is unclear) and pending the committee's decision not fill further similar vacancies.

142 Taylor was cross-examined by counsel for the applicant. He indicated that from the time services to the respondent were suspended on 28 March 1996 (following the complaint by the applicant) to the time the CES ceased operating in May 1998, services were not restored.

143 Taylor gave evidence to the effect that after the applicant made her complaint in March 1996, he became aware that there was a file at the Maitland office of the CES that held documents concerning the respondent. They evidenced the complaint of Ms X, Cooper and Ms Y (and were, I infer, the documents I have already referred to). Taylor gave evidence about the creation of (and the recording of the existence of) a sensitive information file. The import of his evidence was that such files were not common. Indeed his affidavit evidence was that such a file would be created if a serious complaint had been received. He volunteered (describing it as a guess) that there were probably 10 or a dozen such files at Hamilton where there would have been thousands and thousands of employers registered.

144 A computer system was introduced into the CES in the late 1980s or early 1990s called job system. An earlier computer system had been introduced in 1984 called job bank. Job system was a national computer system. If a sensitive information file existed in relation to an employer it would be recorded on the separate computer record maintained for that employer (or employer outlet). For a small employer with separate business addresses, each business address would have its own employer record. Taylor appeared not to know whether there had been any notation on the respondent's employer record (in the computerised records) maintained at Maitland that there was a sensitive information file in existence. Indeed, his evidence was equivocal about whether there was a sensitive information file concerning the respondent at the Maitland office. However in an internal CES minute dated 7 March 1996 it is asserted that there was a "Sensitive Information Register file" on the respondent held at the Maitland CES and I am satisfied there was. It is probable that its existence was noted on the computer record maintained in relation to the respondent by reference to his Greta surgery employer number.

145 What emerges from this evidence is as follows. By August 1986 the CES had received, during the preceding eight years, several complaints of sexual harassment by the respondent. It is not clear whether complaints had been made in addition to the three referred to in the letter of 19 August 1986 set out in par 134 above. Two of the complaints had been in writing. One of the written complaints may well have been the complaint of Cooper. That complaint resulted in at least the suspension of services to the respondent though they were reinstated when the complaint was not pursued by Cooper. The other written complaint may have been that of Ms X though when Ms X made her complaint is not clear. Who made the oral complaint referred to in the 1986 letter is not clear. While services to the respondent were temporarily suspended after the complaint was made by Cooper, no steps were taken which would have lessened the possibility of sexual harassment occurring assuming the complaint of Cooper had had some foundation in fact. The CES was not in a position to be satisfied that it had no foundation in fact.

146 At least one more complaint (an oral complaint by Ms Y to an officer of the CES who invited the employee to make a written complaint - there is no evidence that a written complaint was made) had been made to the CES (probably to Maitland) before the applicant obtained employment with the respondent through the services of the CES. The nature of the complaints or the number of them or both were viewed by the Maitland CES as

sufficiently serious to justify the creation of a sensitive information register file concerning the respondent and his practice at Greta. I infer from Taylor's evidence that the computer record for the respondent concerning the Greta practice was not the same as the computer record for the practice at Raymond Terrace. The notation on the computer record for the Greta practice that the sensitive information register file had been created, would not have been apparent to officers of the CES at Hamilton (or Newcastle which was the branch where the applicant was told of the job with the respondent) when accessing the computer record for the respondent at the Raymond Terrace practice.

The legal character of the claims against the Commonwealth

147 The case against the Commonwealth in the agency proceeding is based on the alleged contravention of sections 22, 26 and 105 of the S D Act. Section 22 renders it unlawful for a person providing a service to discriminate on, relevantly, the ground of the person's sex in specified ways and s 26 renders it unlawful for a person administering a Commonwealth law or conducting a Commonwealth program to discriminate against another person on, relevantly, the ground of sex. The Commonwealth conceded that, for present purposes, it provided a service in procuring employment for the applicant with the respondent though did not accept that, in doing so, there had been the administration of a Commonwealth law or Commonwealth program for the purposes of s 26.

148 Section 22 provides:

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

149 Section 26 provides:

> *"(1) It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the other person's sex, marital status, pregnancy or potential pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.*
>
> *(2) This section binds the Crown in right of a State."*

150 Section 105 provides:

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

It is to be recalled that Div 2 of Part II concerns discrimination on the grounds of sex and the express proscription of sexual harassment is found in Div 3. Section 105 does not operate on conduct which is only proscribed by Div 3.

Findings on the claims against the Commonwealth

151 If a person provides a service to another and in the course of providing it, the service provider deals with the recipient of the service in a particular way because of the recipient's sex, then a contravention of s 22 may arise (subject to satisfying the specific matters referred to in that section): see e.g. *Evans v Lee* (1996) EOC 92-822. The different dealing may involve sexual harassment. The same, in principle, could be said of s 26 concerning, as it does, the administration of Commonwealth laws and programs. That is, if they are administered in a way that results in the differential treatment of a person subject to the law or involved in the program because of, relevantly, the person's sex, then a contravention of s 26 may arise. The treatment may involve sexual harassment. However in the present matter it is difficult to see how the conduct of the Commonwealth itself was conduct of this character.

152 However, the facilitation of the applicant's employment with the respondent assumes greater significance in the context of s 105. Of central importance is the scope of s 105 and, in particular, whether it can be said that the Commonwealth "permitted" the respondent to

engage in conduct which was unlawful. The Macquarie Dictionary defines the word "permit" in the following way:

> *"*-v.t. *1. to allow (a person, etc.) to do something:* permit me to explain. *2. to let (something) be done or occur:* the law permits the sale of such drugs. *3. to tolerate; agree to. 4. to afford opportunity for, or admit of:* vents permitting the escape of gases. –v.i. *5. to grant permission; allow liberty to do something. 6. to afford opportunity or possibility:* write when time permits. *7. to allow or admit (fol. by* of*):* statements that permit of no denial. *–n. 8. a written order granting leave to do something. 9. an authoritative or official certificate of permission; a licence. 10. permission. [late ME, from L* permittere *to let go through] –**permitter**, n."

153 It can be seen that the definition includes, as a meaning of the word as a transitive verb, to let something be done or occur, to tolerate or to afford an opportunity for something to occur. Provisions in statutes creating accessorial liability arise both in the civil and criminal law. The proper construction of such a provision and the nature of the conduct it comprehends must depend both on the language used and the statutory context in which it is found. This is illustrated by authorities concerning s 75B of the *Trade Practices Act 1974* (Cth) such as *Yorke v Lucas* (1985) 158 CLR 661.

154 Section 122 of the *Disability Discrimination Act 1992* (Cth) ("the D D Act") is a provision which, in terms, is in materially identical language to s 105 and found in Act of a similar character to the S D Act. It is a provision *in pari materia*. The meaning of s 122 was considered by Madgwick J in *Cooper v Human Rights and Equal Opportunity Commission* (1999) 93 FCR 481. In issue in those proceedings was whether a council, which had approved the refurbishment of a building as a cinema which had no wheelchair access, had permitted a breach of s 23 of the D D Act. That section makes it unlawful to discriminate against person on the grounds of the person's disability by, effectively, limiting or denying access to premises used by the public unless (as provided by s 23(2)), relevantly, any alteration to the premises to provide access would impose unjustifiable hardship on the person who would have to provide it. His Honour concluded that the primary liability of the operator under s 23 did not depend upon the complainant establishing no justifiable hardship. Rather, s 23(2) provided a means for the operator to demonstrate circumstances which were exculpatory and would relieve it of liability.

155 As to the liability of the council and the scope of s 122, his Honour identified the possible approaches to the construction of the section (at 492):

> ***"Liability as a s 122 permittor - the possibilities***
>
> *The degree of knowledge, if any, required to establish liability as a supposed "permittor" under s 122 is unclear on the face of the legislation. There are several possibilities: (1) on the analogy of the criminal law, see* Giorgianni v The Queen *(1985) 156 CLR 473, it might be that, in the absence of any material that could affirmatively satisfy the Commission that an alleged permittor knew or believed that unjustifiable hardship would* not *be involved, the alleged auxiliary could not be found to have permitted an unlawful act constituted by failure to provide means of access; (2) if there were some material before the Commissioner that could point to unjustifiable hardship, it might be that before a person could be said to have permitted an unlawful discriminatory act by another, the Commission would need to be affirmatively satisfied that that person knew or believed that unjustifiable hardship to that other would not be involved; (3) on the analogy of* Proudman v Dayman *(1941) 67 CLR 536, if the Commission was in fact satisfied that the alleged permittor knew or believed that unjustifiable hardship would be involved, liability under s 122 would not have been established; (4) such last mentioned knowledge or belief is quite irrelevant, and all that need be shown is that permission was given to discriminatory provision of access."*

156 In dealing with a submission that the appropriate analogy was the criminal law (which had informed the approach to the construction of s 75B), His Honour said:

> *"There are several reasons why it is inappropriate in this instance to adopt the high standard of knowledge required to attribute to accessories in criminal cases. The* Sex Discrimination Act *1984 (Cth) has a provision in similar terms to s 122 (s 105 thereof) whilst the* Racial Discrimination Act *1975 (Cth) does not. Section 122 has, it seems to me, been carefully drafted. Care has, in my view, been taken not to employ the traditional formula of the criminal law, "aids, abets counsels or procures", to define accessory liability. Instead the phrase used in s 122 is "causes, instructs, induces, aids or permits". It is clear that the s 122 concepts are wider than the traditional criminal law concepts; one might certainly "permit" an act without aiding, abetting, counselling or procuring it. There seems little doubt that the departure from the traditional criminal law phraseology was deliberate. The civil and compensatory nature of the remedies for breach of the duties established by the Act, and its broad purposes (as to which, see below), would furnish an adequate reason why such a departure would likely have been intended. The significance of that, it seems to me, is that it puts this case outside the reasoning in* Yorke v Lucas*."*

157 His Honour then made some observations about knowledge of unjustifiable hardship, a matter specifically concerning s 23(2) of the D D Act, and went on to say:

> *"... the purposes of the* Disability Discrimination Act*, as indicated by s 3, include the elimination, "as far as possible", of discrimination against disabled people in what might be thought the main practical areas of life, so far as the Commonwealth's legislative power can reach those areas. It is also an object of the Act, under s 3(c), "to promote" recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community. The language referred to and the words emphasised are, to my mind, both an indication that the Act was intended to have far-reaching consequences and an explanation of why this was so. These are factors that would make sense of the introduction of a new concept of accessory liability and one very considerably broader in its reach than that traditionally employed by the criminal law.*
>
> *Even without special regard to the precise provisions of s 3 of the Act, it should, of course, as beneficial legislation for a burdened class of the public, receive a beneficial interpretation in the case of ambiguity. This is especially so in the case of "legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose":* Waters v Public Transport Corporation *(1991) 173 CLR 349 at 359. See also the discussion in Pearce and Geddes,* Statutory Interpretation in Australia *(4th edn, Sydney, Butterworth, 1996), pp 222-225."*

158 His Honour then indicated, having regard to these considerations, it was unnecessary for a complainant to prove the permittor knew there was no unjustifiable hardship to establish liability under s 122. Madgwick J then turned to the meaning of the word "permits" and said at 494:

> ***"The meaning of "permits"***
>
> *But if such material is raised, the question remains: did the person complained of permit an act of discrimination which was unlawful? It seems to me that, for the purposes of the* Disability Discrimination Act*, one person permits another to do an unlawful discriminatory act if he or she permits that other to do an act which is in fact discriminatory. It is not essential to the concept of permission, in this context, that the permittor should know or believe in the lack of cogency of an assertion of unjustifiable hardship, particularly having regard to the unavoidably subjective features included in such an assertion and in knowledge or belief about it. There is no warrant for adopting, in relation to a statute concerned to vindicate human rights by the imposition of civil and compensatory liability, the narrowest definitions of the word "permit" that might be thought appropriate in statutes imposing criminal liability. For example, in* Broad v Parish *(1941) 64 CLR 588 at 595,*

Starke J adopted the meaning "intentionally allow". Upon that basis, there is no warrant for treating the statute as presuming knowledge in the absence of facts which might put it in doubt (in the way, for example, that in the criminal law the interest of an accused for the natural and probable consequences of his/her acts might be presumed but, upon possible drunkenness being raised, the Crown acquires the burden of showing that it did not rob the acts of such intent). Knowledge that there was no exculpation of the principal is simply, in my view, not required to be shown. In Adelaide City Corporation v Australasian Performing Rights Association Ltd *(1928) 40 CLR 481 at 490-491, Isaacs J said:*

> 'the word "permits" is of very extensive connotation… the primary [dictionary] meaning of "permit" is: "to allow, **suffer**, give leave; **not to prevent** …" As an illustration, a person "permits" his hall to be used for the public performance of a play … if he knows or **has reason to** know or believe that the particular play … will or may be performed and, having the legal power to prevent it, nevertheless disregards that power and allows his property to be used for the purpose. **For example**, … McCardie J held that [a claim that copyright in a musical work had been infringed by the hall proprietors] was rightly abandoned. But that was because the hall proprietors "**had no reasonable ground for suspecting** that there would be an infringement of copyright by the band'" *(Emphasis added.)*

Isaacs J was a dissentient in that case, but the result turned on the necessary degree of the power to control the allegedly permitted infringement and not the degree of knowledge of it. The sort of approach outlined by Isaacs J seems to me to be appropriate here.

In Howard v Northern Territory *(1995) (unreported, Equal Opportunity Commission, 19 December 1994), Sir Ronald Wilson used expressions including "knowledge or at least wilful blindness or recklessness in the face of known circumstances" as being necessary to attract the operation of s 105 of the* Sex Discrimination Act 1984*, the equivalent of s 122 of this Act. However, he was speaking of the degree of knowledge required of the positive elements of an act of sexual discrimination in a case where:*

> 'there was nothing in the circumstances to put [the alleged permittor] on inquiry as to the lawfulness of [the principal discriminator's] decision or to require them to interrogate him to satisfy themselves of the lawfulness of his decision'.

I do not perceive that my approach materially differs from that of Sir Ronald."

159 His Honour then considered the question of whether an honest and reasonable belief that circumstances existed which would result in the permitted conduct not being unlawful,

might excuse a permittor in the context of an alleged contravention of s 23. He concluded such a belief would have that affect.

160 What emerges from *Cooper v Human Rights and Equal Opportunity Commission* is that the notion of "permitting" should not, in the context of legislation such as either the D D Act or the S D Act, be approached narrowly. Indeed the reference by his Honour to the approach of Isaacs J in *Adelaide City Corporation v Australasian Performing Rights Association Ltd* that a person may permit something to happen if the person has a belief that something will or may happen, would suggest a wide operation should be given to s 105. In an entirely different statutory context, Pincus J observed in *Evans v Accident Insurance Mutual Holdings Ltd* [1998] 2 Qd R 350 at 363 that while a reference in a provision in a statute to permitting someone to do something in a particular condition would create a requirement that there be knowledge of the condition, that was not the inevitable meaning of such a provision. In that matter Pincus J concluded (though his Honour was in the minority) that a person could permit another person to drive a vehicle under the influence of intoxicating liquor even if the person did not notice that the prospective driver was intoxicated (though when the driver was manifestly intoxicated at the time): see also *Waugh v Kippen* (1986) 160 CLR 156 at 165.

161 The judgment of the High Court in *Adelaide City Corporation v Australasian Performing Rights Association Ltd* was applied by a Full Court of the Australian Industrial Court in *Young v Australian Workers' Union* (1974) 5 ALR 347. In issue was whether employers (a partnership) had breached an industrial award which made it unlawful to permit a shearer to use an oversized comb when shearing. The Full Court quoted the following passage of the judgment of Knox CJ in *Adelaide City Corporation v Australasian Performing Rights Association Ltd* (at 487):

> *"I agree with learned judges of the Supreme Court in thinking that indifference or omission is "permission" within the plain meaning of that word where the party charged (1) knows or has reason to anticipate or to suspect that the particular act is to be or is likely to be done, (2) has the power to prevent it, (3) makes default in some duty of control or interference arising under the circumstances of the case, and (4) thereby fails to prevent it. This statement of the legal position was not challenged in argument before this Court."*

The Full Court then considered each of these elements by reference to the facts. Their Honours found that the employers anticipated or expected that the shearers would or would be likely to use the oversized comb and the employers had the power to take whatever steps were reasonably necessary to prevent the contravention.

162 Their Honours saw as an important question whether element (3) was satisfied. One of the partners (the employers) had given evidence that he informed the shearers they were not to use the oversized combs and stamped on their contracts words to the effect that they were to use standard size combs only. Instructions had also been given to a person to act as supervisor and check the combs at lunchtime. The supervisor was to tell the shearers they would be dismissed if they were caught using oversized combs. One of the shearers was told this. One shearer had been caught but not dismissed. The Full Court indicated that even if this evidence was to be accepted (which it had not been) it would not have established that the employers had not permitted the use of the oversized comb. It appears the Full Court thought that it would have been necessary for the employers to inspect the gear of each shearer before commencing work and regularly during the day.

163 Section 105 provides a means of bringing about lawful conduct by rendering liable a person who could prevent unlawful conduct from occurring or continuing or who assists, directly or indirectly, in its performance. A person can prevent unlawful conduct by not creating a situation where it will or may take place or altering a situation so it will not continue. In my opinion, a person can, for the purposes of s 105, permit another person to do an act which is unlawful, such as discriminate against a woman on the grounds of her sex, if, before the unlawful act occurs, the permitter knowingly places the victim of the unlawful conduct in a situation where there is a real, and something more than a remote, possibility that the unlawful conduct will occur. That is certainly so in circumstances where the permitter can require the person to put in place measures designed to influence, if not control, the person's conduct or the conduct of that person's employees. An employment agency may place an employee with an employer and knows or has reasonable grounds for believing that there is a material chance (being something more than a remote chance) that the employee will be at risk of being discriminated against on the grounds of sex. If the agency takes no steps to influence or control the employer's conduct (if the employer is a natural person and is the likely discriminator or harasser) or the conduct of employees of the employer (if the discrimination is not likely to be by the employer himself or herself), then it may have

"permitted" any subsequent unlawful conduct by the employer by way of discrimination on the grounds of sex. That is not to say, however, that an employment agency would be liable for unlawful conduct (visited upon an employee it placed in employment) which was expected in the sense that one can anticipate or expect that discrimination might take place in any workplace notwithstanding that it is unlawful. Something more would be required.

164 I accept that if s 105 operates in the way I have discussed, an employment agency may well confront practical problems in dealing with complaints of sexual harassment (constituting discrimination on the grounds of sex) made by employees which it has placed with an employer and maintaining a relationship with an employer and placing future employees with it. It is unlikely an agency would be able to investigate whether any particular complaint had substance. The agency would also have to approach with some care, the extent to which it could republish the complaint and, in particular, do so to potential employees of the employer in question.

165 However the fact that there may be practical problems for an employment agency concerning the substantiation of complaints of harassment constituting discrimination or the communication of the risk of discrimination to potential employees does not mean, in my opinion, that the word "permit" should be given a narrow meaning. There is no reason apparent to me why an employment agency, to whom several complaints had been made about sexual harassment (apparently constituting discrimination) by one of the employers it serviced (who was a natural person), could not either terminate the service or inform the employer that the agency would tell, as a condition of maintaining the service, potential employees that complaints had been made and the nature of the complaints or at least require the employer to put in place measures at the workplace to stop or at least influence the potentially unlawful conduct. Such measures could involve requiring the employer (a natural person) to read material about what constituted discrimination on the grounds of sex, and in particular, sexual harassment and commit himself or herself to a protocol designed to stop such conduct. If the contravening conduct was likely to be by employees of the employer other or additional measures might be appropriate.

166 It is necessary now to consider whether the Commonwealth (through the CES) permitted the respondent to discriminate against the applicant in the way just discussed. At the time the applicant was placed in employment with the respondent, the CES knew (in the

sense that from time to time officers of the CES had been informed) that several young women placed in employment with the respondent had complained of having been sexually harassed by the respondent in a way that would apparently constitute discrimination on the grounds of the employee's sex. While none of the complaints were investigated or investigated to finality by any other agency or body, the CES did not know whether, and in my opinion could not have been satisfied that, the complaints were not of substance. The frequency and/or seriousness of the complaints were such that the unusual step was taken of creating a sensitive information file for the respondent in relation to the Greta surgery.

167 There is no evidence to suggest that prior to the applicant's employment and subsequent complaint, the CES required the respondent to take any steps that might avoid further discrimination on the grounds of sex involving sexual harassment. Indeed the evidence suggests no such steps were taken. All that appears to have happened (other than opening the internal sensitive information file or register) was the suspension of services to the respondent for a period in 1985 after Cooper made her complaint and before it was withdrawn from investigation by the anti-discrimination committee. While the general policy of the CES may be, as discussed earlier, to require that safeguards be put in place at the workplace, no evidence was led to show this had occurred in relation to the respondent and the documentary evidence sustains an inference that it was not. That is, there was no record of any communication to the respondent requiring him to take any action. Moreover the Commonwealth did not endeavour to elicit from the respondent evidence that he had been asked to take such steps by the CES and had satisfied the CES that he had taken them.

168 It is probable that none of this history was known by the caseworker at the Newcastle branch who facilitated the employment of the applicant with the respondent. That is because the employer code for the respondent at his Raymond Terrace practice was not linked to the information, apparent on his computerized record for the respondent as an employer in the Greta practice, that would have alerted the case worker (or anyone else in either the Newcastle or Hamilton branch) that the respondent might be a problem employer. By problem employer, I mean an employer for whom a sensitive information file had been created. The existence of that file would have been apparent only if the Greta employer code was used.

169 Can it be said, in these circumstances, that the CES placed the applicant in employment having reasonable grounds for believing that there was a material chance that the applicant was at risk of being discriminated against on the grounds of her sex through sexual harassment and permitted the unlawful conduct in the way discussed? In my view, it can. It must be accepted that there will be occasions when former employees will make quite unfounded complaints to agencies like the CES about former employers for a variety of reasons. However, in the present case the number of complaints of sexual harassment (at the very least four) over almost two decades should have alerted the CES to the distinct possibility that any young female sent to work for the respondent was at risk of sexual harassment and being discriminated against on the grounds of her sex. Indeed it did alert the CES in the sense that a sensitive information file was created in relation to the respondent. However the records were maintained by the CES in such a way that the caseworker who facilitated the applicant's employment did not know of the history of complaints.

170 However, the fact the caseworker did not know does not, in my opinion, lead to a conclusion that the Commonwealth did not permit the discrimination in the way being discussed. The collective knowledge of officers of the CES can be treated as the knowledge of the Commonwealth: see *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 583 per Brennan, Deane, Gaudron and McHugh JJ. In some circumstances, the knowledge of individual employees or officers of a corporation cannot be aggregated in a way that alters the character of the knowledge. For example, a corporation does not act fraudulently where several of its employees (involved in the corporation's conduct) possess discrete pieces of information (by itself innocent information) which, if known to one employee, would evidence fraud. However, this is not such a situation. Moreover, the existence of the sensitive information file which gathered together much of the information about the respondent and was noted in a computer record would answer any suggestion that the knowledge of individual officers of the CES could not be aggregated. That is, the knowledge was already aggregated: see generally *Re Chisum Services Pty Ltd* (1982) 7 ACLR 641 and as to cases of fraud see *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 144-145 and 160-162.

171 I am satisfied that the Commonwealth permitted the respondent to discriminate against the applicant on the grounds of her sex. In so doing, the Commonwealth is, by

operation of s 105, to be treated as having discriminated against the applicant on the grounds of her sex.

Compensation

172 The position of the respondent in the employment proceeding and the Commonwealth in the agency proceeding have, to this point, been considered separately for obvious reasons. I have concluded that each has engaged in conduct proscribed by the S D Act. However it is convenient to deal with the question of whether compensation should be awarded and in what sum against the respondent and/or the Commonwealth at the same time.

173 I first consider the evidence led on the question of compensation or damages. It was evidence from the applicant, her mother, her aunt, Dr Kennedy and the counsellor, Pacey. The applicant's evidence was that the experience working with the respondent had been traumatic. She became withdrawn and frightened. She was unable to sleep and put on weight. She found it extremely difficult to cope with what happened and the experience affected her relationship with her partner, her family and her friends. This evidence was corroborated by the evidence of her mother and aunt. It was also corroborated by the evidence of Pacey who works as a counsellor with Relationships Australia. She saw the applicant on five occasions in 1996 (18 September, 2 and 28 October, 18 November and 23 December). Pacey made notes of the counselling sessions and, in her evidence in chief, summarised her impressions of the applicant as someone who was in quite a bad way and was extremely stressed, anxious, confused, upset and humiliated. Her impression was that the circumstances did not change during the period of counselling. Pacey conceded, and I accept, that there were a number of factors, other than the applicant's experiences with the respondent, that were impacting on the applicant's general sense of well-being and emotional state during the period of the counselling. However Pacey's evidence over all is generally consistent with the applicant's account of the effect on her of the conduct of the respondent.

174 Dr Kennedy gave evidence that she first saw the applicant on 8 March 1995 and she last saw her on "the 23rd of the sixth of this year" (this appears to be a mistake given that she gave evidence on 22 June 2000). It emerged in cross-examination that Dr Kennedy saw the applicant once (and spoke to her once on the phone) between September 1995 and 4 March 1996 and then saw her on 24 April, 20 September, 30 October 1996, 14 March 1997, 15 April, 11 August and 30 September 1998.

175 Dr Kennedy prepared a report on the applicant dated 11 September 1997. In that report Dr Kennedy noted that the applicant first discussed with her the sexual harassment by

the respondent at a consultation on 4 March 1996. She recorded that the applicant then displayed symptoms of stress/anxiety and that when she saw the applicant on several later occasions, she exhibited various stress-related symptoms. She also recorded that she saw the applicant on 20 September 1996 when she appeared still stressed and anxious and more depressed. The applicant then said she was suffering from insomnia. In her report Dr Kennedy expressed the view that she hoped many of the applicant's symptoms would resolve or would at least become manageable. In her evidence in chief, Dr Kennedy expressed the view that more recent observations of the applicant suggested she was experiencing "a major depression". During cross-examination a number of other factors impacting upon the applicant's sense of general well being and emotional state were raised with Dr Kennedy. They included the applicant's father's increased alcohol intake, the death of the applicant's stepbrother in October 1995 and the applicant's mother's serious illness which had involved surgery. Dr Kennedy accepted, and I accept, that these matters would plainly have influenced the applicant's emotional state.

176 I am satisfied that the conduct of the respondent had a significant and negative impact on the applicant and the effect lasted for at least two years. While other significant factors were also impacting on her during this period and affecting her emotional state, the consequences of the conduct of the respondent were a significant extra burden that the applicant has had to suffer during a difficult period in her life.

177 A submission was made by the Commonwealth that the employment proceeding (and it appears this submission embraced the agency proceeding as well) was to enforce the determination of HREOC. Accordingly, it was submitted, damages that could be awarded were limited to the damages awarded by HREOC, namely $15,100. Not only is this submission contrary to the approach of Spender J in *Aldridge v Booth* at 21 (His Honour said: "*In matters of this kind, the Federal Court pursuant to s 82 (2) has to make such orders as the Federal Court thinks fit*" but not in ignorance of the determination of HREOC) and the observations of Lockhart J in *Hall v A & A Sheiban Pty Ltd* (at 244) but overlooks the clear trend of recent authority emphasising that the exercise of the judicial power of the Commonwealth is undertaken independently by the Courts (see par 105 above). In my opinion, the clear words of s 83A(2) that "the Court may make such orders (including a declaration of right) as it thinks fit" should be given full effect. That is, if the Court decides

that damages should be awarded, it may award damages in a sum which differs from any sum that may have been awarded by HREOC.

178 I am satisfied that the conduct of the respondent had a significant effect on the applicant particularly having regard to her age and comparative vulnerability which is compensable by the award of $15,000 by way of damages. To this should be added an amount of $100 for the counselling. It is the same amount of compensation as was awarded by HREOC though, it must be accepted, assessed by me by reference to a more limited number of instances of sexual harassment. However the more limited number would not, in my opinion, have had a materially lesser effect on the applicant than all the conduct particularised in the applicant's complaint. While I have independently concluded that it is the appropriate amount, I have also paid regard to HREOC's determination in reaching the conclusion I have.

179 The applicant also sought aggravated damages having regard to the respondent's approach to the complaint and his failure to appear before HREOC. Reference was made to *Lyon v Godley* (1990) EOC 92-287 concerning the awarding of such damages and the approach to be adopted. It appears to have been accepted by Lockhart and French JJ in *Hall v A & A Sheiban Pty Ltd* (at FCR 239 and 282 respectively) that aggravated damages can be awarded to compensate for sexual harassment though by reference to a statutory formulation of the power to award compensation which differs from the section that now applies, namely s 83A(2). If anything, however, that section is cast in sufficiently wide terms as to put beyond doubt the Court's power to award such damages.

180 It is generally accepted that the manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff so as to warrant the award of additional compensation in the form of aggravated damages: see *Triggell v Pheeney* (1951) 82 CLR 497; *Coyne v Citizen Finance Limited* (1991) 172 CLR 211. Such damages are not limited to libel proceedings. In *Myer Stores Ltd v Soo* [1991] 2 VR 597, for example, Murphy J at 606 considered that an award of aggravated damages was warranted in an action for false imprisonment where the defendant persistently insinuated throughout the trial that facts existed to justify the imprisonment, in particular that the plaintiff was guilty of shoplifting.

181 In the context of anti-discrimination law a wide variety of matters may affect the decision to award aggravated damages in any particular case. In *Whittle v Paulette* (1994) EOC 92-621 at p 77,306 the Queensland Anti-Discrimination Tribunal noted, when awarding damages, "that the first respondent was arrogant and aggressive in the witness box and insensitive to the effect of his treatment of the complainants". In deciding not to award aggravated damages in *Greenhalgh v National Australia Bank Ltd* (1997) EOC 92-884, the Human Rights and Equal Opportunities Commission noted:

> *"This is not a matter in which the respondent has refused to sit down and negotiate with the complainant. The respondent did make several offers of settlement to the complainant, some which included the payment of her costs to the date of the proposed settlement. Neither is this a matter where the complainant has been put to the expense and stress of having to establish the facts of her sexual harassment, nor the respondent's vicarious liability."*

182 In *McIntyre v Tully* (1999) 90 IR 9, Atkinson J of the Queensland Supreme Court, affirmed the decision of the Anti-Discrimination Tribunal to award aggravated damages to a plaintiff who had suffered added distress as a result of the defendant's method of cross-examination. See also *John v M G N Ltd* [1997] QB 586 at 608 per Lord Bingham MR. That the proceedings are stressful for a plaintiff, however, is not in itself sufficient to attract an award of aggravated damages. The defendant must conduct his or her case in a manner which is unjustifiable, improper or lacking in bona fides: *Triggell v Pheeney* (1951) 82 CLR 497 at 514; *Spautz v Butterworth* (1996) 41 NSWLR 1 at 17-18 per Clarke JA.

183 The stress of litigation is well recognised: see, for example, the observations of Dawson J in *Commonwealth v Verwayen* (1990) 170 CLR 394 at 461. However in *Coyne v Citizen Finance Limited* (supra), Toohey J emphasised that a vigorous defence alone does not expose a defendant to the risk of additional damages. His Honour held, at 237, that:

> *"It is not the case that every unsuccessful defendant must face the prospect of damages being increased, simply because the defendant has elected to defend the action. It is for the jury, properly directed in the circumstances of the case, to determine whether the defendant's conduct lacks bona fides, or is improper or unjustifiable, in the sense referred to in* Triggell v Pheeney*."*

184 In the present case, the applicant has submitted that it is appropriate to award aggravated damages on the basis of Dr Nanda's approach to the complaint and his failure to appear at the hearing before the Commission. I did not understand this submission to raise

for consideration the cross-examination of the applicant. It was, however, directed to the conduct of the respondent after the applicant's complaint was lodged with HREOC. There is limited information before me about why the respondent did not appear before HREOC. Had he done so and failed in his defence of the complaint, he may have been more accepting of HREOC's determination. Having failed before HREOC he elected to contest the matter in this Court when the applicant sought to enforce the determination. While it was his legal right to do so, it occurred against a background where he had not appeared before HREOC. Plainly the Commissioner took the view that the explanation given by the respondent for not being able to appear at the hearing dates on 12-15 April 1999 was of insufficient moment to warrant the grant of an adjournment.

185 I am satisfied that the resolution of the complaint of the applicant has been delayed, and delayed by a considerable period, by the conduct of the respondent and, in particular, his failure to participate in the proceedings before HREOC. I am also satisfied that the applicant has suffered additional stress and mental anguish because of this delay for which she entitled be compensated by way of aggravated damages. I propose to order that the respondent pay the applicant a further sum of $5000 as aggravated damages.

186 A submission was made by the Commonwealth that any sexual harassment that occurred was by the respondent who was, in the defined sense, the "respondent" (see s 4 of the S D Act) and, accordingly, the applicant could only obtain relief under s 81(1)(b) against the respondent and not the Commonwealth. "Respondent" is defined as:

> *"'respondent'", in relation to a complaint, means the person who is, or each of the persons who are, alleged to have done the act to which the complaint relates"*

This submission fails to give full effect to s 105 which results in a person to whom the section applies being treated as having done the unlawful act of another. It is not suggested that the agency proceeding against the Commonwealth is not properly before the Court as an application capable of being made under s 46PO of the HREOC Act. That being so, then the Court has power under s 46PO(4) to make "such orders..... as it thinks fit [including] an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent": see s 46PO(4)(d).

187 In the application filed on 11 May 2000 in the agency proceeding, compensation was sought and s 105 was referred to as a section of the S D Act on which the complaint was based and under which the Commonwealth's conduct was said to be unlawful. Similar reliance was placed on that section in the original complaint dated 30 April 1998 to HREOC. There is no statutory inhibition, I can discern, which would prevent the Commonwealth being ordered to pay the damages, in their entirety, due to the applicant for the conduct of the respondent which is to be treated also as the conduct of the Commonwealth.

188 In the result, I have concluded that the applicant is entitled to $15,100 damages by way of compensation for the unlawful conduct of the respondent. Both the respondent and the Commonwealth are legally liable to pay that compensation though the applicant cannot be compensated twice. It is the respondent alone who is legally liable to pay the $5000 compensation by way of aggravated damages. The parties did not address the Court on how such a result should be reflected in orders binding both the respondent and the Commonwealth. They should be given the opportunity to do so.

The role of the Commonwealth in the proceedings

189 It is appropriate that something be said about Commonwealth's role in these proceedings. There is an expectation that the Commonwealth will conduct itself as a model litigant: see the discussion of Finn J in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 196 and the cases his Honour cites.

190 It is to be recalled that the applicant applied for the consolidation or joint trial of the employment proceeding and the agency proceeding. The Commonwealth opposed the application. At one point during the hearing of the application for consolidation or joint trial on 30 May 2000, counsel for the Commonwealth suggested it had no interest in the question of what, as a matter of fact, occurred between the respondent and the applicant. On 2 June 2000 a solicitor from the Australian Government Solicitor spoke with my associate and indicated that agreement could not be reached about the Commonwealth accepting findings made about the conduct of the respondent for the purposes of determining the liability of the Commonwealth. In the result, and as noted earlier in these reasons, I made orders on 5 June 2000 that the employment proceeding and the agency proceeding be heard together and that the evidence in one be the evidence in the other (with certain qualifications).

191 At a hearing on 19 June 2000, these orders were varied on the application of the Commonwealth. The explanation given by counsel for the Commonwealth for the variation was:

> *"... if evidence is led in the Nanda case then that is evidence against Dr Nanda - evidence of the applicant against Dr Nanda and technically speaking the Commonwealth isn't entitled to cross-examine in relation to evidence that is led in the Nanda proceedings. We are not a party to those proceedings and that is why we apply to have* [the earlier orders varied] *and put instead an alternate regime of trying to ensure that it is clear which of the applicant's evidence is in the Nanda proceedings and which of the evidence is in the Commonwealth's proceedings and which, if there is any, of the evidence is in both."*

192 When the joint hearings commenced on 22 June 2000 an issue arose concerning whether particular evidence was being tendered by the applicant against only the respondent or against the Commonwealth as well. That led to a discussion about whether it was necessary to prove, as against the Commonwealth, that the respondent had engaged in unlawful conduct. As a result of what was said by counsel for the Commonwealth, I gained the clear impression, and it appears counsel for the applicant also gained the same impression, that the Commonwealth wished to play no part in the contest between the applicant and the respondent in the employment proceeding concerning whether or not the respondent had sexually harassed the applicant. The position I understood the Commonwealth was taking was that it would not involve itself in the question of whether the respondent had engaged in unlawful conduct and would accept the Court's determination on that question. The import of what was said on behalf of the Commonwealth was that it would not be necessary for the applicant to tender, as against the Commonwealth, evidence led against the respondent to establish his unlawful conduct. In that context counsel for the applicant indicated she might nonetheless tender the evidence in both proceedings but I indicated, in view of what counsel for the Commonwealth had said, it was not necessary. The position I understood the Commonwealth was taking was an understandable one given that the Commonwealth was proposing to argue that whatever may be the liability of the respondent having regard to his conduct, it had no liability to the applicant under the S D Act. It was with this understanding, on my part, that the trial was conducted and various orders made about the reception of evidence against one or other of the respondents to the two proceedings.

193 Notwithstanding these events, at the conclusion of the trial, the Commonwealth sought to make detailed and extensive submissions in the employment proceeding and, in particular, submissions about who was to be believed in the factual contest between the applicant and a number of witnesses called in that proceeding including, obviously and most importantly, the respondent. This was in relation to evidence that had strictly not been tendered against it. Those submissions were made against the background where counsel for the Commonwealth did not challenge the applicant's evidence by cross-examining her. Indeed the fact that the Commonwealth ultimately sought to make the submissions it did, is difficult to reconcile with its opposition to the consolidation or joint hearing of the employment proceeding and agency proceeding.

194 It might be thought that it would be only in fairly compelling circumstances that the Commonwealth would involve itself directly in a contest (even if only by making submissions) between a person seeking the benefit of what is remedial Commonwealth legislation and another putting in issue any entitlement of that person under that legislation. I accept, however, that this may be taking too narrow a view of the position of the Commonwealth as a litigant. Nevertheless if circumstances did arise where the Commonwealth thought it was necessary to involve itself in such a factual contest, then it should make it perfectly plain to the parties and the Court at an early stage that this was the position it was adopting. This did not, in my opinion, happen and the ensuing confusion and its resolution probably consumed at least two hours of hearing time (in addition to the time taken up in debating whether the proceedings should be consolidated). That this occurred is to be regretted.

Costs

195 While some submissions were made about costs during the hearing, I think the preferable course is to give the parties an opportunity to make submissions about costs with the benefit of the findings I have made as part of the submissions that will be necessary to deal with the question of how the applicant's entitlement to damages is reflected in orders.

Conclusion

196 I have concluded that both the respondent and the Commonwealth have engaged in conduct proscribed by the S D Act and the applicant is entitled to compensation for loss and

damage flowing from that conduct. The applicant is entitled to $15,100 by way of compensation for the sexual harassment and discrimination by the respondent, which is also deemed to be conduct of the Commonwealth, and $5000 by way of aggravated damages from the respondent for his conduct following the making of the complaint to HREOC. The only formal order I will make is to stand the matter over for a period from the date of publishing these reasons with a direction that the parties file and serve written submissions within 10 days dealing with the question of what orders should be made concerning the payment of compensation and what orders should be made about costs.

I certify that the preceding one hundred and ninety-six (196) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moore.

Associate:

Dated: 11 April 2001

Counsel for Leanne Elliott:	K Eastman
Solicitor for Leanne Elliott:	W G McNally & Co
Counsel for Prem Nanda:	G Scragg
Solicitor for Prem Nanda:	Marshall & Partners
Counsel for the Commonwealth:	S Winters
Solicitor for the Commonwealth:	Australian Government Solicitor
Date of Hearing:	22-23 June, 21-23 August, 5 September, 3-4 October 2000
Date of Judgment:	11 April 2001