

**TO: HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON SOCIAL
POLICY AND LEGAL AFFAIRS**

RE: Arrangements Surrounding Crimes at Sea

Dr Anna Dacre
Committee Secretary
Standing Committee on Social Policy and Legal Affairs

tospla.reps@aph.gov.au

Holiday Cruise Industry – Federal Discrimination law

Our submission to the Inquiry is narrowed and focused on a particular aspect of the cruise industry. That focus is Federal Discrimination Law.

The question is: do cruise passengers from an Australian port on a cruise holiday which after a period of time returns to an Australian port with the same passengers have the protection of:

1. the Racial Discrimination Act 1975 (Cth) (RDA);
2. the Sex Discrimination Act 1984 (Cth) (SDA);
3. the Disability Discrimination Act 1992 (Cth) (DDA); and
4. the Age Discrimination Act 1992 (Cth) (DDA).

This involves a determination as to whether those acts have extra-territorial jurisdiction.

This also involves asking the question as to whether cruise passengers have the benefit of the Australian Human Rights Commission Act (Cth) (AHRC Act) formerly the Human Rights and Equal Opportunity Commission Act 1986 (Cth) which establishes the regime for making complaints of unlawful discrimination.

The specific grounds of **unlawful discrimination** under RDA, SDA, DDA and ADA (the Acts) are:

1. Race, Colour, descent or national or ethnic origin;
2. Sex;
3. marital status;
4. pregnancy or potential pregnancy;
5. family responsibilities;
6. disability;

7. people with disabilities in possession of palliative or therapeutic devices or auxiliary aids;
8. people with disabilities accompanied by an interpreter, reader, assistant or carer;
9. person with a disability accompanied by a guide dog or an assistance animal’;
10. age;
11. offensive behaviour based on racial hatred;
12. sexual harassment; and
13. harassment of people with disabilities.

The Australian Human Rights Commission (AHRC) is the forum through which written complaints are made and the complaint is investigated by the President of the Commission and the matter is either resolved through conciliation or if not resolved, avenues are open to have the matter dealt with by the courts.

All Australians have the right to avail themselves of the AHRC Act and the AHRC procedures.

Where do cruise passengers fit into the AHRC Act?

What is the jurisdiction of (the Acts):

1. the Racial Discrimination Act 1975 (Cth) (RDA);

As His Honour O’Loughlin J noted in *Brannigan’s* case¹ at [26] “... *the legislature was not intending that the Racial Discrimination Act would have extra-territorial effect*”.

2. the Sex Discrimination Act 1984 (Cth) (SDA);¹

Section 9(2) expressly states the SDA applies “throughout Australia” As His Honour O’Loughlin noted in *Brannigan’s* case¹ at [16] “*The provisions of subs 9(2) and its statement of application throughout Australia, is, in my opinion a clear indication that the Act is limited in its effect to Australia*”.

3. the Disability Discrimination Act 1992 (Cth) (DDA)

Section 12(2) “... this Act applies throughout Australia”

As His Honour O’Loughlin noted in *Brannigan’s* case¹ at [21] “*I see no difference in the two corresponding subsections of the Acts; they are, in my opinion words of limitation that favour the conclusion that there is no extra-territorial effect*”.

Brannigan’s case was confirmed by Edmonds J in *Vijayakumar’s* ²case.

4. the Age Discrimination Act 1992 (Cth) (DDA)

1. *Brannigan v Commonwealth of Australia* [2000] FCA 1591

2. *Vijayakumar v Qantas Airways Ltd* [2009] FMCA 736.

Although there is no case law, it appears the Act only applies “within Australia” – section 9(2) and 10(5).

With cruise ship passengers it seems that these Acts have no extra-territorial operation.

Australia means the territorial sea and the meaning of “territorial sea” is found in the Seas and Submerged Lands Act 1973 (Cth). The expression “territorial sea” takes its meaning from the UN Convention on the Law of the Sea 1982 (UNCLOS) see s.3(1).

Article 3 of the UNCLOS provides

“Every State has the right to establish the breadth of its territorial sea up to a limit of 12 nautical miles, measured from the base lines determined in accordance with this Convention”.

In other words, the 4 Acts are restricted in their operation to within 12 nautical miles off shore.

Whether this restriction applies to cruise ships we do not know. Brannigan and Vijayakumar cases involved complainants who were on land in another country and may be distinguished. There has been no judicial discussion, interpretation or authority on this particular aspect of the Acts as far as we know.

There are certain particular circumstances that may be applied to cruise ship holiday passengers and thus may arise in judicial discussion and judgments in the future.

At the moment it seems that the following apply:

- At the Australian port where cruise holiday passengers are waiting to board their cruise ship, the Acts apply.
- As the cruise ship cruises up say Sydney Harbour and travels through Sydney Heads, the Acts apply.
- As soon as the cruise ship reaches 12 nautical miles off Australia’s coast – the Acts are thrown overboard.
- At all times the passengers are on board the cruise beyond the 12 nautical miles, say for the 21 day cruise – the passengers are not protected by the Acts.
- On return to Australia, once within the 12 nautical miles zone – passengers are again protected by the Acts.
- It is submitted that these submissions have a retrospective effect from 1st January 2010.

Unlawful discrimination has come a long way in Australian society and Australian cruise passengers would expect the same protection from passengers and crew alike on a holiday. It is submitted that this is an intolerable situation and can and will cause extreme hardship and stress to Australian passengers who are unlawfully discriminated whilst on board a cruise ship departing an Australian port.

It is submitted that most, if not all cruise passengers are unaware of this situation.

It is submitted that most, if not all, travel agents are unaware of this situation.

It is submitted that most, if not all passengers and travel agents presume that they would be protected by the Acts at all times they were onboard the cruise ship for their holiday.

It is submitted that the Hof R committee recommend:

1. an amendment to the Acts so that Australian residents have the jurisdiction and protection of the Acts.
2. negotiate an agreement with the cruise industry to make it a mandatory term in their contracts with Australian passengers that the jurisdiction of the Acts apply to Australian passengers.
3. negotiate with the cruise industry on the basis that it is a condition for a cruise ship to use the Australian port facilities (including the new Garden Island Naval facilities in Sydney) to include a clause in their contracts with Australian passengers that the Acts have jurisdiction over all the Australian passengers at all times whilst they are on board the cruise ship.

Australian passenger means “an Australia resident who books a 45 day or less cruise holiday on a cruise ship which departs and returns to an Australia port within that time”.

John O'Brien
Katherine Strahan – 20th November 2012

Copy to Mr Rob Oakeshott Member for Lyne: