The effectiveness of discrimination legislation is judged to a large extent on whether there is compliance with orders made. Despite the Government's commitment to introduce new measures appropriate to a human rights jurisdiction, reverting to the old enforcement mechanisms provides little incentive for those complained against to conciliate or settle complaints. Worse still, complainants who have substantiated their complaint before the Human Rights and Equal Opportunity Commission, will have to duplicate the process in costly proceedings in the Federal Court to enforce the decision.

While the *Brandy* decision may have resulted in unpalatable interim arrangements, it has allowed for a some considered participation in law making by those best placed to advise — the clients or users of the legislation and their advocates. The consultations with the Attorney-General's Office have triggered discussions beyond the enforcement question, covering issues such as:

the most appropriate jurisdiction for the determination of human rights matters and the possible establishment of a Human Rights Court;

the qualifications and expertise of adjudicators;

the extent to which legal representation of parties impedes the resolution of complaints;

a right of appearance by non-legal advocates for complainants;

the making of costs orders, particularly where the Commission has determined a complaint substantiated.

It is timely to reconsider the broad implications of 'anti-discrimination legislation . . . designed for the weak' but operating only for survival by the strongest (Associate Professor Phillip Tahmindjis).

Andrea Durbach is Assistant Director of the Public Interest Advocacy Centre, Sydney.

LITIGATION

Class actions get go ahead

AMANDA CORNWALL reports that class actions will be allowed in much wider circumstances in State courts following a February decision of the High Court.

In *Carnie v Esanda Finance Company Ltd* 127 ALR 76, the High Court gave a unanimous decision favouring class actions, giving a wide interpretation to Rule 13(1) of the NSW Supreme Court Rules. Of particular importance was the meaning given to the term 'same interest'. The decision makes it clear that representative proceedings can now proceed even where members of the class have separate contracts with the defendant and where damages are sought.

The case has inspired public interest lawyers around Australia because it affects the interpretation of class actions procedures in all States. Similar, though more detailed, rules exist in other States, which have been interpreted narrowly by cautious State Supreme Courts.

In his reasoning Judge McHugh said:

> The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be done efficiently or effectively on their behalf by one person with the same community of interest as other consumers. Nor should the court's list be cluttered by numerous actions when one action can effectively determine the rights of many.

Mr and Mrs Carnie, farmers in New South Wales, can now bring proceedings against Esanda Finance Corporation on a representative basis, under the New South Wales Supreme Court rules. They will be acting on behalf of other consumers who entered into the same loan contracts with Esanda and were similarly affected, known as the 'class'.

Coalition for class actions

Inspired by the High Court's support for class actions, the Public Interest Advocacy Centre have teamed up with Consumer Credit Legal Centre and other groups in New South Wales to form the Coalition for Class Actions. The Coalition is concerned that the benefits of the High Court decision will be thwarted by a conservative approach to interpreting the rules by the superior courts of New South Wales.

When the Carnies appeared before the NSW Court of Appeal in 1992 the majority of the Court said that if class actions are to operate in NSW as they do in the Federal Court, there should be legislative direction.[1] The Supreme Court rules they said, were inadequate for that purpose as they do not deal with issues such as service, notice, whether people can opt in or out of the class, the conduct of proceedings, and discontinuance or settlement.

The Coalition is based on the national Coalition for Class Actions which successfully lobbied the Commonwealth Government to introduce legislative procedures for class actions in the Federal Court in 1992. Arguments for enhanced representative proceedings class actions were convincingly argued at the time in a number of reports prepared for the Government. These included two reports prepared by the Coalition for Class Actions, in 1990 and 1991, and a report by the Australian Law Reform Commission *Grouped Proceedings in the Federal Court* in 1988.

The Federal Court Model

The class actions procedures in the Federal Court have proven to be fair and effective since they came into force in 1993. There has not been a flood of unreasonable claims by nuisance consumers as predicted by its opponents in 1992.

The Coalition for Class Actions wants to see the class actions provisions in Part IVA of the *Federal Court Act* introduced for superior courts in New South Wales. They believe it would:

- provide legislative direction, and certainty on procedural issues;
- accommodate related legislative issues, such as limitations periods, which could not be covered in Court Rules;

provide consistency with the Federal Court, facilitating cross vesting; and

avoid the current opportunities for forum shopping.

One important amendment to the Part IVA model is advocated by the Coalition — a provision for appropriate mecha-

nisms for distribution of unclaimed funds. These are known as *cy pres* orders, meaning 'as near as possible'. The absence of such a provision in the *Federal Court Act* means that unclaimed moneys stay with the defendant.

The Coalition believes unclaimed moneys should be to be distributed in a variety of ways, other than requiring individual members of a class to be identified and claim a share of the award. Australian examples of the types of arrangements that can be made in cy pres orders are found in some creative settlements in the consumer credit area.

Consumer Credit Legal Service (CCLS) in Victoria took on HFC Financial Services in 1987 for engaging in practices which were found by the Credit Licensing Authority, to be 'dishonest, unfair and to the serious detriment of its borrowers'. As the affected borrowers were hard to find, the Authority agreed to a settlement proposed by HFC, the Director of Consumer Affairs and CCLS, that HFC pay $2.25 million to a consumer fund. Some of the money was claimed by HFC borrowers but most has been used to establish the Consumer Law Centre Victoria. Similar cases against Westpac resulted in the creation of a Credit Information hotline in Victoria and a consumer research and information trust in New South Wales.

Reform for tribunals

The focus of the Coalition is not limited to reform of class actions in NSW superior courts. It is also seeking reforms to the class actions provisions in New South Wales tribunals.

Grouped proceedings provisions under New South Wales anti-discrimination law, which are the same as those in Commonwealth sex and race discrimination laws, have proven problematic in a number of ways. While the more recent provisions in the *Disability Discrimination Act 1993* (Cth) are an improvement, the Coalition would like to see further refinements and integration with the Federal Court procedures.

Encouraging class actions

The Coalition plans to have an ongoing educational role, providing information and analysis of class actions proceedings in Australia. To start the process, the Coalition will publish a review of the operation of class actions proceedings in the Federal Court, New South Wales and State and Commonwealth discrimination jurisdictions later this year.

If you wish to be involved in the Coalition contact Amanda Cornwall at Public Interest Advocacy Centre on tel (02) 299 7833 or fax (02) 299 7855.

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YOUTH

Has anybody listened to 'Nobody Listens'?

JENNY BARGEN discusses the response to a report on young people and police in NSW.

In the December 1994 issue of the *Alternative Law Journal* one of the Notices drew readers' attention to the release of a new report, *Nobody Listens*. The report was researched and written by the New South Wales Youth Justice Coalition (YJC), in association with the NSW Youth Action and Policy Association (YAPA). The findings in the report were based on the responses to a questionnaire completed by 140 young people from ten metropolitan and seven regional agencies (refuges/accomodation services, streetworker facilities, community centres, legal centres and youth centres) about their experiences with the police: on the street, in the police station and elsewhere; and on their knowledge and use of formal complaints mechanisms.

Nobody Listens paints a dismal picture of the relationships between police and the young people who completed the questionnaire. Harrassment, assault, and strip searches were found to be almost everyday occurrences for some young people. A pattern of differential policing emerged — the young people most often harrassed, assaulted and searched were those who were from Asian or Aboriginal families. It was clear that police treated young people who were visibly different more harshly than those who conformed to a stereotype of the 'normal' young person held by some police.

The picture is similar to that found in Queensland, Tasmania, Victoria and Western Australia by Alder and others in 1992.[1] Their research was extensive and, indeed, methodologically more reliable, than that carried out for *Nobody Listens*, and included a review of legislation and legal policies touching police powers with respect to young people in those four States. In addition to surveying young people's perceptions of the police, Alder *et al.* surveyed police officers, lawyers and legal centres. They were, therefore, able to obtain a multi-dimensional perspective on the ways in which police and juveniles interact.

Nobody Listens repeated the recommendations in *Kids in Justice* that any policy on policing young people should be a public document, prepared through the process of consultation between police, young people and youth welfare and legal workers; that a comprehensive range of accountability mechanisims for police in the policing of young people should be implemented; and that a well-resourced, accessible and independent complaints mechanism such as a Children's Ombudsman should be established. *Nobody Listens* also recommended that Police Youth Liaison Officer positions be established in every patrol, with clear responsibilities towards young people and their 'community', as well as to the police service, for the policing of young people.