



Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

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31 July 2008

Peter Hallahan
Committee Secretary
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hallahan

Re: Inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality

Thank you for the invitation to make a submission in relation the aforementioned inquiry.

Noting the scope of the inquiry as set out in points (a) to (o) of the invitation, the Office of the Anti-Discrimination Commissioner (OADC), will comment on a number of those points, as per below.

Introduction

At the outset, the OADC notes that the Tasmanian *Anti-Discrimination Act 1998* (the ADA) prohibits discrimination on a number of grounds, including gender, in a range of areas of activity. It is well accepted that the ADA is among the most progressive and broad pieces of anti-discrimination legislation in Australia. It is important to note that sometimes complainants will have the option to lodge a complaint with the OADC or the Human Rights and Equal Opportunity Commission (HREOC) under the *Sex Discrimination Act 1984* (SDA). Further, Tasmanians who wish to make complaints against Commonwealth entities are only able to lodge a complaint to HREOC¹ and there are limitations in relation to making complaints under the SDA against instrumentalities of a State (see for example, s 13 of the SDA).

Due to the intersection and overlap between the ADA and SDA, the OADC is of the view that Tasmanians should have the same or similar rights whether they lodge a complaint under the SDA or the ADA. To achieve this, the OADC advocates some changes to the SDA that will conform with the ADA in circumstances where the ADA has a broader coverage and its text and structure are easier to follow.

¹ See the recent decision of *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)* [2008] FCAFC 104 which held that the ADA does not apply to Commonwealth entities.

a. the scope of the Act, and the manner in which key terms and concepts are defined

The OADC is of the view that some of the definitions under the SDA could be improved so that the meaning is clearer, and in some instances, the meaning widened to better meet its objectives. Further, the OADC is of the view that the structure of the SDA is complex and could be improved by defining key terms such as direct and indirect discrimination once, and listing the relevant areas of activity once. In this regard, it is noted that the ADA has separate Parts and Divisions that deal with different issues. For example, all terms are defined in s 3, prescribed attributes are listed in s 16, the areas of activity are listed in s 22, and discrimination is defined in ss 14 and 15.

It is also important to note that the coverage of the ADA in relation to the areas of activity is more comprehensive than the SDA. S 22(1) of the ADA provides that “*Subject to the exceptions and exemptions specified in Part 5, this Act applies to discrimination and prohibited conduct, other than inciting hatred, by or against a person engaged in, or undertaking any, activity in connection with any of the following:*” This means that to fall within an area of activity, it need only be established that a complainant **or** a respondent were undertaking any, activity in connection with any of the areas of activity (the breadth of s 22 of the ADA was also discussed in the decision of *Burton v Houston* [2004] TASSC 57 (11 June 2004)).

The OADC is of the view that s 8 of the SDA could be drafted more clearly. It is understood that the intention of s 8 is that the attribute need not be the sole or dominant reason for the less favourable treatment where there is more than one reason for the discrimination. It is respectfully submitted that s 14(3)(a) of the ADA makes this point clearer by the use of plain language:

For direct discrimination to take place, it is not necessary –

(a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment;

It is submitted that the definition of a ‘club’ is restrictive because the club must sell or supply liquor for consumption on its premises to be characterised as a club within the meaning of s 4 of the SDA. Many clubs such as sporting clubs do not sell or supply liquor. Therefore, there may often be a technical barrier in bringing complaints against clubs. It is noted that the same problem exists in relation to the definition of a club under the ADA.

The OADC strongly supports the maintenance of s 27 of the SDA which relates to requests for information. The OADC receives a number of inquiries about irrelevant questions pertaining to prescribed attributes. While there is no specific provision in the ADA dealing with requests for information, the definition of employment and discrimination can be interpreted broadly to encompass irrelevant questioning. However, the OADC is of the view that the application of section 27 is clearer, and as stated, should remain.

In this regard, the OADC notes that s 26 of the *Anti-Discrimination Act* (NT) also deals with unnecessary information in clear terms.

It is also noted that the definition of employment is more broadly defined under the ADA than the SDA.

In relation to victimisation under s 94 of the SDA, the OADC notes that it is an offence to engage in victimisation and penalties apply. The OADC questions why victimisation amounts to an offence, particularly having regard to the remedial and beneficial nature of anti-discrimination legislation, when other prohibited acts do not.

d. consistency of the Act with other Commonwealth and state and territory discrimination legislation, including options for harmonisation

See introduction and submissions generally.

As a matter of broad principle, the OADC supports options for harmonisation provided there is a comprehensive protection against discrimination in a wide range of areas of public life. Reference is made to modelling provisions on the ADA on the basis that it offers broad ranging protection against discrimination. The OADC acknowledges that other State and Territory Acts are quite broad and cover some areas not covered by the ADA.

f. impact on state and territory laws

The OADC supports maintaining s 10 of the SDA which does not preclude the operation of State or territory laws and provides people with the option to lodge in their home State or HREOC, where there are no jurisdictional barriers to exercising that choice. Similarly, the OADC agrees that people should not be able to ‘double dip’ and lodge a second complaint with HREOC if another State or territory anti-discrimination body has already dealt with the matter.

i. addressing discrimination on the ground of family responsibilities

Firstly, the OADC is concerned that the definition of ‘defacto spouse’ in the SDA only includes opposite sex and not same sex defacto partners. The OADC is of the view that the definition of defacto spouse should encompass same sex partners in order to remove discrimination against same sex couples that may be exercising family responsibilities. It is also respectfully submitted that carers who are not in a loving and/or sexual relationship be afforded protection against discrimination on the basis of family and/or caring responsibilities.

Similarly, with changing societal attitudes and the increasing role of men in childrearing, in so far as the SDA permits, there is a strong case for affording equal rights to men exercising family responsibilities. These suggested amendments would bring the SDA in line with the ADA and better reflect current community expectations regarding gender equality.

It is noted that s 14(3A) of the SDA states that “*It is unlawful for an employer to discriminate against an employee on the ground of the employee’s family responsibilities by dismissing the employee*”.

To the extent that the SDA only prohibits discrimination on the basis of family responsibilities arising from termination of employment, the OADC is of the view that this coverage is unnecessarily limited and fails to address discrimination on the ground of family responsibilities in employment in a number of circumstances, for example:

- Not appointing or promoting a person to a role because of their family responsibilities;
- Treating an employee less favourably at work for example by making inappropriate or negative remarks about their family responsibilities;
- Issuing rosters that do not take into account employees’ family responsibilities;
- Dealing with shift workers unfairly on the basis of their family responsibilities;
- Indirectly discriminating against workers with family responsibilities by unreasonably refusing flexible working options such as part-time work or job sharing.

In addition, the OADC believes that discrimination on the basis of family responsibilities (and the other attributes covered by the SDA) should be unlawful in all areas of activity like the ADA. For example, the OADC receives a number of anecdotal reports from people with children, or single parents, having difficulty securing rental accommodation. Further, the OADC has received a range of complaints alleging discrimination on the basis of family responsibilities and parental status in the provision of a service (such as excluding children from restaurants and motels).

k. sexual harassment

It is noted firstly that the definition of sexual harassment under the ADA is more broadly defined than under the SDA.

It is particularly noteworthy that the definition of sexual harassment in s 28A of the SDA does not include displaying matter related to a prescribed attribute (for example sex), which can encompass displaying offensive pornographic images. Section 3(d) of the ADA defines conduct of a sexual nature to *include* displaying matter related to a prescribed attribute. The OADC considers it important that such conduct be included in the definition of sexual harassment in an age of increasing technology where people have access to a range of electronic media through, for example, mobile phones and the internet.

n. scope of existing exemptions

The OADC accepts that sometimes it is necessary to allow discrimination in defined circumstances. However, the OADC has some concerns regarding the number and breadth of the exemptions contained in the SDA which, in our submission, conflicts with the underlying philosophy of the SDA to eliminate discrimination.

The OADC is also of the view that the meaning of some of the exemptions are ambiguous and could be improved by using plain English. In making this submission, the OADC will focus on a few key exemptions contained in the SDA.

Section 14(3) of the SDA provides that “ *Nothing in paragraph (1)(a) or (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person’s sex, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.*”

The OADC considers it is problematic that persons may discriminate against domestic workers in these circumstances. The OADC is of the view that the exemption is likely to have the effect of disadvantaging women as group, who traditionally are more likely to be engaged in domestic work. The OADC is of the view that maintenance of s 14(3) may encourage the marginalisation of low paid female domestic workers.

The OADC notes that there are a number of circumstances in which religious bodies may discriminate under the SDA.

The OADC is of the view that the breadth of s 37 (d) of the SDA is problematic. S 37(d) provides that nothing in Division 1 or 2 affects “*any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.*”

Applying this exemption, an argument could be mounted that a woman, or an unmarried woman, not be appointed principal of a religious school because to do so might injure the religious susceptibilities of some adherents of that religion. It is respectfully submitted that such a scenario would undermine the underlying philosophy of the SDA to eliminate discrimination and its role in implementing the non-discrimination obligations under the *Convention of the Elimination of All Forms of Discrimination Against Women*.

The OADC has similar concerns regarding the breadth of the exemption contained in s 38 of the SDA, particularly the aspect that permits discrimination by educational institutions established for religious purposes “*...that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*”

In the OADC’s view, s 38 is unnecessarily broad because a respondent need only establish that he or she personally acted in good faith, which may be construed as acting on an honest belief that a particular action would *avoid injury to the religious susceptibilities of adherents of that religion or creed*. The subjective component of s 38 of the SDA, by its very nature, could have far reaching application, with the consequence of rendering lawful what would otherwise be unlawful discrimination in a key area of public life. As per above, it is respectfully submitted that the current exemption undermines the underlying philosophy of the SDA to eliminate discrimination.

The OADC also questions the exemption in relation to voluntary bodies contained in s 39 of the SDA, which provides that “*Nothing in Division 1 or 2 renders it unlawful for a*

voluntary body to discriminate against a person, on the ground of the person's sex, marital status or pregnancy, in connection with:

(a) the admission of persons as members of the body; or

(b) the provision of benefits, facilities or services to members of the body."

Voluntary bodies can provide important services to members of the public and are an area of public life. Accordingly, the OADC is of the view that voluntary bodies should be prohibited from engaging in discrimination. Such an approach would be consistent with the ADA which does not preclude voluntary bodies from the application of the Act.

In relation to s 41A of the SDA that deals with new superannuation fund conditions, the OADC questions the use of this exemption. In other words, how often would actuarial data exist that would render discrimination on the basis of sex or marital status reasonable in relation to superannuation? It may be that with the passing of time and changing attitudes, discrimination against women in relation to superannuation is no longer considered acceptable in the community.

Finally, the OADC notes that s 43 allows discrimination against women in relation to the performance of combat duties. The OADC is aware that this exemption is currently under consideration. This issue raises complex and challenging questions, which will be undoubtedly subject to further debate, which the OADC will be keen to participate in.

If the Committee requires further information or clarification on this submission, please do not hesitate to contact Catherine Edwards, Complaints Manager.

Yours Sincerely,

Bedwards

per

Sarah Bolt

Anti-Discrimination Commissioner