



Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

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Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary,

The Sex and Age Discrimination Legislation Amendment Bill 2010

Thank you for the opportunity to comment on the Sex and Age Discrimination Legislation Amendment Bill 2010 (Cth) (the Bill)

The Office of the Anti-Discrimination Commissioner (the OADC) welcomes the opportunity to contribute to this important Bill.

Before providing the OADC's view on the Bill, the OADC welcomes the introduction of the Sex and Age Discrimination Legislation Amendment Bill 2010 into Parliament by the Federal Attorney-General, the Hon Robert McClelland, on 30 September 2010. The Bill demonstrates the Federal Government's recognition that there is a need for the strengthening of protections against sex discrimination and sexual harassment through amendments to the *Sex Discrimination Act 1984* (Cth) (the SDA). The OADC further welcomes the establishment of an Age Discrimination Commissioner in the Australian Human Rights Commission. The establishment of an Age Discrimination Commissioner will ensure that all Australians are protected and able to participate in areas of public life in Australian society regardless of age.

The Sex Discrimination Act 1984 (Cth)

General comment

The OADC welcomes all developments, clarifications and expansion of the SDA to be achieved through the successful passage of this Bill. It is well accepted that the *Anti-Discrimination Act 1998* (Tas) (the ADA) is among the most progressive and comprehensive pieces of anti-discrimination legislation in Australia. The ADA prohibits discrimination in relation to 20 separate attributes including breastfeeding and family responsibilities.

It is pleasing that the SDA will, as a result of the Bill being passed, have as separate protected attributes or grounds, breastfeeding and family responsibilities. This will provide greater protection to Tasmanians both at the Federal level and will give them the same or similar rights whether they lodge a complaint under the SDA or the ADA.

Breastfeeding

The OADC is pleased that the Bill introduces a separate ground of discrimination in relation to breastfeeding together with an inclusive definition into the SDA. Clarity in relation to what 'breastfeeding' means and in what areas of activity discrimination is prohibited on this ground is vital to assist all parties to a complaint. In this regard, reference is made to the OADC's submission to the Senate Inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equalityⁱ (Senate SDA Inquiry Submission) in which the OADC submitted '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'. It is pleasing that this point appears to have been noted by the Inquiry and incorporated in the Bill.

Family responsibilities

The OADC also welcomes the introduction by the Bill of a less restrictive application of possible discrimination on the ground of family responsibilities with the replacement of the term 'employee' to a 'person'.

It was noted by the OADC in its Senate SDA Inquiry Submission that the restriction in the SDA to only protect against employment termination on the basis of family responsibilities was unnecessarily limited and failed 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 a person's family responsibilities;
- by making inappropriate or negative remarks at work about a person's 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;
- by unreasonably refusing flexible working options such as part-time work or job sharing.

The proposed amendments to the SDA would enable people to lodge complaints in regard to possible discrimination in broader circumstances than previously, which is applauded by the OADC.

It is also pleasing that the Bill recognises the possibility of indirect discrimination on the ground of family responsibility and makes this unlawful. It is the experience of the OADC, and no doubt other anti-discrimination bodies in Australia that administer Acts with similar provisions to the ADA, that return-to-work arrangements and flexible working conditions can and do raise issues of indirect discrimination.

It is disappointing that the Bill does not go as far as protecting people with family responsibilities in areas of activity other than employment, such as education; provision of goods, services and facilities; accommodation; land; clubs and the administration of Commonwealth laws and programs. The OADC has had both enquiries and complaints from Tasmanians who have alleged both direct and indirect discrimination on the basis of family responsibilities in almost all of the above areas. It is submitted that the Committee

recommend amendments to ensure protection against discrimination on the ground of family responsibility in all areas of activity as is the case with the other grounds protected in the SDA.

The OADC agrees wholeheartedly with the amendment to section 9 of the SDA to give the same protections to both men and women under the SDA and to take into account other international instruments and the *Constitution* to expand protection under the SDA. If men and women are to share equally in the responsibility of caring for family members, it is vital that both are protected against discrimination on this ground. The inadvertent consequence of failing to provide equal protection for men and women may be that heterosexual couples continue to have the female member of the couple take on the primary caring responsibilities for family members to ensure that they have protection against discrimination.

Sexual harassment

The OADC welcomes the amendments that relate to sexual harassment under the SDA.

The following comments in relation to the amendments of the sexual harassment provisions under the SDA are made with the sexual harassment provision found in the ADA in mind.

Firstly, the definition of sexual harassment is more broadly defined in the ADA than in the SDA. In its Senate SDA Inquiry Submission, the OADC noted 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.ⁱⁱ

The OADC notes that this has not been recognised in the recommendations made by the Committee or the amendments proposed in the Bill. 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.

The OADC welcomes the insertion of the word ‘possibility’ in section 28A(1) of the SDA and agrees that the amendment will strengthen the protection against sexual harassment by lowering the burden of proof placed on complainants in sexual harassment complaints.

The OADC considers the insertion of section 28(1A) to be beneficial to all parties to a complaint in that it provides some explanation as to what a reasonable person may consider to be circumstances of relevance whilst on the other hand not restricting the circumstances. The OADC’s view is that by providing such clarification parties and especially complainants will have a clearer understanding of what types of circumstances are considered to be relevant.

The OADC welcomes the broadening of section 28B(6) to include possible sexual harassment between workplace participants from one or another workplace and between difference types of workplace participants. The ADA imposes no such restriction on complainants with the exception that the sexual harassment occur in one of the areas of activity set out in section 22(1)(a) of the ADA.

The OADC welcomes the broadening of sections 28F and 28G of the Act to include sexual harassment in relation to educational institutions and in relation to the provision of facilities goods and services.

Exemptions and exceptions

In its Senate SDA Inquiry Submission, the OADC acknowledged that it is accepted that sometimes it is necessary to allow discrimination in carefully defined circumstances. However, the OADC remains concerned about the number and breadth of the exemptions contained in the SDA as their retention conflicts with the underlying philosophy and purpose of the SDA to eliminate discrimination. It is noted that proposed amendments to the exemptions in the SDA have been primarily confined to insertions in regard to the two new grounds of possible discrimination, breastfeeding and family responsibilities. It is disappointing that the Federal Government has not taken this opportunity to remove or limit the scope of the exemptions to the SDA.

In particular, the OADC questions the exemption in relation to voluntary bodies contained in section 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 and do provide important services to members of the public and are an important aspect 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 SDA.

It is submitted that this exemption should be repealed so that, as stated above, voluntary bodies would be prohibited from engaging in discrimination. The OADC submits that, if necessary, the SDA could also be amended to ensure that voluntary bodies could argue the possible defence of unjustifiable hardship. The OADC is of the view that this would be consistent with the ethos of eliminating discrimination in the SDA rather than providing exemptions to various types of bodies and not others.

The Age Discrimination Act 2004 (Cth)

The OADC applauds the Federal Government's amendments to the *Age Discrimination Act 2004* (Cth) which includes the establishment of a separate Age Discrimination Commissioner within the Australian Human Rights Commission. This step recognises the real need for important focused work and research to be undertaken to address issues of age discrimination in Australia, especially given that our population is aging and more Australians are seeking to work longer. The establishment of the position of Age Discrimination Commissioner, with provision of appropriate funds and resources, will enable greater focus on this work and targeted collaboration with state and territory anti-discrimination bodies including the OADC.

It is disappointing that the Bill does not amend the *Age Discrimination Act 2004* (Cth) to improve the scope of protection against discrimination on the basis of age, including through removing or limiting the scope of exceptions and exemptions to this Act. The OADC is aware that a consolidation of laws process is currently being or will be undertaken in respect of all of the current Federal Human Rights Legislation, and that this process will involve public forums as well as seeking public comment. The OADC is of the view that such a process will hopefully demonstrate the real need for the amendment of the *Age Discrimination Act 2004* (Cth) to either bring the Act up to best practice in the other Federal

anti-discrimination legislation or at minimum to strengthen the protections under this Act. the OADC urges the Committee to recommend, as part of this inquiry, a full review of the scope of the exceptions and exemptions in the *Age Discrimination Act 2004* (Cth) with a view to ensuring effective protection against discrimination on the basis of age to the greatest extent possible.

Conclusion

In closing, the OADC appreciates the opportunity to comment in relation to the very important Sex and Age Discrimination Amendment Bill (2010) tabled in Federal Parliament by the Federal Attorney-General. The OADC, whilst making some observations that in its view would be beneficial to the legislation, embraces the amendments and urges the Committee to recommend in favour of the adoption of the Bill.

Yours sincerely

(Ms) Robin Banks
Anti-Discrimination Commissioner

ⁱ Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality.