JUDGEMENT

EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 14 of 1990

An Electorate Officer
(Name suppressed)
Complainant

- against -

A Research Officer
(Name suppressed)
Respondent

BEFORE: Mr N P Hasluck QC (President)
Ms P Harris (Member)
Ms L Newby (Deputy Member)

Counsel for the Complainant — Dr S. C. Churches
Counsel for the Respondent — Mr B. Singleton
Mr R. Nash

HEARD: 13/9/90, 8/10/90, 7/12/90
1/3/91, 3/5/91.

REASON FOR JUDGEMENT

(Delivered: 13 June 1991)

JUDGEMENT

By letter dated 7 May 1990 the Complainant made a complaint to the Commissioner for Equal Opportunity alleging sexual harassment in employment contrary to Section 24(1) of the Equal Opportunity Act 1984 ("the Act"). The sexual harassment was alleged to have taken place between August and November 1989 while the Complainant was employed as an Electorate Officer working for the Hon. K. Hallahan, MLC, Member for East Metropolitan Region. The Complaint was brought against a Research Officer who was working for the Hon. Mr R. Pearce, MLA, Member for Armadale. The two members of parliament shared office space at Shop 13, Tudor Arcade, 205 Jull Street, Armadale ("the electoral office premises").

The Complainant relied upon Section 24(1)(b) of the Act which provides that it is unlawful for a person to harass sexually an employee of a person by whom the first mentioned person is employed. For the Complainant to make out a case of unlawful sexual harassment contrary to that provision it would be necessary to establish that she and the Respondent were employed by the same person. The Commissioner investigated the complaint and formed a view that the Complainant was employed as an Electorate Officer by the Joint House Committee of the Parliament of Western Australia ("the Joint House Committee"), while the Respondent was a public servant employed under the Public Service Act 1978 in a department of the public service. The Commissioner therefore dismissed the complaint pursuant to Section 89 of the Act on the grounds that the parties did not have a common employer and accordingly the complaint was misconceived. The Commissioner advised the Complainant that she was entitled to have

the complaint referred to the Tribunal, and the Complainant acted on that advice.

The Tribunal generally proceeds on the basis that inquiries shall be held in public in the manner envisaged by Section 121(1) of the Act and shall be subject to public scrutiny in the manner normally applicable to the proceedings of Courts and Tribunals within the legal system. However, in a case such as this, where a serious allegation had been made bearing directly upon the personal reputation of the Research Officer, and where it was apparent at the outset that the matter might not proceed beyond a determination of the preliminary issue dealt with below, the Tribunal made orders at the first Directions Hearings and on all subsequent occasions, including the delivery of these reasons, that pursuant to the powers vested in the Tribunal by Sections 121 and 122 of the Act any evidence given before it, the contents of any document produced to the Tribunal or any information that might enable a party who has appeared before the Tribunal to be identified, shall not be published. That ruling remains in force for the time being.

The Tribunal also gave directions at an early stage that the issues raised by the complaint should be defined by Points of Claim filed on behalf of the Complainant and by an Answer filed on behalf of the Respondent. Both parties accepted that the question of whether the parties had a common employer should be dealt with as a preliminary issue. Owing to the complexity of the preliminary issue a number of amendments to the Points of Claim were effected and, so as to avert any misunderstanding in that regard, the Tribunal will briefly describe the procedural history of this matter.

On 26 September 1990, Points of Claim were filed on behalf of the Complainant

describing the employment of the parties in general terms but referring principally to the facts and matters allegedly constituting the sexual harassment. At a Directions Hearing on 8 October 1990 Counsel for the Complainant foreshadowed an application to join the Crown, or possibly the Department of Transport, as a Second Respondent on the grounds that the body to be joined might arguably be liable pursuant to provisions of the Act concerning vicarious liability, being principally Sections 161 to 163 inclusive. Counsel for the Complainant was directed to file revised Points of Claim reflecting the connection between the proposed Second Respondent and the matters in issue. The fresh Points of Claim, containing reference to the Joint House Committee and to the Respondent's employment by the Department of Transport, were filed on 23 October 1990.

On 8 November 1990 an Answer to the revised Points of Claim was filed on behalf of the Respondent. The Answer denied that the parties had a common employer In addition to denying the central allegation of sexual harassment the Respondent's answer went on to say that if the Tribunal found that the Complainant and the Respondent were both employed by a common employer then an order should be made returning the complaint to the Commissioner for the purpose of conciliation as envisaged by the Act, because this would have been the procedure had the Commissioner formed a view that she did have jurisdiction to deal with the matter.

On 13 November 1990, the Complainant filed fresh Points of Claim reflecting the contents of 23 October 1990 document but adding the State of Western Australia as Second Respondent. At a further Directions Hearing on 7 December 1990, Counsel for the Complainant applied to join the State of Western Australia. That application was

resisted by Mr J. D. Allanson who appeared for the State Crown Solicitor. During the course of discussion it emerged that no relief was being sought against the proposed Second Respondent and it was also noted that the Complainant might be confronted with difficulties in complying with provisions of the Crown Suits Act 1947 in regard to the giving of notice prior to commencement of proceedings. Counsel appearing for the State Crown Solicitor submitted that it was not necessary for the Crown or for the State or for any Government instrumentality such as the Department of Transport to be joined as a party or to be heard in order for the preliminary issue to be determined. Against that background Counsel for the Complainant withdrew his application to join a Second Respondent and it was then resolved that the parties would proceed to a hearing of the preliminary issue on the basis of the Points of Claim filed on 23 October 1990 and the Answer filed by the Respondent on 8 November 1990. Counsel for the State Crown Solicitor indicated that the Crown Solicitor and the Government did not wish to intervene or play any further part in the proceedings.

The preliminary issue came before the Tribunal on 1 March 1991 and during the course of the hearing Counsel for the Complainant sought and obtained leave to amend the Points of Claim filed on 23 October 1990. He undertook to file a clean copy. The amendments consisted mainly of deletions of various paragraphs from the Points of Claim with the result that the Respondent's Answer remained applicable. No amendment to the Respondent's answer was made, and in due course a clean copy of the Points of Claim, reflecting the amendments allowed on 1 March 1991, was filed on 10 May 1991. It follows that the pleadings comprise the Points of Claim filed on 10 May 1991 and the Respondent's answer of 8 November 1990. The Tribunal will call the Points of Claim

filed on 10 May 1991 (corresponding essentially to the Points of Claim filed on 23 October 1990 after deletion of part of paragraph 10, paragraphs 11 to 15 and with a reconstitution of paragraph 16) "The Points of Claim". The Respondent's Answer filed on 8 November 1990 will be called "The Respondent's Answer".

The Tribunal will return to the pleadings in more detail in a moment. At this stage it is convenient to note that the Complainant's case proceeds from the premise that the Complainant was an Electorate Officer and that, according to paragraph 16 of the Points of Claim *"Electorate Officers are employed by persons themselves employed by the State of Western Australia, and are employed by the State in the business of Government and both Complainant and Respondent are persons employed on that basis"*. In short, unlike an earlier version of the Points of Claim, it was no longer suggested that the Complainant and the Respondent were persons employed by the Crown in right of Western Australia. It is pleaded that they were both employees of the State of Western Australia.

At the hearing of the preliminary issue the Tribunal received evidence from the Complainant, from Evelyn Mavis Mann and from the Respondent. Various documents were also tendered including Standing Orders of the Legislative Assembly and Legislative Council and a copy of an order made by the Industrial Relations Commission applicable to Electorate Officers.

The evidence established that as at 8 September 1988, Kay Hallahan was a member of the Legislative Council, one of the two chambers forming part of the Parliament of Western

Australia, and being, more particularly, the Member for the South-East Metropolitan Region. She was also Minister for Community Services; The Family; Youth; The Aged; Minister assisting the Minister for Women's Interests; and Deputy Leader of the Government in the Legislative Council. At that time the Honourable Bob Pearce was a Member of the Legislative Assembly for the Electorate of Armadale the boundaries of which lie within the South-East Metropolitan Region. He was also Minister for Transport and for the Environment. Both members of Parliament employed Electorate Officers at the electoral office premises which was situated within both electorates.

Section 2 of the Constitution Act 1889 provides that the Parliament of Western Australia consists of the Queen and the Legislative Council and the Legislative Assembly. By Section 34 Standing Rules and Orders, joint as well as otherwise, shall be made for the orderly conduct of business. By Section 36 it shall be lawful for the Legislature *"by any Act"* to define the privileges, immunities and powers of the two Houses, *"provided that no such privileges, immunities and powers shall exceed those for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof"*.

Chapter 30 of the Standing Orders of the Legislative Assembly deals with Standing Committees. Clause 405 states that a House Committee, to consist of the Speaker and four other members to be chosen as the House may direct, shall be appointed at the commencement of each session with power to act during the recess, and with power to confer with the House Committee of the Council.

Clause 1 of the Joint Standing Rules and Orders of the Legislative Council and

Legislative Assembly provides that at the commencement of every session there shall be appointed by each House a number of Standing Committee's including a House Committee. The President, and the Speaker, respectively, shall be *ex officio* a member of each Committee. Clause 2 provides that the House Committee shall consist of four members of each House, in addition to the *ex officio* member.

Clause 38 of the Standing Orders of the Legislative Council provides that at the commencement of each session the Council shall elect four members to serve on the House Committee as a Standing Committee with the President to be an *ex officio* member of that Committee. By Clause 38(c) the House Committee shall have power to act during recess, and to confer with the like Committee of the Assembly, and shall continue in office until the opening day of the next session, and every member shall continue to act notwithstanding he has retired by effluxion of time and been re-elected, but no member shall continue to act after he has ceased to be a member of the House.

Section 37 of the Industrial Relations Act 1979 provides that an award binds all employees employed in the industry to which the award applies and all employers employing those employees. By Section 38 the parties to proceedings in which an award is made shall be listed in the award. The term *"employer"* includes the crown *"or any public authority"* employing one or more employees. Division 4 deals with the registration of unions and associations. By Section 60, upon registration an organisation shall become and be *"for the purposes of this Act"* a body corporate capable of suing and being sued. Later provisions of the Act deal with specialised Tribunals including Public Service Arbitrators and this Tribunal will return to those provisions later.

An order made by the Industrial Relations Commission on 1 May 1987 in proceedings between the Civil Services Association of Western Australia as Applicant and the Joint House Committee as Respondent gives force to an award to be known as the Electorate Officers' Award 1986. The term *"employer"* is defined to mean the Joint House Committee. An Electorate Officer means *"a person who provides personal assistance involving a wide range of duties to a Member of Parliament as part of the Member's responsibility to his/her constituency, and shall include assistants to the secretaries to parliamentary parties"*. The Award prescribes salary levels and deals with a number of familiar matters such as leave and continuity of service. Clause 12 provides that subject to the provisions of the Award the following Agreement and Award and any amendments thereto or replacements thereof shall be deemed to have been made between the parties to this Award and shall apply *mutatis mutandis*:

1. *Public Service Miscellaneous Allowances Award 1982;*
2. *Public Service Allowances (District) Agreement 1973.*

In early September 1988, when it became known that Kay Hallahan's existing Electorate Officer was to leave the position. Kay Hallahan interviewed the Complainant, a woman born on 27 February 1962. Soon after the interview the Complainant was told she had the position and could start on Tuesday 8 September 1988. On that day she completed and signed an *"Application for Position of Electorate Officer"* directed to the Personnel Services Branch of the Department of the Premier and Cabinet. The form was signed by both the Complainant and by Kay Hallahan as the Member of Parliament. The form bears a notation

" *For Office Use Only*":

Recommended for approval ...
Department of Premier and Cabinet
Approved/Not Approved ...
Chairman Joint House Committee

The form suggests that final approval of the appointment rests with the Chairman of the Joint House Committee even though the Personnel Services Branch of the Department of Premier and Cabinet has a role to play in assessing the application. The outgoing Electorate Officer, submitted the form to the Human Resources Section of the Department of Premier and Cabinet under cover of a letter dated 9 September 1988 stating that the Complainant had commenced work and that she, the outgoing officer, had *"Continued working at Kay Hallahan's electorate office until today, Friday 9 September 1988, at Mrs Hallahan's request"*. Sample copies of the Complainant's payslip were also put in evidence and on those payslips the paypoint is described as *"Treasury Department"*. The governmental department is described as *"Electorate Offices"* and the branch is referred to as *"Electorate Officers"*. These documents paved the way for a submission made in the course of argument that the employer, as indicated by the Electorate Officers' Award, was the Joint House Committee even though, for administrative convenience, the processing of documents and the payment of salaries, was handled by the Department of Premier and Cabinet.

On a day to day basis, the Complainant acted on directions from Kay Hallahan. The Complainant said that as an Electorate Officer she was required to type letters, do mail outs to constituents, deal with constituent inquiries as constituents came into the office,

help them with their problems, make telephone calls, organise morning teas, attend seminars, file and attend to the telephone.

On 4 January 1989 Evelyn Mavis Mann commenced work at the electoral office premises as an Electorate Officer assisting Mr Pearce. A sketch plan showing the physical layout of the office premises was put in evidence and that indicated that there was a rough division of office furniture and equipment. For example, each member of parliament had a separate photocopier, although both the photocopiers were positioned together, and if one broke down it was certainly in order to use the other photocopier. A facsimile and shredder was used by both offices and there seems to have been a general sharing of facilities.

The Tribunal now turns to the position of the Respondent. He said in evidence that he joined Telecom, the Commonwealth instrumentality, in 1985. He went on secondment from Telecom to Senator Peter Cook. Mr Pearce approached him while he was employed by Senator Cook, and offered him the position of Research Officer in September 1988. He received a letter from the Public Service Commission saying that he was being employed as a public servant. The letter in question was not produced in evidence but, without objection, a letter to Mr Pearce dated 30 January 1991 from the Public Service Commission was put in evidence to which was attached a copy of the standard form letter used concerning Ministerial office staff at the time of the Respondent's appointment. The Respondent also tendered a copy of the Premier's circular to Ministers of 5 March 1986 concerning the approved structure and arrangements for filling the positions of Ministerial office staff. The letter states:

> *" Your appointment as an officer is made pursuant to the provisions of Section 30(10)(a) of the Public Service Act, 1978, and is subject to the provisions of that Act ... nothing in this letter shall confer permanent or temporary officer status within the meaning of the Public Service Act, 1978, upon you and no part of your service under this letter shall count for the purpose of Section 32 of the Public Service Act, 1978. "*

The letter goes on to say that, following confirmation of acceptance of employment, the employment may be terminated at any time by either of the parties giving to the other one week's notice in writing to that effect, provided however that the Public Service Commissioner in his discretion may terminate the employment at any time by paying the employee that salary in lieu of the said one week's written notice.

It appears from the document just mentioned that the Respondent's employer was the Public Service Commissioner and this is borne out by provisions of the Public Service Act. Section 14 of that Act provides the functions of the Commissioner are to promote and maintain effective, efficient and economic management and operation of the public service of the State. He is empowered to do all things he or she considers necessary, expedient, or desirable to discharge that function. By Section 14(3)(c) he has exclusive authority to appoint, transfer, or promote officers. Section 20 provides that the Public Service shall be constituted by departments and sub-departments. Section 30(1) provides that without limiting the generality of the powers of the Commissioner as provided by Section 14(2) the Commissioner may appoint persons as officers on a full-time, part-time or casual basis and determine the terms and conditions of employment, including rates of remuneration, of such persons either generally or in a particular case. Section 32 deals with applications by temporary officers to become permanent officers.

The Respondent said in evidence that when he commenced working for Mr Pearce he was paid by the Department of Transport on the basis that *"That Department was his (Mr Pearce's) prime or principal portfolio, and they in fact were his service department, or paymaster, for his staff"*. The Respondent said that he never carried out any work directly as an officer of the Department of Transport, never received any direction from any person engaged by that department, never spent any time at their premises and took all his directions from Mr Pearce direct. The department was simply his paymaster. When asked about his duties as a Research Officer he said that it involved background research into matters that might arise in two areas concerning Mr Pearce's dual ministerial responsibilities as Minister for Transport and Minister for the Environment and matters that arose on those subjects out of Mr Pearce's electorate office. He said that in carrying out his work he was located mainly in the Ministerial office but he was always in the electorate when Mr Pearce was in the electorate, and on those occasions would work out of the electoral office premises. On the days when the Respondent attended the electoral office premises he would try and get there before Mr Pearce and then sit in on all meetings and appointments. He would often go to parts of the electorates with the Minister to look at particular problems such as sub-divisions or things that Mr Pearce had to view as the local member. After Mr Pearce left, the Respondent would stay on at the electoral office premises to finalise and process outstanding appointments.

He was asked whether there were occasions when he would request the Complainant to undertake particular tasks associated with her work, or Mr Pearce's work, and he conceded that things were done jointly. *"Being a shared office it was a combined, team*

effort". He said that things like morning teas or Ministerial visits were things that were prepared with *"input"* from both sides of the office. He said there would also be overlap with menial tasks such as letters and fliers to be enveloped and posted. He said that in several cases he gave advice in regard to letters and things like that, rendering assistance to the Complainant. He conceded under cross-examination that the work that he did was related not only to Mr Pearce's portfolios but also connected with his electorate. The Respondent said that his duties were as directed by Mr Pearce and the duties changed according to what Mr Pearce required. When Evelyn Mann, Mr Pearce's Electorate Officer, was asked whether the position she held was the same as the Respondent's position she said that Mr Pearce had informed her that the Respondent was in charge of the office, *"So therefore I took my instructions from him"*.

The Complainant said that in her view the Respondent was in a position to have a say over whether or not she was employed and that if she did not help and join in as a member of the team that she would have difficulty in her position. When the Respondent started coming to the electoral office Kay Hallahan directed her that if she had any matters which were of a sensitive nature that she was to go to the Respondent and receive direction from him. She understood that the Respondent was Research Officer for Mr Pearce but she was not told by Mr Pearce what his function in the office was. Her understanding was that if she needed assistance she was able to refer to the Respondent. She said that on her observation the Respondent was acting *"as an Electorate Liaison Officer"*.

The facts and matters referred to above are set out in the Points of Claim. The

Complainant pleads that she was employed as an Electorate Officer by Kay Hallahan from 8 September 1988 until 23 November 1989. The Electorate Officers' Award provides that the employer shall be the Joint House Committee. The Joint House Committee is composed of members of Parliament. Electorate Officers are employed by persons themselves employed by the State of Western Australia and are employed by the State in the business of Government and both Complainant and Respondent are persons employed on that basis.

She pleads that the Respondent commenced as a Research Officer for Mr Pearce from about May 1989 and was employed by the Department of Transport which seconded him as a Research Officer for Mr Pearce. The department is a department of the Government of Western Australia for which a Minister of the Crown in responsible. The Permanent Head of the department is responsible to a Minister of the Crown in right of Western Australia. An employee of the department including the Permanent Head of the department, is employed pursuant to the Public Service Act 1978, and under that Act he is appointed by the Public Service Commissioner. The Public Service Commissioner is appointed by the Governor. Employees of the Department of Transport are employed by persons themselves employed by the Crown in right of Western Australia, and are thus, by delegated process, employed by the State in the business of Government.

It is also pleaded that the workplace was staffed on a full-time basis by the Complainant and another Electorate Officer and the Respondent attended at the workplace on average three days per week. When he was present, the Respondent was the most senior person at the workplace and he would answer any queries that the Electorate Officers could not

deal with. Having regard to the evidence referred to earlier, the Tribunal finds, as a matter of fact, that the electoral office premises functioned essentially as one office and was staffed on the basis just described.

The Respondent's Answer admits that the Complainant was employed as an Electorate Officer from 8 September 1988 until 23 November 1989. It also admits the terms and conditions of the Award and that the Award provides that the employer is the Joint House Committee. The Respondent's Answer admits paragraphs 17 to 31 of the Points of Claim. The Respondent therefore admits that the Respondent acted as a Research Officer for Mr Pearce, was an employee of the Department of Transport and was employed pursuant to the Public Service Act. It is also admitted that employees of the Department of Transport are employed by persons themselves employed by the Crown in right of Western Australia, and are thus by delegated process, employed by the State in the business of Government. The Respondent denies that the Complainant and the Respondent had a common employer, and denies the facts and matters said to constitute the sexual harassment.

It emerges, then, at a first glance, that although the Complainant was paid by Treasury pursuant to arrangements supervised by the Department of Premier and Cabinet she was employed by the Joint House Committee. The terms and conditions of her employment were governed by the Electorate Officers' Award. She took instructions on a daily basis from Kay Hallahan acting in her capacity as a member of Parliament and as an agent of the Joint House Committee. The Respondent, on the other hand, was employed by the Public Service Commissioner as a casual public servant in the Department of Transport.

His day to day activities were supervised by Mr Pearce, acting in his capacity as a Minister of the Crown. Prima facie, the parties did not have a common employer.

In order to resolve the preliminary issue, however, it becomes necessary to take a more detailed look at the relationships which have just been described in general terms. The Complainant's case is, in essence, that both parties were employed by the State in the business of Government and therefore have a common employer.

The Tribunal pauses to note that by Section 4 of the Act *"employment"* is defined to include part-time temporary employment, work under a contract for services and *"work as a State employee"*. The latter term is said to include *"a member of the Police Force of Western Australia"* but is not otherwise defined. Subject to those interpretations the Tribunal considers that the terms *"employee"* and *"employed"* refer to the common law concept of the employment relationship constituted by a contract of service.

As will become apparent later, it is also important to note that by Section 163 of the Act a reference to an employer shall be construed in relation to employment in a department within the meaning of the Public Service Act 1978 as a reference to the Permanent Head of that department. At a first glance this lends some support to the notion that although the Respondent might be usually described as employed by the Public Service Commissioner within the Department of Transport, for the purposes of the Equal Opportunity Act, provided the conditions mentioned in Section 163 are satisfied, the Permanent Head of the department should be characterised as his employer. Provisions of the Transport Co-ordination Act 1966 establish that the Permanent Head of the

Department in question is the Director General of Transport.

In looking at the question of whether both parties were employed by the State in the business of Government one must begin by taking into account some well-known features of the constitutional structure of the State of Western Australia.

The United States Constitution adopts a clear demarcation between the legislature (Congress), the executive (the President and his Administration) and the federal judiciary. In the United Kingdom, however, the legislature is supreme and is closely interwoven with the executive by reason of members of the government being also members of Parliament, an arrangement known as responsible government. In Australia the British model is followed in the state sphere, as in Western Australia, and to a large extent in the federal sphere, but, in the latter case, subject to a written constitution providing for a strict separation between the judicial power and the other two principal organs of government. Most commentators agree that although the Constitution Act 1899 (W.A.) and related legislation effects a broad and fundamental distribution of powers among the organs of Government, because of the principle of responsible government, it is not such a distribution as precludes overlapping in the case of powers or functions the inherent features of which are not such as to enable them to be assigned, *a priori*, to one organ rather than to another. In many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given. See Boilermakers case (1956)

94 CLR 254 at 336.

Executive authority in a Westminster system of government includes all those discretionary or mandatory Acts of government which can be lawfully done or permitted by the government in pursuance of powers vested in it. In Brown v West (1990) 64 ALJR 204 the High Court reaffirmed the principle that an appropriation made by a valid law is the necessary authority for the Executive Government to take monies out of the Consolidated Revenue Fund. Responsible government means that the discretionary powers of the Crown are exercised by the wearer of the Crown or by its Representative, in this case the State Governor, according to the advice of Ministers having the confidence of that branch of the legislature which immediately represents the people. The practical result is that Executive power is placed in the hands of a parliamentary committee called the Cabinet, and the real head of the Executive is not the Governor but the Premier. See Quick and Garran : The Constitution of the Commonwealth of Australia pp 699 to 703.

The name generally given to the executive branch (but not the legislative branch) of the Government is the Crown as a shorthand term symbolising the powers of Government. It follows from what has been said earlier that executive power is actually exercised by the Premier and the other Ministers who direct the work of the civil servants in the various Government departments. This structure is accurately and commonly described as *"the Government"* or *"the Executive"*. The Crown will include the departments of Government that are headed by a Minister and the concept will also extend to Government agencies and instrumentalities subject to Ministerial control. See Hogg:

Liability of the Crown (2nd Ed) page 9. Also see Bropho v Western Australia (1990) 64 ALJR 374 at 383.

In the leading case of Town Investments Ltd v Department of the Environment (1978) AC 359 it was said that nowadays it would be better, instead of speaking of *"the Crown"* to speak of *"the Government"*, a term appropriate to embrace both collectively and individually all of the Ministers of the Crown and Parliamentary Secretaries under whose direction the administrative work of Government is carried on by the civil servants employed in the various Government departments. Executive acts of Government that are done by any of them are acts done by the Crown. Thus, in that case, where a lease had been taken out initially by a tenant described as the *"Minister of Works"*, which was then followed by a fresh lease in the name of the *"Secretary of State for the Environment"*, the former department having been abolished, the House of Lords held that the leases having been executed under the official designation by the Minister of the Crown in charge of the Government department for acquiring and managing accommodation for civil servants, the tenant of the premises was the Government, or the Crown, with the result that the landlord was unable to say that a new tenant had taken possession of the premises.

A similar approach has been adopted by the courts in this State. In State Government Insurance Office v City of Perth (1987) unreported SCL 73.1 it was said that:

> " *All property acquired by the Minister in his corporate capacity pursuant to the provisions of the Act is property acquired for the Government and rights acquired and obligations incurred by him pursuant to his administration of the appellant (the State Government Insurance Office) are acquired and incurred by him respectively on behalf of the Government in its exercise of its authority "by or through" the State Government Insurance*

Office to carry on business pursuant to the Act as was said ... there is no argument that for the purposes of Section 532 of the Local Government Act the Government of this State is the Crown. That such is the case is clear in any event from a perusal of Section 2 of the Constitution Act."

This line of reasoning applies to crown servants. A subordinate engaged by, or working under, a civil servant is himself a servant of the Crown and not of his superior. Hood Phillips : Constitutional and Administrative Law (7th Ed) 1336. This also applies to a Crown agency. In Western Australia v Watson (1990) WAR 248 the respondent had been employed by the Harbour and Lights Department but amended his pleading before trial so as to advance an asbestosis claim against the State of Western Australia. The Court said at page 266:

" *The State is a legal person ... by Section 3 of the Crown Suits Act 1947 the term "Crown" means the Crown in right of the Government of Western Australia hence the question "What did the State know and when?" becomes "What did the Government know and when?" the Government is constituted by the Premier and the other Ministers of the Crown holding the executive offices of the Government liable to be vacated on political grounds referred to in Section 43 of the Constitution Acts Amendment Act 1899. In other words the Government is in fact constituted by the Cabinet. Because the State is recognised as a legal person it has attributes of corporate personalities."*

It is also useful to note that in the recently decided case, The State of Western Australia v Bond Corporation Holdings Ltd and Others (1991) unreported SCL 8793, Malcolm C.J. said at page 46 that every Minister of the Crown including the Premier is a servant or agent of the Crown in right of the State.

Jennings : The Law and the Constitution (5th Ed) has this to say at page 201:

" *The peculiarity of the civil service rests in its internal organisation. Every one of these million persons is in law a servant of the Queen. In this respect they are exactly like ministers. Indeed, it has been laid down in the courts that the Postmaster-General and a telephone engineer are fellow servants.* Bainbridge v. Postmaster-General *[1906] IK.B. 178. Consequently the courts are not concerned with the civil service as such. They are concerned only to discover whether an officer is a servant of the Crown. Once they have achieved this by-no-means-easy task, they need not consider whether he is a minister or a civil servant, or what sort of civil servant he is, for his liability for wrong is in either case the same, and the powers are those either of the Queen or of the named minister.*

The term 'Crown servant' has not been authoritatively defined. But there are cases in which the courts have had to consider whether or not the holder of a particular office was a Crown servant. In each case the decision was based upon the facts of the case before the court, and no comprehensive definition of 'Crown servant' appears to have been attempted."

When one applies these principles to the circumstances of the present case, turning first to the position of the Respondent, the Complainant by her Counsel is in a position to argue that the Respondent was *"a State employee"*. He was employed on a casual basis pursuant to Section 30(1)(a) of the Public Service Act, being a public servant within the Department of Transport. His salary may have been met by way of an allocation made in favour of the Department of Transport, to which he was temporarily seconded, and he may have been subject to the day to day direction of the Minister of Transport, however, he was effectively a servant of the Crown or of the Government pursuant to the concept reflected in Town Investments v Department of Environment (*supra*). In other words, the term *"Government"* embraces both collectively and individually all of the Ministers of the Crown and Parliamentary Secretaries under whose direction the administrative work of Government is carried on by the civil servants employed in the various Government departments. As Western Australia v Watson (*supra*) shows, in certain contexts the Government can be regarded as the State. Hence, he was a State employee.

The Complainant's case proceeds from the premise that the concept of the Government of the State assumes the presence of a corporate structure. The organs of Government perform various functions but there is a unity in respect of the structure as a whole. The governing mind which controls the structure is the true employer of those who work within the system. The principles of responsible government establish that the Premier and his or her Ministers are able to impose their will and therefore, as the Crown or Executive, are in charge of those who carry out the business of Government.

This approach can then be applied to the position of the Complainant. The Joint House Committee might, as a matter of convenience, be named as her employer in an Award, and the Award might control the particulars of her employment, but, being paid by Treasury, and ultimately subject to the will of the Department of Premier and Cabinet, she formed part of the governmental structure, and was also *"a State employee"*. Thus, she and the Respondent had a common employer.

The argument can be tested to some degree by reference to principles of vicarious liability in tort. Hogg (*supra*) puts the matter in this way at page 90:

> " *The general rule (which can of course be changed by statute) is that the servants of a Crown agent are servants of the Crown itself. This means that the Crown is vicariously liable for a tort committed by the servant of a Crown agent in the course of employment. The Crown agent, even if it is a suable entity, is not vicariously liable for the torts of its servants, because the Crown agent is not the master.*"

He goes on to say at page 259:

> " *Where a corporate Crown agent is directly liable in tort (because the governing body or directing mind of the corporation committed the tort) this obviously means that the injured plaintiff may sue the corporation for damages or other relief. Can the plaintiff also sue the Crown itself? The*

answer to this question should be yes. The corporate Crown agent is equivalent in law to an individual Crown servant, and the Crown is vicariously liable for the tort of an individual Crown servant."

These comments must be read in conjunction with the Crown Suits Act 1947. Section 5 of the Act provides that:

" *1. Subject to this Act the Crown may sue or be sued in any court or otherwise competent jurisdiction in the same manner as the subject.*

2. Every proceeding shall be taken by or against the Crown under the title "The State of Western Australia".

It is important to note however that the primary provision must be read subject to Section 7 which provides:

" *Nothing in this Act shall affect -*

a) the rights or liabilities of any corporate body or instrumentality of the Crown created by any act of Parliament.

b) any right of action which is conferred on the subject by any act of Parliament against any corporate body or instrumentality of the Crown or any official or person nominated as a defendant on behalf of the Crown.

c) any right or liability by law or custom establish of Her Majesty's Attorney General to sue or be sued on behalf of the Crown."

Against this background, it could be argued that if the Complainant drove a vehicle negligently in the course of her employment then, pursuant to principles of vicarious liability, it would be open to the prospective plaintiff to sue the State of Western Australia pursuant to provisions of the Crown Suits Act just mentioned on the basis that she was a servant of the Crown or Government employee. By the same token, if the Respondent drove a vehicle negligently during the course of his employment then he too could be

sued as a servant of the Crown or Government employee. As in Western Australia v Watson (*supra*) it could be said that the State was the employer even though, in the circumstances of that case, the plaintiff might otherwise have been described as a Tally Clerk in the Harbour and Lights Department. This analysis would tend to suggest that both Complainant and Respondent had a common employer, namely, the State of Western Australia.

In the circumstances of the present case, a number of objections can be raised against this line of argument.

First, although the Respondent fits the description of a Crown servant or a Government employee, being an employee clearly subject to the control of a Minister forming part of the executive arm of the Government, there is a degree of ambiguity concerning the position of the Complainant.

The weight of the evidence indicates an intention that she was to be employed by the Joint House Committee rather than by the Department of Premier and Cabinet. The Award governing the terms and conditions of her employment provides that the Joint House Committee shall be her employer. The application form initiating her employment indicated that the final decision concerning her appointment rested with the Joint House Committee. Further, her role was that of Electorate Officer, and on a day to day basis, she took instruction from Kay Hallahan as the Member for the East Metropolitan Region.

If she was capable of being employed by the Joint House Committee and was employed

by that body then an argument would be available to the Respondent that she was not a servant of the Crown or *"a State employee"*. That description can only be applied to a person who is working for the executive. Although there is no strict separation of powers under the Constitution of this State, there is a body of legislation and constitutional conventions, it might be argued, which suggest that Parliament and its officers and agents occupy a special and independent place within the governmental system. For example, Section 44(v) of the Federal Constitution provides that any person who has any direct or any indirect pecuniary interest in any agreement with the public service otherwise than as a member of a company consisting of more than 25 persons shall be incapable of sitting as a senator. In the case of In Re Webster (1975) 49 ALJR 205 Barwick C.J. said that this provision derives from the provisions of a statute passed in the year 1696 to secure the freedom and independence of the Parliament from the Crown and its influence. It is also recognised that various parliamentary privileges and rules concerning contempt enable Parliament to resist the will of the executive (subject to Section 34 of the Constitution Act (*supra*) and provisions of the Parliamentary Privileges Act 1891) although even Parliament cannot simply change the law by claiming new privileges. Stockdale v Hansard (1839) 9 Ad & E1. Accordingly, there is a basis for arguing that the Complainant, although at first glance a state employee in the sense of being a person working within the governmental structure, on closer analysis, cannot be regarded as a servant of the Crown, or as a Government employee in the same sense as the Respondent, because that term should be confined to those employed by the Executive arm of Government. Parliament, and the committees by which it functions, occupy a special and independent place in the governmental structure, from which it follows that the parties do not have a common employer.

There are a number of legal difficulties attached to this view of the matter. The issue is summarised in an article by G.J. Craven : A Few Fragments of State Constitutional Law (1990) Volume 20 University of W.A. Law Review at page 356:

> " *Our instinctive response tends to be that such persons (i.e. parliamentary officers) are employed by "Parliament", yet the very use of the term betrays a duality in our understanding of that concept. For Parliament, ordinarily comprehended, is simply the totality of the members of the Parliament presently existing. That body has, on the face of it, no reality beyond the sum of its members, and is in any event regularly dissolved or partially dissolved, and thus regularly ceases (or partially ceases) to exist. How can a parliamentary officer be said to be in a contractual and responsible relationship with the entire amorphous body of the legislature from time to time, particularly when the group comprising that body is in a state of more or less continual flux?"*

The learned author goes on to say:

> " *The present confusion over the exact nature of the personality of Parliament does cause real confusion. In Victoria, for example, the exact legal basis of the employment of the staff of parliamentary committees pursuant to Section 4K of the Victorian Parliamentary Committees Act 1968 is most unclear. That section provides merely that a Joint Investigatory Committee of the Victorian Parliament may commission persons to undertake research and investigations. The practice has been for the relevant Presiding Officer simply to make out a warrant authorizing the expenditure represented by the salary of the person appointed over a designated period, usually one year. Some Committees have "employed" up to six persons at a time under this system.*
>
> *But by whom are they actually employed? This question has occasionally arisen - although it has never got to the courts, and a variety of equally unsatisfactory answers have been offered. These have included: both the Presiding Officers (implausible, when the warrant issues only from one); the Presiding Officer who issues the warrant (but the warrant is a mere authorization of expenditure containing no terms, while the person appointed is in fact recommended by the Committee concerned, and has little or nothing to do with the Presiding Officer); the relevant Committee as an entity (which has no existence in law, other than for the purpose of discharging very limited statutory functions); the Chairman and/or the members for the time being of the Committee (who do at least control the activities of the person appointed, but, on the other hand, neither pay that person, nor have the legal power to withdraw the warrant authorizing such payment); and finally, the Crown in the right of the State of Victoria, which*

> *was put forward as having engaged the person in question and then having loaned them to the Parliament (an extraordinary view, given that the unfortunate Crown, conventionally conceived, had absolutely no control over the person employed, and received no direct benefit from their employment!). Of course, all these postulates were only put forward after the position that everyone had instinctively believed to apply - namely, that the relevant persons were evidently employed by "Parliament" - was discarded in the fact of the difficulties outlined above in attributing a legal personality to that body capable of supporting a contract of employment.*

The issue is further explored by Peter W. Johnston in his article The Legal Personality of the Western Australian Parliament in Volume 20 of the same journal at page 323. By Section 2 of the Constitution Act the Parliament consists of the Queen and the Legislative Council and the Legislative Assembly. This maintains the medieval fiction that laws are made by the Queen with the advice of both Houses. It is a simple step, then, to assume that so far as the Parliament has a legal identity (that it is a juristic person), this identity is to be equated with that of "the Crown". It is at this stage, however, that conceptual problems arise. The legal personality of the executive Government is also taken to be represented by the Crown. If, then, the executive Government assumes a legal personality - as was determined to be the case in the State of Western Australia v Watson (*supra*) - (that is, it is equated with the Crown) how can it be that the same entity is capable of providing a legal personality to the body described as *"Parliament"*? Whilst the doctrine of the separation of powers has, in general, been rejected in the context of the Australian states, to identify Parliament solely with the executive would be to compound a constitutional incongruity. It would mean, in practical terms, the complete subjugation of Parliament to the Executive and would render Parliament functionally ineffective. Thus, if parliamentary staff are in effect employed by the executive Government, the latter would have in its power the means to thwart Parliament.

The learned author goes on to suggest that one way of resolving the difficulties between equating the personality of Parliament with that of the executive, in terms of control of appropriation and employment of parliamentary staff, is to regard the Parliament as capable of assuming a continuing legal existence as a body irrespective of whether or not any of its distinct constitutive elements is functional. In other words, Parliament might be represented by the Governor as the Crown in its legislative capacity as distinct from its executive capacity. On that basis, Parliament or the Joint House Committee as an agent of Parliament is capable as such of exercising power such as employment of its staff and control of its affairs, property and precinct.

The learned author says at page 336:

> " *What emerges from this analysis is that the clerks and the parliamentary staff are in an ambiguous situation. Their status is somewhat unique. Constitutional propriety would perhaps be better served if the appointment of the clerks was by the Governor alone on the recommendation of the presiding officer of the relevant house, though this would entail a departure from a notion of responsible government. Whilst for purposes of general house control and discipline, the houses can be regarded as having delegated their responsibilities to their presiding officers, the situation of employment is a somewhat curious anomaly.*
>
> *In many instances, the application of particular pieces of legislation regulating employment to Parliament and its staff would fall to be determined by the terms of the particular legislation rather than by general constitutional concepts and principles. Thus, where statutes such as the Western Australian Equal Opportunity Act rely on general expressions such as "person", there will be substantial doubt as to whether this embraces Parliament itself, and even more doubt about this includes a House of Parliament. Courts will probably hesitate to adopt a construction that would enhance the executive's interference with parliamentary independence. Something more explicit would normally be required. If it should emerge from the terms of the legislation that a term such as "employer" is capable of including the Crown, one can then ask whether this is the Crown in right of the State Government or the Crown manifested as the Governor in Parliament."*

The learned author then examines various provisions of the Industrial Relations Act and notes that by Section 23(1) the Commission has jurisdiction for industrial matters except for certain matters relating to the discipline of persons who are officers of either House of Parliament under the control of the President or Speaker or under their joint control.

As to the jurisdiction of the Public Service Arbitrator, Section 80C(1) excludes from the definition of *"Government officer"* any person who is an officer or employee in either House of Parliament. The learned author then says:

> " *Whether the more general definition of "employer" in section 7 operates to include either the Clerks of the Houses is another matter. One has to approach the concept of "employer" to some degree as parasitic upon the meaning of "employee" in the same section. That definition, as expanded at common law, requires a consideration of the relationship between the persons said to be the employer and employee, largely in terms of whether the former has control over the activities of the latter and whether the "employee" can be said to be part of the organisation or apparatus of the "employer". Given the generality of these expressions it seems to be clear that a relationship of employment exists, for the purposes of the Industrial Relations Act between the parliamentary staff and the "Crown" arguably manifested as the Governor in Council, as suggested above, rather than a notional corporation personified by the trinitarian agencies of "parliament" (both Houses and the Queen) or by a corporation sole comprised by "the Governor in Parliament".*

In other words, he doubts the notion of Parliament comprised as a corporation sole and, if the Tribunal understands him correctly, appears to conclude that Parliament does not have an independent existence as an employer with the result that parliamentary officers and similar employees must be regarded as attached to the executive.

The notion that Parliament does not have an independent existence as a corporation capable of acting as an employer appears to be borne out by the practice in other

jurisdictions whereby the employment of parliamentary officers is controlled by special enactment, in a way which does not seem to have a parallel in Western Australia. With the enactment of the House of Commons (Administration) Act in 1978 the structure of the staff of the House of Commons was altered by the abolition of the Commission for Regulating the Offices of the House of Commons, set up in the House of Commons Offices Act 1812, and the establishment of a new Commission. Erskine May : Parliamentary Practice (21st Ed) p. 102. The Federal Public Service Act 1922 contains specific provisions concerning parliamentary officers. House of Representatives Practice (2nd Ed) puts the matter in this way at page 243:

> " *In practice the Clerk of the House of Representatives is appointed by the Governor-General on the recommendation of the Speaker. While in effect they are employed under the Public Service Act, the Clerk and the officers come under the overall authority of the Speaker of the House of Representatives, not the Executive Government, in order that they may carry out their duties as independent officers of the Parliament free from executive control. The Clerk's appointment is not subject to the approval of the House although, the House is always advised of the appointment by the Speaker and in practice, party leaders are consulted in respect of a proposed appointment.* "

Before attempting to reach a conclusion concerning this issue, which does not appear to have previously been the subject of any decided case, the Tribunal will briefly examine another objection to the Complainant's argument that both Complainant and Respondent should be regarded as Government employees having a common employer in the persona of the Crown or the State. It is implicit in a number of the authorities referred to above that the general rule whereby employees of the executive can be regarded as Government employees can be modified by specific enactments. Statutory provisions similar to Section 163 of the Act can establish that for certain purposes the employer of one who

might otherwise be regarded simply as *"a State employee"* shall be a nominated person or agency.

In a dissenting judgement in Town Investments v Department of Environment (*supra*) Lord Morris said at page 394:

> " *If a Minister though acting on behalf of the Crown does not become the Crown but remains a separate legal person (such as a corporation sole) then it becomes necessary to see what contract the parties made in this case."*

Hogg (*supra*) has this to say at page 261:

> " *In Northern Pipeline Agency v Perehinec, the question arose whether a contract of employment could be enforced against the Northern Pipeline Agency in its own right, or whether the Crown itself was the proper defendant ... the Northern Pipeline case is the latest manifestation of a trend, especially evident in the Supreme Court of Canada, to hold public bodies responsible in their own right for their contractual obligations. ... Estey J. plainly wanted to avoid the artificial result of holding that the Crown itself was the only employer in the various and complex public sector. He said that "In the world of realities" the agency was a separate entity within the public sector, and should be treated as the employer of its staff."*

It must also be remembered that by Section 7 of the Crown Suits Act 1947 nothing in the Act affects the rights or liabilities of any corporate body created by any act of Parliament or any right of action which is conferred on the subject against any corporate body or instrumentality of the Crown or any official person nominated as a defendant on behalf of the Crown.

It appears, therefore, that the general rule whereby property owned by an instrumentality under the control of a Minister may nonetheless be regarded as property of the Crown or

of the Government as in State Government Insurance Office v City of Perth (*supra*) or whereby a Tally Clerk attached to a particular department may nonetheless be regarded as an employee of the State as in State of Western Australia v Watson (*supra*) can be displaced by specific statutory provisions. One must be certain, however, that the statutory provisions in question truly interpose a nominated person or body between the claimant and the Crown or *"State"* that would in the normal course be liable pursuant to the principles discussed earlier. The Joint House Committee may have an apparently independent status as the Respondent to an award pursuant to provisions of the Industrial Relations Act, and be capable of being sued in that capacity, but if, upon searching analysis, it is found to be a crown agent or instrumentality, not unlike a State Government Insurance Office or a Harbour and Lights Department, then the Crown or State may still be regarded as the employer pursuant to the rule cited by Hogg (*supra*) at page 90 that the servants of a Crown agent are servants of the Crown itself. Thus, in the present case, the fact that the Joint House Committee has a corporate status is not of itself sufficient to establish that it is the employer.

A number of decided cases support the view that specific statutory enactments may determine that for the circumstances of a particular case a particular person or body is not only a specific emanation of the Crown but also the person or body identified as "*the employer*" and intended to be exclusively liable in respect of the obligations attaching to that status. Thus, in O'Callaghan v Loader (1984) EOC 92-023 it was held that the Commissioner for Main Roads (NSW) can be an employer. The Department of Main Roads was not a department within the meaning of the Public Service Act, the Commissioner had full power to employ any officers for the purpose of the administration

of the department and therefore had power to employ a lift operator. The New South Wales Tribunal held that the Commissioner was in fact the Complainant's employer.

It is against this background that the Tribunal now turns to the provisions of the Equal Opportunity Act.

The objects of the Act are set out in Section 3 and include by Section 3(b) the elimination, so far as is possible, of sexual harassment in the workplace and in educational institutions and sexual harassment relating to accommodation. The Tribunal pauses to note that legislation of this kind was never intended to proscribe sexual relationships, whether inside or outside the workplace, which are, or have the potentiality of being consensual. Sexual harassment consists only of unsolicited and unwanted sexual advances within certain narrowly defined circumstances. One such circumstance is that the harassment occur in the workplace. See O'Callaghan v Loder (*supra*). The tendency in the interpretation of such legislation is to apply a remedial and liberal construction that meets the clear public policy of equal opportunity as enunciated in the preamble to the Act. See Gilles Fontaine v Canadian Pacific Ltd (1990) 11 CHRR para 1.

Section 24(1)(b) provides that it is unlawful for a person to harass sexually an employee of a person by whom the first mentioned person is employed. It has already been noted that *"employment"* includes work as a State employee. Section 163(1) provides that a reference in the Act to an employer shall be read and construed in relation to employment in a Department within the meaning of the Public Service Act 1978 as a reference to the Permanent Head, within the meaning of that Act, of that Department and anything determined or done with respect to an offer of any such employment, the terms and

conditions on which any such employment is afforded, opportunities or benefits associated with the employment, dismissal, or with respect to any other matter concerning employment, by an officer or employee in any such Department who is authorised to determine and do things in that respect shall be deemed to have been determined or done by the Permanent Head. By Section 24(3) a person shall be taken to harass sexually another person if the first mentioned person makes an unwelcome sexual advance or request for sexual favours, or engages in unwelcome conduct of a sexual nature, and the other person has reasonable grounds for believing that a rejection would disadvantage the other person in connection with his or her employment.

At first glance Section 163 suggests that generally when public servants are involved in cases of discriminatory conduct then the employer is to be regarded specifically as the Permanent Head of the relevant department. In other words, the question of whether the conduct complained of is unlawful will be determined on the basis that the party liable is not the Crown but the Permanent Head. As has already been noted the Crown Suits Act allows for such a position. By Section 5 the Crown may be sued under the title *"The State of Western Australia"* but, when read with Section 7, that provision does not affect any right of action which is conferred on the subject by any statute against an official person nominated as a defendant on behalf of the Crown. Thus, to take one example, if a public servant is dismissed on the ground of pregnancy then, by Section 163, the party acting unlawfully is deemed to be the Permanent Head of the Department, and the claim will be advanced against that particular servant of the Crown. Such an approach appears to be consistent with the scheme of the Act. Discriminatory conduct is usually a reflection of prevailing attitudes and those attitudes in turn are often an outgrowth of policies and practices followed by the employer. It is therefore appropriate that liability should be

attached to a party capable of influencing the policies and practices, that is to say, the Permanent Head of the Department. But can the same comment be made in regard to sexual harassment which, as Section 24(3) indicates, in speaking of *"unwelcome"* conduct, depends to a large degree upon interaction between individuals at a personal level?

It is important to note that the term *"employer"* does not appear in Sections 24(1)(a) or 24(1)(b) of the Act and where the term does appear in 24(1)(c) it is in regard to a person seeking employment. It is also important to notice that Section 163 is preceded by provisions dealing with vicarious liability. Had the term *"employer"* been situated in the definition section of the Act with a view to clarifying the position concerning public servants then it might have been possible to argue that the term *"employer"*, although not expressly mentioned in sections 24(1)(a) and 24(1)(b), is there by necessary implication as a corollary to the term *"employee"*. It is clear, however, that Section 163 is linked to provisions concerning vicarious liability, and one is therefore obliged to give due weight to the criteria in Section 163(1) which form part of the deeming provision. Those criteria suggest that what is being spoken of is not an employer for all purposes but, more specifically, an employer acting in respect of the various matters and spheres of responsibility detailed in the provision.

Put shortly, the deeming provision appears to be limited to certain situations, such as offers of or dismissals from employment, matters which might conceivably be influenced by policies and practices implemented by the Permanent Head of a Department, and the mechanism provided by Section 163, whereby arguably the *"employer"* not only can be but also must be the Permanent Head of the Department, is not intended to apply to a

case of sexual harassment. Section 163 speaks of an officer or employee who is authorised to determine and do things in respect of the matters first mentioned or any other matter concerning employment. This is not consistent with the forms of conduct comprising sexual harassment and suggests that Section 163 does not control Section 24(1)(b) and the term *"employer"* has been consciously omitted from that provision. Accordingly, in the present case, the Tribunal does not consider that Section 163 displaces the general rule that a public servant should be characterised as a servant of the Crown or of the Government and can be regarded as *"a State employee"*.

It emerges, then, that the two employees in question should probably be characterised as employees of the Crown or of the State for the purposes of Section 23(1)(b) of the Act, being employed by the State in the business of Government, notwithstanding that they work for different arms of the State, unless it be established that Parliament has a corporate existence of its own, separate from the Crown considered as the Executive, with the result that an agency of Parliament such as the Joint House committee cannot be regarded as an agent of the Crown, and its servants are not Crown servants.

When the Tribunal draws together the threads of earlier discussion, the following picture is revealed. As indicated by Jennings (*supra*) each case must be decided according to its own facts. The weight of academic opinion suggests that Parliament cannot be regarded as a corporate sole for the purpose of acting as an employer of staff. Legislation in England and in federal sphere in Australia appears to have recognised this reality because parliamentary officers are employed as public servants pursuant to special statutory provisions. Stockdale v Hansard (*supra*) and Section 36 of the Constitution Act establish

that Parliament cannot alter the law or expand the range of its privileges other than by enactment. At present within this State there appears to be no statute providing for parliamentary officers, or similar subordinate employees such as Electorate Officers, to be employed by Parliament and its committees, and the Standing Orders of the two Houses do not explicitly allow for such a result. There is no strict separation of powers in the constitutional system of this State and principles of responsible Government would suggest that the Crown or executive arm of Government is in charge of and ultimately has the power to control the activities of all those working in the business of Government. Further, those working for the Government at every level are generally regarded as servants of the Crown even though they may take direction from a Minister of Head of Department or other agent of the Crown on a day to day basis. Thus, without attempting to enunciate any general rule, the Tribunal considers that, in the circumstances of the present case, both parties are employed by the State and have a common employer. As it happens, such a finding produces a result which appears to be consistent with the realities of the case, and with the mischief aimed at by the legislation, in that both parties, as a matter of fact, were often present at the same workplace and were essentially part of the same team.

Put shortly, the Tribunal considers that Parliament by its Joint House Committee cannot be regarded as a corporate entity capable of acting as an employer in substitution for the State of Western Australia although, as a matter of convenience, it may outwardly function as a body having an independent existence within the system of Government. The parties are both *"State employees"* and do have a common employer because ultimately the Government is in a position to control their activities and their

remuneration, even though, pursuant to well-established conventions, it is unlikely that the Government would interfere with an Electorate Officer's employment having regard to the special place that Parliament occupies within the constitutional structure.

In raising the absence of a common employer issue as a preliminary issue, the Respondent was, by implication, proposing that the complaint referred to the Tribunal by the Commissioner should be dismissed at an early stage pursuant to Section 125(1) on the ground that it was misconceived or lacking in substance. Having resolved the preliminary issue in favour of the Complainant, it follows that the Tribunal is not prepared to make such a ruling and considers that, subject to the observations which follow, the Tribunal should now proceed to complete the inquiry by hearing evidence concerning the facts and matters allegedly constituting the sexual harassment. The Tribunal does not consider it appropriate that the matter be referred back to the Commissioner as requested by the Respondent in his pleading. In the manner allowed for by Section 89 the Commissioner was satisfied that the complaint was misconceived or lacking in substance. As it happens the Tribunal has formed a different view but the Commissioner, in the exercise of her independent role, was at liberty to reach her own conclusion concerning the preliminary issue. She has therefore discharged her function and the complaint has been referred to the Tribunal to be dealt with. However, recognising that the presence of the preliminary issue may have diverted attention from the prospects of arriving at a negotiated settlement of the dispute, the Tribunal, in the exercise of the conciliation power allowed to it by Section 118, will defer the fixing of a hearing date until the parties, represented by their advisers, have had an opportunity to meet in conference to discuss the matters in issue. The Tribunal will hear from the parties as to what orders should be made and directions given in order to carry that intention into effect.