



**OFFICE OF THE NORTHERN TERRITORY  
ANTI-DISCRIMINATION COMMISSIONER**

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**COMPLAINANT:** Susan Barton-Johnson

**RESPONDENT:** Darwin Turf Club

**TRIBUNAL:** Mr Tom Stodulka  
Hearing Commissioner

**ISSUE:** Challenge to Jurisdiction  
due to alleged deficiencies  
in complaint and s. 76  
decision

**DATE OF APPLICATION:** 5 December 2001

**DATE OF DECISION:** 7 December 2001

## **Introduction**

1. In 1999 the Complainant, Susan Barton Johnson, was living in a de facto married relationship with Stephen Paynter. Stephen Paynter was a licensed trainer of race horses. Licenses and permits to train race horses in Darwin are issued by the Respondent, Darwin Turf Club.
2. The Complainant had for a time acted as Stephen Paynter's foreman and had looked after his horses while he was absent from Darwin.
3. In August 1999, the Respondent suspended Stephen Paynter's licence to train for three months. The suspension finished on 18 November 1999.
4. On 26 September 1999, the Complainant applied to the Respondent for a restricted permit to train race horses. The Respondent adjourned consideration of her application until 17 November 1999 and then refused to grant her a licence.
5. The Complainant lodged a complaint with the Anti-Discrimination Commission. She alleged that she was refused a restricted permit to train because of the policy of Darwin Turf Club to prevent 2 people in the same household holding a trainer's licence and also because the committee would not accept that she was applying for a licence to train in her own right and that this constituted discrimination on the basis of her marital status.
6. A delegate of the Commissioner accepted the complaint and, as required by s 70 of the Act, she notified the Respondent of the substance of the complaint by letter dated 13 December 1999.
7. The Commissioner's delegate proceeded to investigate the complaint. The Respondent responded to the complainant's allegations in a number of letters. The Respondent denied that they had the policy alleged by the

Complainant and denied that they had refused her a permit for the reasons she alleged.

8. On 25 January, while the complaint was still being investigated, the Respondent wrote to the Complainant as follows:

“Subsequent to the discussions held between yourself and the Club, I wish to advise (so that there are no misunderstandings) that you are free to make a fresh application for a restricted permit to train if you so desire.”

9. The Complainant made a fresh application for a permit and on 16.02.00 the committee of the Respondent decided to grant her a permit subject to three conditions.
10. The Complainant refused to accept the third condition stating that she believed it placed restrictions on her that were unfair and were over and above the requirements of a particular local rule which applied to all trainers.
11. The Respondent refused to withdraw the condition.
12. The Complainant then lodged a complaint of victimisation with the Anti-Discrimination Commission. She alleged that the third condition was imposed because she had made the first complaint to the Commission.
13. The victimisation complaint was likewise accepted by a delegate of the Commissioner and investigated.
14. At the conclusion of the investigation, the Commissioner’s delegate, Ms Jacqui Bourke, determined that there was *prima facie* evidence to substantiate both of the complaints made by the Complainant. On 26.05.00 she made a written report headed “FINDING ON COMPLETION OF INVESTIGATION”.

15. The report begins:

“I, Jacqui Bourke, Delegate of the Commissioner, in the matter wherein Susan Barton Johnson is the Complainant and Darwin Turf Club is the Respondent, have considered the material disclosed or created in the investigation into this matter and find:

**That I am satisfied that there is *prima facie* evidence to substantiate the allegation of discrimination on the basis of marital status and prohibited conduct on the basis of victimisation in the complaint.**

16. Ms Bourke then sets out the material she considered and the grounds upon which she reached that conclusion.

17. The report was sent to both the Complainant and the Respondent on 29 May 2000.

18. The matter was unable to be resolved by conciliation.

19. On 13 July 2000 the Complainant wrote to the Commission and requested that her “complaints against the Darwin Turf Club go directly to hearing”. On 8 August 2000 Ms Bourke, the delegate of the Commissioner advised the Complainant the matter would be referred to hearing and that the Registrar would contact her in due course. On the same day Ms Bourke advised the Respondent that the Complainant had requested the matter be referred to hearing, that the matter had been referred to hearing and that the Registrar would be in touch.

20. Notice of a Registrar’s Conference set down for 26 October 2000 were sent to the parties along with copies of a “Report under s.77 of the Anti Discrimination Act” on 6 October 2000.

21. The s. 77 report itself is very brief although it attaches the material referred to as material considered in the delegate's s.76 prima facie decision. The s. 77 report itself merely notes the identity of the parties that the basis of the complaint is "Section 19 – Discrimination on the grounds of marital status in the area of work and s. 23 Prohibition of Victimisation. It notes the date the complaint was lodged, the date it was accepted and the date of the *prima facie* decision. It also notes that the matter was referred to the Commissioner for hearing under s. 84 on 8 August 2000.
22. At the Registrar's Conference, held on 26 October 2000 directions were made by consent for the filing and service of Points of Claim by the Complainant and a Response by the Respondent.
23. The Complainant filed Points of Claim on 30 November 2000. The Points of Claim contained (inter alia) the following allegation:
  - “2. The Respondent is responsible for inter alia, the licensing of horse trainers in the Darwin region, and as such is a supplier of goods, services or facilities for the purposes of sections 20 and 41 of the *Anti-Discrimination Act (NT)*.”
24. The Respondent filed its Response on 15 December 2000. That Response contained (inter alia) the following:
  - “2. Admitted.”
25. Directions Hearings and Registrar's Conferences were held on 17 November 2000, 22 January 2001, 2 February 2001 and 15 February 2001.
26. By letter dated 7 February 2001, the Respondent advised as follows:
  - “I confirm that I wish to make an application that the complaint be discontinued under section 102 of the Act on the basis that it is misconceived.

In particular, the Respondent denies that it is the supplier of goods, services or facilities pursuant to Section 41 of the Act as alleged in paragraph 2 of the points of claim.”

27. On 15 March 2001 directions were made for the exchange of written submissions and the Respondent’s application under s 102 was set down for hearing on 9 April 2001.

28. On 2 March 2001, the Complainant filed amended Particulars of Claim. Paragraph 2 was amended as follows:

“2. The Respondent is responsible for inter alia, the licensing of horse trainers in the Darwin region, and as such has the power to grant, renew or extend a qualification or authorisation that is needed for, or facilitates the carrying out of a trade or business or alternatively is a supplier of goods, services or facilities for the purposes of sections 20 and 41 of the *Anti-Discrimination Act (NT)*.”

29. By letter dated 21 March 2001 the Respondent referred to the Amended Points of Claim and advised:

“In light of the amendments made, I confirm that the Club has resolved not to proceed with the application pursuant to section 102 of the Anti-Discrimination Act.”

30. At a directions hearing held on 28 March 2001, the hearing date for the application on 9 April 2001 was vacated and directions given for the exchange of draft agreed facts and documents and lists of witnesses.

31. A further Registrar’s conference was held on 23 August 2001. The Respondent was directed to file a Response and the matter was tentatively listed for hearing for three days commencing on 22 October 2001.

32. On 24 August 2001 the Respondent filed its Response to the Amended Points of Claim. The Response contained (inter alia) the following:

“2. The Respondent admits that it is a qualifying body and that it is responsible for, inter alia, the licensing of horse trainers in the Darwin

region but otherwise denies the contents of paragraph 2 of the Points of Claim.”

33. Further directions hearings were held on 13 September 2001 and 26 November 2001. The hearing dates in October were vacated and the matter re-listed for 3 days commencing on 5 December 2001 at 10.00 am.
34. In the mean time both parties filed and served affidavits, exchanged documents and agreed on a lengthy statement of agreed facts.
35. On 4 December 2001, the Respondent requested that the hearing begin at 9.00 am the following day to accommodate one of its witnesses who was travelling interstate at lunch-time on 5 December. I acceded to that request.
36. Less than half an hour before the requested starting time of 9.00 am, counsel for the Respondent gave notice to the solicitor for the complainant and to counsel assisting the Commissioner, that he would be submitting that the Commissioner lacked jurisdiction to conduct the hearing. During argument before me I noted, and I repeat here, my displeasure that in a matter that had been on foot for over a year with a party represented by a legal practitioner, an issue as fundamental as the jurisdictional point raised by counsel for the Respondent should be brought up at such a late hour.
37. I heard submissions from counsel for the Respondent, counsel for the Complainant and counsel assisting. On 5 December, I held that I did have jurisdiction and said that I would publish my reasons. Those reasons are as follow.

## The Respondent's Submissions

38. The Respondent has submitted that I lack jurisdiction to embark on a hearing of this matter. The submission is made on two alternative bases.
39. Firstly, it is submitted that the complaint did not disclose prohibited conduct and the Commissioner was therefore bound to reject it under s 67 (d) of the *Anti-Discrimination Act* ("the Act") and, conversely, could not accept it under s 66 of the Act.
40. Hence, it is submitted, the Commissioner had no power to conduct an investigation under s 74 (1) (b) of the Act; the delegate of the Commissioner could not have made the requisite finding under s 76 (1) (b) of the Act; there was no power to conduct a conciliation under s 78 and no power to conduct a hearing under s 83.
41. The Respondent says that the complaint alleged discrimination on the basis of marital status, but did not allege what was referred to in submissions as the third crucial element, namely that the discrimination occurred in one of the areas of activity specified in s 28 of the Act.
42. The alternative submission made by counsel for the Respondent was that, even if the complaint did disclose prohibited conduct, the finding of a *prima facie* case by the Commissioner's delegate is defective because it does not address the crucial third element of prohibited conduct under the Act.
43. The Respondent submits that a proper finding of a *prima facie* case is a pre-requisite to the power to conduct either a conciliation or a hearing.

## The Effect of s. 84

44. I should note here that in the instant case there can be no basis to this second submission. As noted above at paragraph 19 the hearing in this matter was called on pursuant to s. 84 of the Act.

Section 84 (1) provides:

### 84. REQUEST FOR HEARING AFTER 6 MONTHS

(1) If the Commissioner has not finished dealing with a complaint at the expiration of 6 months after accepting the complaint under section 66, either the complainant or the respondent may, in writing, request the Commissioner to conduct a hearing of the complaint.

In addition s. 84 (7) provides:

(7) Subject to subsection (2) [which is not relevant to the current discussion], if a request under subsection (1) is made by the complainant, the Commissioner shall conduct a hearing of the complaint.

45. The inter-relation of these provisions in s. 84 with s. 76 was considered by Bailey J in *Darwin Port Authority and Adey and Grieg v Anti-Discrimination Commissioner* [1999] NTSC 8 (at paragraphs 39-60). His Honour concludes (at paragraph 59):

*“I consider that s 84 (1) and s 84 (7) cannot be interpreted as being subject to s 76 of the Act. Accordingly, I consider there is no basis to order the defendant to determine whether there is prima facie*

*evidence to substantiate the allegation of prohibited conduct in the complaint, prior to proceeding to a hearing of the complaint.”*

46. As the issue of alleged deficiencies in the s. 76 *prima facie* decision of the Delegate Ms Bourke was argued by counsel before me I will consider this matter later in this decision. However, in light of the decision of Justice Bailey, I determine that if the complaint in this matter was in proper form and properly accepted, then I am bound to find that I have jurisdiction to hear the complaint by virtue of s 84 (1) and s 84 (7), irrespective of any such alleged deficiencies in the s. 76 decision.
47. It is appropriate therefore to turn to the issue of the validity of the complaint and its acceptance under s 66.

### **The Complaint and s. 66**

48. Counsel for the Respondent has not submitted that the activities of the Respondent in issuing permits to people to train horses does not in fact come within one of the areas of activity covered by the Act. Rather, the submission is that there is a defect in the form of the complaint.
49. I do not agree that there is such a defect. As is required by s 70 of the Act, the substance of the complaint was set out in the letter from the delegate of the Commissioner to the Respondent dated 13.12.99. That letter states:

“In summary the Complainant, Ms Barton Johnson is alleging that she was refused a restricted permit to train because of the policy of Darwin Turf Club to prevent 2 people in the same household holding a trainer’s licence and also because the Committee would not accept that she was applying for a licence to train in her own right and that this constituted discrimination on the basis of her marital status.”

Several pages of detailed allegations follow concerning what is alleged to have been said and done by various committee members and officers of

the Respondent in connection with the Complainant's application for a "Permit to Train".

50. Section 33 of the Act provides (to the extent relevant):

"33 (1) A person who has power to grant..... authorisation that ..... is needed for, or facilitates, the.... carrying on of a trade or business shall not discriminate –

- (a) in granting .... authorisation or failing to do so; or
- (b) in the terms on which .... authorisation is granted..."

(2) A person who has power to grant..... authorisation that ..... is needed for, or facilitates, the.... carrying on of a trade or business shall not discriminate against another person –

...

- (c) by treating the other person less favourably in any way in connection with the grant .... of ... authorisation."

51. Section 20 provides so far as is relevant:

"20 (1) For the purposes of this Act, discrimination includes –

- (a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity;

.....

in any area of activity referred to in Part 4.

(2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had , or is believed to have or had (sic) -

- (a) an attribute;
- (b) a characteristic imputed to appertain to an attribute; or
- (d) a characteristic imputed to appertain generally to persons with an attribute'

less favourably than a person who has not, or is believed not to have, such an attribute.

- 52. The attributes on the basis of which the Act prohibits discrimination are set out in s 19 of the Act. They include “marital status”.
- 53. Section 33 does not set out a separate prohibition outside of the main scheme of the Act prohibiting discrimination on the basis of an attribute in a relevant area of activity. It appears in Part 4 of the Act, referred to in s 20. The scheme of that Part is that *Division 1* (Section 28) sets out 6 broad areas of activities to which the Act applies. There follow 6 separate divisions (*Divisions 2 to 7*) which further elaborate on what constitutes discrimination in each of those 6 areas. Division 3, in which section 33 appears, deals with discrimination in the area of work. A contravention of s 33 amounts to discrimination on the basis of an attribute in the area of ‘work’.
- 54. The complaint made by the Complainant is that the Respondent refused to grant her a restricted permit to train because of the policy of Darwin Turf Club to prevent 2 people in the same household holding a trainer’s licence and also because the committee would not accept that she was applying for a licence to train in her own right and that this constituted discrimination

on the basis of her marital status. This contains all of the necessary elements to amount to an allegation of prohibited conduct. It alleges discrimination - ie exclusion or less favourable treatment - on the basis of an attribute – namely marital status - in connection with the grant/ refusal of an authorisation necessary for the conduct of (or which facilitates the conduct of) the business of a horse trainer – namely a “restricted permit to train”. If that allegation is made out on the facts, it would amount to prohibited conduct within the meaning of section 33.

55. Further, I consider that it is possible that the conduct alleged, if proven, may amount to a breach of s 41 of the Act which prohibits discrimination on the basis of an attribute in the provision of (inter alia) services and facilities. The Respondent at first admitted that it was a supplier of “goods, service or facilities” within the meaning of s 41 and later denied it. It elected not to proceed with a section 102 application based on the assertion that it was not such a provider. In those circumstances, I consider the question of whether or not the Respondent is a provider of goods services or facilities to be a matter for evidence at the hearing.
56. It cannot be said, therefore, that there is no complaint on foot within the meaning of the Act, or that the Commissioner was obliged by s 67 of the Act not to accept the complaint. In *Fiorido v Anti-Discrimination Commissioner & Northern Territory of Australia* (Unreported, NT Local Court, 15 May 2001, Trigg SM), Mr Trigg SM held (at p. 5) that the threshold test for acceptance of a complaint under s 66 is “a very basic screening process”.<sup>1</sup>
57. In his written outline of submissions, counsel for the Respondent submitted: “Unless the complaint specified an area of ‘work’ activity, as described in the Act, the complaint did not properly allege ‘prohibited conduct’ under the Act.” [emphasis added]

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<sup>1</sup> His Worship goes on to draw an analogy with s. 63 of the *Native Title Act 1993* (Cth.) as considered by French J in *re Waanyi Peoples Native Title Application* (1994) 129 ALR 100 at 111-113.

58. I do not accept that this is the correct test to apply. Section 64 sets out the requirements for the form of a complaint. So far as is relevant, it provides that the complaint must be in writing, and must set out in detail the alleged prohibited conduct. That is to say, the Complainant must say what the Respondent has done – ie must set out the material facts which, if proven, would amount to prohibited conduct. There is no requirement for the Complainant to set out the provisions of the Act which the Complainant believes the Respondent has contravened. Nor is there any requirement for the Complainant to analyse the Respondent’s conduct in terms of “prohibited conduct”, “attribute” or “relevant area of activity”. Indeed, many of the people whom the Act is arguably most designed to protect may be quite unable to do so and may nevertheless state in the complaint what they say the Respondent has done wrong in terms which satisfy the requirements of s 64.

59. I believe this interpretation accords with that of Martin CJ in *Dew v Anti-Discrimination Commissioner* (1996) 130 FLR 1 where his Honour states:

*“ It may be expected that many of the persons who seek the remedies available under the Act will come from disadvantaged backgrounds, and partly for that reason are prone to be discriminated against...”*

His Honour goes on to note:

*“If the Complaint is in accordance with the requirements of the Act and the substance of it conveyed to the respondent, which is all that is required, the occasion for seeking further detailed particulars should rarely arise.”* (at pp 28-29 unreported version).

60. If a complaint in fact discloses allegations of conduct which, if proven, would amount to prohibited conduct within the meaning of the Act, it is appropriate for the complaint to be accepted. The present complaint does

so and I therefore conclude that it was properly accepted pursuant to s 66 of the Act.

### **The s. 76 Decision**

61. The alternative submission made by the Respondent is that a proper finding of a *prima facie* case is a pre-requisite to the power to conduct either a conciliation or a hearing and that the finding of a *prima facie* case by the Commissioner's delegate is defective because it does not address the crucial third element of prohibited conduct under the Act. I have already noted that as this is a matter referred to hearing pursuant to s. 84 of the Act that I do not believe there can be any foundation to this submission in the present case. However, as the matter was argued before me and clarification of the issue may assist in determining the requirements of procedure under the Act I will now turn to consider these submissions.
62. Counsel for the Respondent said in written submissions: "the third element of prohibited conduct is not included as part of [the delegate's] analysis. There is a single passing suggestion in [the delegate's] report that the complaint might have involved the area of activity of 'work': see page 8. This single passing reference is not expressly elaborated upon elsewhere in the report."
63. I do not accept that the finding of the delegate is defective in the manner suggested.
64. Section 76 of the Act sets out what the Commissioner (or his delegate) is required to do on completing an investigation. He must determine that the complaint is dismissed [76 (1) (a)] or, "if satisfied that there is *prima facie* evidence to substantiate the allegation of prohibited conduct in the complaint" – proceed to conciliation or a hearing [76 (1) (b)].
65. Section 77 provides that the Commissioner may [not must] prepare a report relating to the investigation of a complaint.

66. There is no requirement to produce a report at all; no requirement to prepare a report which analyses all of the elements of the prohibited conduct and no requirement to “expressly elaborate upon” the area of activity which the complaint relates to<sup>2</sup>. The only prerequisite for proceeding to a conciliation or hearing is that the Commissioner [or delegate] be “satisfied that there is *prima facie* evidence to substantiate the allegation of prohibited conduct in the complaint”.
67. If there were any inadequacies in the format of the report produced by the delegate, these could not impinge upon the Commissioner’s jurisdiction.
68. The Respondent’s submission must therefore amount to this. The delegate cannot have been satisfied that there was *prima facie* evidence to substantiate the allegation of prohibited conduct in the complaint because she did not turn her mind to the question of whether the alleged discrimination occurred in one of the relevant areas of activity set out in the Act.
69. However, such a submission is not borne out by an examination of the delegate’s report. In the report which was prepared by the Commissioner’s delegate, Ms Bourke, in this matter, she addresses the complaint actually made throughout.

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<sup>2</sup> In relation to a decision under s. 76, I should note that the delegate may be required to provide reasons for their decision to dismiss a complaint pursuant to s. 76 (a) by virtue of the provisions 106 (2) (b) if there is an appeal against the decision to dismiss the complaint. However, Mr Trigg SM in *Malaysian Airline Systems v Anti-Discrimination Commissioner & Jude Lee* (Unreported, NT Local Court, 20 April 1999) determined that there is no appeal under s. 106 against a decision that there is *prima facie* evidence to support the allegations of prohibited conduct in the complaint per s. 76 (b) and thus there can be no requirement to provide reasons for such a decision under s. 106. At p. 92 of (the transcript of) that decision his Worship states:

“So a determination under s. 76 is not according to Bailey J, a necessary step in the chain before one gets to a hearing. That being so I do not see that a decision therefore under s. 76 is of such crucial importance that it could be, or would be, intended to be itself the subject of a full appeal de novo under s.106.”

Mr Trigg’s reference to Bailey J in that passage is reference to the decision of Bailey J in *Darwin Port Authority & Adey & Greig v Anti-Discrimination Commission* [1999] NTSC 8 referred to *supra*.

70. The Complainant has alleged that the Respondent discriminated against her on the basis of an attribute – namely marital status - in connection with the grant/ refusal of an authorisation necessary to conduct the business of trainer – namely a permit to train race horses. If that allegation is made out on the facts, it would amount to prohibited conduct within the meaning of section 33 (and possibly s 41).

71. The Commissioner’s delegate determined that there was prima facie evidence to substantiate that complaint. The substance of the complaint is set out on page 4 under the heading “Background”.

“The Complainant, alleges that she was discriminated (sic) on the basis of marital status and that she was victimised by the respondents. She says that she was refused a restricted permit to train because of the policy of Darwin Turf Club (hereafter DTC) to prevent 2 people in the same household holding a trainer’s licence and also because the committee would not accept that she was applying for a license to train in her own right and that this constituted discrimination on the basis of her marital status.”

72. The report then deals with the history of the complaints and the investigation (and an early attempt at conciliation). It then goes on to set out the test to be applied in order to find that there is *prima facie* evidence of prohibited conduct (p 7) and the definition of discrimination (p8).

73. Ms Bourke sets out the definition of discrimination in s 20 in full, including the requirement that the discrimination occur in an area of activity referred to in Part 4. She also adds the words (*which includes work*) in italics after that requirement with a note at the bottom of the page “The italicised words are mine”. In light of this it is difficult to see how it could be said that the delegate did not address the question of whether the alleged discrimination occurred in one of the relevant areas of activity set out in the Act, and that therefore the delegate cannot have been satisfied that there was *prima facie* evidence to substantiate the allegation of prohibited conduct in the complaint.

74. There follow, throughout the report, references that make it clear that the delegate is considering whether there is *prima facie* evidence of discrimination by the DTC in the granting of an authorisation needed for (or which facilitates) the carrying on of the business of a trainer – ie a permit to train.
75. On page 9 Ms Bourke refers to direct and indirect discrimination and says, “The allegations associated with direct discrimination concern a policy that the DTC will not issue licenses to train horses to 2 members of the same household.” On the same page she says: “The complainant says that she told the licence sub-committee that she would feel discriminated against if her domestic arrangements were considered in conjunction with her licence application”.
76. On page 10 Ms Bourke says: “It would appear to me that people seeking a licence to train horses from DTC would be more likely to be adults and as such live in a household which would more likely than not contain individuals who would be living in relationships that would be defined as marital status for the purposes of the Act ....”
77. On page 11 the delegate concludes: “It would appear to me that on the balance of probabilities the Licensing sub-committee, at least in part, used this policy/ practice when making its decision and that as a result it indirectly discriminated against Ms Barton Johnson on the basis of her marital status and that the complainant has suffered less favourable treatment by being refused a permit to train.”
78. On the same page Ms Bourke goes on to define the question in relation to direct discrimination in the following way: “The next question involves direct discrimination. Did the DTC make its decision not to grant a permit to train on discriminatory grounds?” She goes on to consider this and to decide, on p 16, that there is *prima facie* evidence of this. Throughout her discussion of the issues it is clear that the discrimination alleged and being

considered is discrimination on the basis of an attribute (marital status) in connection with the grant of a permit to train.

79. In summary, I consider that the complaint does allege conduct which amounts to prohibited conduct under the Act and that, at the conclusion of the investigation, the delegate was satisfied that there was *prima facie* evidence to substantiate the prohibited conduct which was alleged in that complaint.
80. The delegate was not obliged to set out in a report every step in the chain of reasoning that led her to that conclusion – or indeed prepare a report at all. It cannot be concluded from the report that Ms Bourke did prepare that she addressed only the question of whether there had been discrimination on the basis of an attribute and ignored the third crucial element, namely that the discrimination occurred in one of the areas of activity specified in s 28 of the Act. Quite the contrary, the report makes it clear throughout that she was considering whether there was evidence of the complaint that had actually been made, and that complaint contained allegations of conduct which, if proven, would have been in breach of s 33 of the Act and which, accordingly, would amount to discrimination in the area of work. [See also the comments at 55 above in relation to s 41.]

## **Conclusion**

81. For these reasons I hold that I do have jurisdiction to proceed to a hearing of the compliant.
82. Because of the conclusions I have reached, it is not necessary for me to deal with the question of whether the Respondent was correct in submitting, as it did, that if the complaint did not disclose prohibited conduct the Commissioner had no power to conduct an investigation; the delegate of the Commissioner could not have made the requisite finding under s 76 (1) (b) of the Act; there was no power to conduct a conciliation under s 78 and no power to conduct a hearing under s 83.

83. However, I note that s 74 (2) allows the Commissioner to carry out an investigation if it appears to the Commissioner in the course of carrying out his functions that prohibited conduct has occurred and that, by subsection 74 (3), such an investigation shall, for the purposes of the Act, be deemed to be an investigation of a complaint. I also note that s 83 (c) allows the Commissioner to hold a hearing where he believes that the nature of the complaint is such that it should be dealt with by a hearing.
84. Arguably, section 74 (2) would mean that the Commissioner had jurisdiction to proceed to a hearing where an investigation revealed prohibited conduct even if there had been a defect in the original complaint.
85. Arguably, also, s 83 (c) would allow the Commissioner to proceed to a hearing where there had been a valid complaint, even if the Commissioner's delegate had not formed the requisite opinion under s 76 (1) (b).

Tom Stodulka  
Anti-Discrimination Commissioner

7 December 2001