



ANTI DISCRIMINATION
COMMISSION QUEENSLAND

**THE SENATE STANDING COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS**

SUBMISSION

**INQUIRY INTO THE
SEX AND AGE DISCRIMINATION
LEGISLATION AMENDMENT BILL 2010
[PROVISIONS]**

27 October 2010

1. INTRODUCTION

The Senate Legal and Constitutional Affairs Legislation Committee (the Committee) is inquiring into the provisions of the Sex and Age Discrimination Legislation Amendment Bill 2010 (the Bill). The Bill seeks to amend:

- the *Sex Discrimination Act 1984* to strengthen protections against sex discrimination and sexual harassment; and
- the *Age Discrimination Act 2004* to introduce a dedicated position of Age Discrimination Commissioner in the Australian Human Rights Commission.

This submission focuses on the proposed amendments to the *Sex Discrimination Act 1984* (the SDA). The Anti-Discrimination Commission Queensland makes no comment on the proposal to introduce a dedicated position of Age Discrimination Commissioner in the Australian Human Rights Commission.

1.1 About the Anti-Discrimination Commission Queensland

The Anti-Discrimination Commission Queensland (ADCQ) is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991* (the Queensland AD Act).

The scheme of the Queensland AD Act is to prohibit discrimination, both direct and indirect, on certain grounds in certain areas of activity, unless an exemption under the Act applies, and to provide a mechanism for resolving contraventions of the Act. Other objectionable conduct is also prohibited, including sexual harassment, victimisation, vilification and unlawful requests for information.

There are 16 grounds on which discrimination is unlawful, and these include sex, pregnancy, breastfeeding, family responsibilities, and association or relationship with a person with any of the attributes.

Discrimination is prohibited in the areas of work, education, the provision of goods and services, accommodation, club membership and affairs, the administrations of State laws and programs, superannuation, insurance, and local government. The prohibition against sexual harassment is not limited to areas of activity.

The functions of the ADCQ include promoting an understanding, acceptance and public discussion of human rights in Queensland, as well as inquiring into and where possible effecting conciliation of complaints of contraventions of the Queensland AD Act. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.

2. SEX DISCRIMINATION ACT AND AGE DISCRIMINATION ACT AMENDMENT BILL 2010

In this submission, the ADCQ comments on the provisions relating to the extension of protection from discrimination on the ground of family responsibilities, sexual harassment, and the exemptions for voluntary bodies, acts done under statutory authority, and superannuation fund conditions.

The ADCQ supports the proposed extension of protections from discrimination on the new ground of breastfeeding as set out in the Bill.

2.1 Extension of protections from discrimination on the ground of family responsibilities

In its report on the inquiry into the effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender identity, the Committee made two recommendations in relation to the ground of family responsibilities, namely:

1. Broaden the prohibition of discrimination on the ground of family responsibilities to include indirect discrimination and discrimination in all aspects of employment (recommendation 13); and

2. Impose a positive duty on employers to reasonable accommodate requests by workers for flexible working arrangements to accommodate family or carer responsibilities (recommendation 14).

The Bill implements the recommendation relating to the broadening of the ground of family responsibilities to all aspects of employment, except in the exercise of a discretion in relation to the payment of a superannuation benefit (sub-section 14(4)). Discrimination in the exercise of a discretion in relation to the payment of a superannuation benefit is prohibited only on the grounds of sex and marital status.

While the family responsibilities ground is limited to the work areas, the new ground of breastfeeding extends to the other areas of:

- education (section 21);
- provision of goods, services and facilities (section 22);
- accommodation (section 23);
- disposition of land (section 24)
- club membership and affairs (section 25); and
- administration of Commonwealth laws and programs.

In Queensland, discrimination on the ground of family responsibilities has been prohibited in all areas under the Act since 31 March 2003. In the past three financial periods the ADCQ has reported the following information for the ground of family responsibilities, based on accepted complaints¹:

- **2007 – 2008**

Percentage of complaints:	6.9		
Work		35	(76%)
Administration of State laws and programs		3	(6.5%)
Accommodation		5	(11%)
Pre-work		2	(4%)
Education		1	(2.5%)
Total		46	(100%)

¹ Only complaints that indicate a possible contravention of the Act are accepted by the ADCQ for investigation and conciliation – sections 136 and 141.

• **2008 – 2009**

Percentage of complaints:	6.7		
Work		40	(82%)
Goods & Services		4	(8%)
Administration of State laws and programs		3	(6%)
Education		1	(2%)
Accommodation		1	(2%)
Total		<u>49</u>	<u>(100%)</u>

• **2009 – 2010**

Percentage of complaints	5.2		
Work		27	(87%)
Goods & Services		2	(6.5%)
Accommodation		2	(6.5%)
Total		<u>31</u>	<u>(100%)</u>

These statistics demonstrate that complaints of discrimination on the ground of family responsibilities comprise a significant proportion of complaints by ground, and although the majority of these complaints arise in the work area, complaints do arise in the other areas.

In Western Australia and Tasmania, discrimination on the ground of family responsibilities is also prohibited in areas additional to the work areas.

In the absence of any compelling reason to limit the protection of family responsibilities to the work area, the extension of this protection to the other areas, as with the new ground of breastfeeding, is consistent with the expanded preamble to the SDA. It is also consistent with various provisions of the relevant international instruments, such as the protection of family², the right to be free from discrimination³ and the widest possible protection and assistance should be accorded the family⁴.

The ADCQ recommends amendment of the Bill to extend the protection from discrimination on the ground of family responsibilities to all areas under the SDA, including both direct and indirect discrimination.

² International Covenant on Civil and Political Rights, article 23

³ International Covenant on Civil and Political Rights, article 26

⁴ International Covenant on Economic, Social and Cultural Rights, article 10

The ADCQ supports the Committee's recommendation to impose a positive duty on employers to reasonably accommodate requests for flexible working arrangements, having addressed this issue in its submission to the 2008 inquiry.

2.2 Sexual Harassment

The ADCQ supports the proposed amendments to the definition of sexual harassment (items 53 and 54) which address recommendations 15 and 16 of the Committee. The amendment to the reasonable person test to *the possibility* of offence, humiliation or intimidation, and the inclusion of an indicative list of circumstances, are based on the Queensland AD Act.

The ADCQ suggests a further amendment to the definition of sexual harassment in section 28A of the SDA. It concerns the indicative meaning of 'conduct of a sexual nature' in sub-section 28A(2), which provides:

- (2) In this section:
conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

The expression 'in relation to' has been interpreted to include being aware of something of a sexual nature a person does or writes or says about the person to a third person⁵. The definition in sub-section 28A(2) could potentially limit section 28A(1) rather than simply making it clear that the prohibited 'conduct of a sexual nature' is intended to include remarks, comments or statements with sexual connotations.

The ADCQ recommends amending sub-section 28A(2) by omitting the words 'to a person, or in the presence of a person'.

The ADCQ strongly recommends the extension of the protection from sexual harassment unlimited by areas of activity, as is the case under the Queensland AD Act. A general prohibition against sexual harassment is not

⁵ See *Carter v Linuki Pty Ltd* [2005] NSWADTAP 40 at 15; *Linnell v Seachem Australia Pty Ltd* [2010] NSWADT 111 at 19-23

unreasonable and should be a right of all persons in 2010. Sexual harassment can occur across all human interactions in our community. The Queensland Commission's experience is that the complaints it receives generally do not fall outside the bounds of reasonable expectations. It has not opened the floodgates of intrusion into domestic relationships; the reasonable person test in the legislation adequately manages this possible concern.

However, in the absence of such extended protection, the ADCQ supports the broadening of sexual harassments protections, including:

- (a) the proposed amendment to section 28B(6) (item 55) to extend the protection against sexual harassment between people employed by different organisations by removing the requirement that the sexual harassment occur at the workplace of both of the workplace participants; and
- (b) the proposed new sub-section 28G(2) (item 59) to make it unlawful for a person to sexually harass another person in the course of seeking or receiving, goods, services or facilities from the harassed person, extending the protection from sexual harassment to service providers, in addition to the existing protection for customers and clients; and
- (c) the proposed amendment to sub-section 28F(2)(a) extending the protection from sexual harassment to students, regardless of their age (item 56) and the proposed new sub-sections 28F(2A) and (2B) by removing the requirement that the person responsible for the harassment must be at the same educational institution as the victim of the harassment (item 57).

It is noted however that the protection from sexual harassment in the education area is limited to sexual harassment by a staff member or by a student who has attained the age of 16 years. The ADCQ submits that the age limitation is not necessary, and this has not been an issue in successfully managing complaints in Queensland.

2.3 Exemption - Voluntary Bodies

The existing provision of the SDA (section 39) exempts voluntary bodies from discriminating on the grounds of sex, marital status and pregnancy in connection with admitting persons as members, and providing benefits, services or facilities to members, of the body.

Voluntary body is defined in the SDA as meaning:

an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include:

- (a) a club;
- (b) a registered organisation;
- (c) a body established by a law of the Commonwealth, or a State or of a Territory; or
- (d) an association that provides grants, loans, credit or finance to its members.

Club is defined in the SDA as meaning:

An association (whether incorporated or unincorporated) of not less than 30 persons associated together for social literary, cultural, political, sporting, athletic or other lawful purposes that:

- (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and
- (b) sells or supplies liquor for consumption on its premises.

Essentially, a voluntary body for the purposes of the SDA is a not-for-profit organisation.

Earlier reports⁶ have long called for the repeal of the voluntary bodies exemption, and have recommended that voluntary bodies should not be prioritised over the human rights goals of anti-discrimination law. The ADCQ endorses these recommendations.

⁶ Sex Discrimination Commissioner, *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*, AGPS, Canberra, 1992; ALRC 69, *Equality Before the Law*, 1994; Research Paper, *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984*, 1999

Following a recent decision of the Queensland Civil and Administrative Tribunal in which sporting bodies⁷ were found to be entitled to an exemption from discrimination in the provision of goods or services⁸, the Queensland Anti-Discrimination Commissioner has called for the repeal of the relevant provision of the Queensland AD Act. The Queensland Attorney-General is reported as having his department consider the proposal.

The ADCQ recommends the removal of the exemption for voluntary bodies from discrimination under the SDA. It is noted that the Committee in its report also recommended the removal of the exemption for voluntary bodies together with broadening the definition of clubs so that more bodies were entitled to the single-sex exemption. The ADCQ supports this approach.

In the absence of the removal of the voluntary bodies exemption, the ADCQ opposes the extension of the exemption to include the grounds of breastfeeding and family responsibilities (item 61). There does not appear to be any justification for allowing discrimination on these grounds.

2.4 Exemption - Superannuation fund conditions

The superannuation fund exemptions⁹ currently allow certain discrimination relating to the fund conditions on the grounds of sex and marital status. When the superannuation fund exemptions were introduced in 1991 they were intended to be temporary.

Since then, the Sex Discrimination Commissioners have worked towards removal of these exemptions, and more recently the Australian Human Rights Commission has suggested a review of all permanent exemptions with a view to considering whether they should be retained, narrowed or removed.

⁷ Which would have met the definition of voluntary bodies in section 39 of the SDA

⁸ *David Yohan representing PAWES (Providing Awareness with Education and Sport) v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No.2)* [2010] QACAT 471

⁹ Section 41A New Superannuation fund conditions; and section 41B Existing superannuation fund conditions

Exemptions should be narrow, and only retained where there is clear and appropriate justification for their existence. At this time, there does not appear to be any justification for expanding the superannuation fund exemptions to allow discrimination on the ground of family responsibilities.

The ADCQ recommends a review of the existing superannuation fund exemptions and opposes the broadening of the exemptions to include the ground of family responsibilities.

3. RECOMMENDATIONS

- 1. Implement the proposed extension of protections from discrimination on the new ground of breastfeeding.**
- 2. Extend the protection from discrimination on the ground of family responsibilities to all areas under the *Sex Discrimination Act 1984*, including both direct and indirect discrimination.**
- 3. Amend sub-section 28A(2) of the *Sex Discrimination Act 1984* by omitting the words 'to a person, or in the presence of a person'.**
- 4. Extend the protection from sexual harassment generally so that it is not limited by areas of activity under the *Sex Discrimination Act 1984*.**
- 5. In the absence of a general prohibition against sexual harassment, amend sub-section 28F of the *Sex Discrimination Act 1984* to provide protection from sexual harassment by a student, regardless of their age.**
- 6. The removal of the exemption for voluntary bodies from discrimination by the repeal of section 39 of the *Sex Discrimination Act 1984*.**

- 7. In the absence of the removal of the exemption of voluntary bodies from discrimination, the existing exemption should not be extended to the grounds of breastfeeding and family responsibilities as provided for in item 61 of the Bill.**

- 8. Review the existing superannuation fund exemptions in the *Sex Discrimination Act 1984*.**

- 9. Remove items 63 to 67 of the Bill so that the exemptions for superannuation fund conditions in sections 41A and 41B of the *Sex Discrimination Act 1984* are not broadened to include the ground of family responsibilities.**