



Equal Time

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Transgender, transsexual, bisexual and intersex people are extremely vulnerable to discrimination, but anti-discrimination law in this area needs reform to serve them effectively. See page 6 for a roundup of the issues.

The disability that dares not speak its name

Many people with psychiatric disabilities are reluctant to disclose them in the workplace for fear of discrimination and harassment. At the same time, some employers are unclear about their obligations to employees with psychiatric disabilities. Margaret White, one of the Board's Senior Workplace Relations Consultants, looks at the legal issues.

When Rajiv Oberoi lodged complaints of race discrimination with the Human Rights and Equal Opportunity Commission, the investigator reported to HREOC that Mr Oberoi's perception of events was affected by his depression, and therefore lacked credibility.

After his initial complaints were dismissed, Mr Oberoi lodged another complaint alleging that the investigator had discriminated against him. The magistrate held that Mr Oberoi had received less favourable treatment than others in the same or similar circumstances because of his psychiatric disability. He was awarded \$20,000 compensation (*Rajiv Oberoi v Human Rights and Equal Opportunity Commission*, [2001] FMCA 34).

Mr Oberoi's experience highlights one of the many problems confronting people with psychiatric disabilities - it can be hard to get others to take you seriously, especially if you disagree with them!

Stigma

Psychiatric disabilities carry a stigma based on uninformed ideas about dangerousness, drug dependence, personal inadequacy, and unpredictable, bizarre behaviour. It is popularly believed that people with depression, anxiety or stress-related disorders should pull themselves together and that medications for these disabilities are grossly over-prescribed.

A survey conducted by the American National Mental Health Association in 2001 found that one third of respondents met the diagnostic criteria for either depression or anxiety. However, only 18% had ever sought treatment, and 42% of those were ashamed of their condition.

It's no wonder that most people with psychiatric disabilities choose not to disclose that fact to their employer or their colleagues, so that psychiatric disability is 'the

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From the President

As our regular readers will know, the Board has been conducting a program of events under the title of *Advance Australia Fairly*. The principal element of this program is a recognition that many of the problems which beset race relations in Australia today arise from a lack of understanding about the variety of beliefs and value systems which are current in our society.

While it is important that we all understand and support the core values of the Australian community, values such as respect, tolerance, equality of rights, free participation in our democratic processes, obedience to the law and the like, there are nonetheless some areas in which values differ among different cultural, ethnic or religious groups in our society.

One example is the way in which we think about 'families'. For many people, the family is a nuclear unit consisting of parents and children. For others it is an extended arrangement covering more than two generations and stretching well beyond parent and sibling relationships. For yet others it may be a same sex partnership.

The media play a vital role in mediating and explaining the ways in which these different cultural values are understood and expressed. It is for this reason that so much of the *Advance Australia Fairly* campaign has focussed on media matters.

In our two highly successful seminars we have tried to examine

how differences in our community, which contribute to the rich fabric of our multicultural society, can be presented in a positive light. In our postcard initiative we have sought to use a different aspect of the media to highlight the contributions of specific individuals to this process of national enrichment. Our forthcoming analysis on reporting race issues in the media will probe further into the dynamics of media presentations of difference.

We are now supplementing the *Advance Australia Fairly* activities with some further work concentrating on the issues surrounding Arabic and Islamic Australians. The Arabic/Islamic communities in Australia have a rich and diverse history stretching back into our earliest colonial days, but often little is known or understood about them.

Recently media portrayals of these communities have been very negative: think of the treatment of asylum seekers, 'boat people', 'children overboard', September 11, the war on terrorism, ethnic crime, Afghanistan, Nigerian fatwas, Bali and potential war with Iraq - just to cite a few examples.

With the assistance of the Attorney General's Department, the Board has now appointed two Arabic-speaking officers for a six month period to work on some of these issues. I would like to recognise the support of the Department and the Director General, both in this initiative and in funding for the *Advance Australia Fairly* program as

a whole. We would not have been able to conduct either program from our own inadequate resources.

Sana Salame will be joining us on secondment from the Department of Community Services and Ihab Shalbak comes to us from the private sector and work with the Australian Arabic Communities Council. Their role at the Board will be multifaceted, and will include:

- working to improve our knowledge of the Arabic/Islamic communities;
- enhancing those communities' understandings of the operations of, and their rights under, our legislation;
- strengthening our liaison with the Community Relations Commission;
- ensuring that our publications are written in a way which is useful and meaningful to the members of the Arabic/Islamic communities;
- focusing on working with the Arabic language media in getting our messages across; and
- helping the communities get their messages into the mainstream media.

I regard this as a logical outgrowth of the work that began with the *Advance Australia Fairly* program, and as a significant addition to our armory in improving race relations, community understanding and mutual respect among all Australians.

Chris Puplick

Advance Australia Fairly more successful events

The Anti-Discrimination Board's Advance Australia Fairly program has continued with another successful seminar on racism in the media, and the launch of the second series of postcards to be distributed in cafes and cinemas around NSW.

The seminar *We interrupt this programme*, held at Bankstown on 29 November, explored the issues raised at the *Beyond these walls* seminar held in October from a practical viewpoint. It brought together media professionals and representatives from communities affected by the current media climate to share their knowledge and develop strategies to improve the way they are represented.

Introduced by MC Electra Manikakis from SBS TV, speakers in the morning session included Ross Coulthart from Channel Nine's Sunday Program, Anthony McClellan from AMC Media, community activist and filmmaker Paula Abood, and youth workers Maj Harris and Ricki Smith (who spoke about their work to promote a more positive image of young people in local newspapers).

In the afternoon, public relations specialists from the Jordan Templeman Group led workshops on practical aspects of media presentation such as preparing a press release, pitching a story and interview techniques. This culminated in a mock press conference at which the panel acquitted themselves extremely well in the face of some very difficult questions from the 'press'.

The response from participants was very positive, and it was clear they were finding the information very empowering. As one commented: 'It was really well put together, practical advice with a variety of perspectives, and didn't avoid the bigger issues which was really good'.

The seminar was followed by the launch of the second set of postcards featuring NSW citizens from a variety of ethnic, cultural and religious backgrounds, which was held at Young, NSW on Human Rights Day, December 10.

The cards profile NSW citizens whose everyday endeavours enrich the life of the community in the state. They feature workers at Burrangong Meat Processors at Young, (including refugees from Afghanistan, recent migrants from Fiji, Indigenous Australians and people with Italian, Maltese, Greek and Anglo-Celtic heritage), emergency services workers from a variety of backgrounds, Chinese-born Wei Yi (Joe) Zhang, who runs a popular Italian restaurant in Young, the de Bortoli winemaking family, and a group of actors including Sacha Horler, Anthony Wong, Maya Jupiter and Josh Quong Tart.

The highly successful launch, held at Young's Zouch Café, was hosted by Young Mayor John Walker and also addressed by Board President Chris Puplick and Joe Zhang. Attendees included representatives from community organisations, the local high school, and the local Aboriginal Land Council.



Balbinder Singh (left) from the Sikh Association of Sydney with seminar speaker Anthony McClellan.



Fairfield youth workers Ricki Smith (left) and Maj Harris.



(L-R) Postcard 'star' and restaurateur Joe Zhang, Young Mayor John Walker and Anti-Discrimination Board President Chris Puplick.



(L-R) Narelle Hennessy from the Board, Norma Freeman from Young Local Aboriginal Land Council and Rodney Freeman.

The disability that dares not speak its name

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disability that dares not speak its name'. People with physical and sensory disabilities have made important gains in their quest for equitable treatment, but people with psychiatric disabilities have to confront even greater challenges in combating community views.

Unlawful discrimination

Mental illness is a disability within the meaning of the *Anti-Discrimination Act 1977* (ADA), and it is unlawful to treat a person with a disability less favourably than others in the same or similar circumstances. Someone with a psychiatric disability must be able to do the job, of course. But the fact that they have a disability should not form the basis of decisions relating to their performance or development.

People do not have to disclose a disability when accepting a job. In *Randell v Consolidated Bearing Co* ([2002] FMCA 44), an 18 year old with dyslexia was awarded \$4,701 for lost wages and \$10,000 for hurt, humiliation and distress when he was unfairly dismissed, despite the fact that he had not disclosed his disability when he was employed.

Once employed, people with disabilities are entitled to be treated equally and must not be discriminated against, either directly or indirectly, merely because they have a disability. The ADA does permit employers to consider a person's disability in relation to hiring and dismissing an employee, but only in cases where

enabling the person with a disability to perform the inherent requirements of the position would require the employer to provide accommodation to such a level that it would impose an unjustifiable hardship on them. However, it is hard to define what 'accommodation' may be required in relation to a psychiatric disability, which may be unpredictable in its effects.

The case law is much clearer about what accommodation might impose an unjustifiable hardship. In *Oreb v Discovery Clothing Co. P/L* ([2001] NSWADT), Ms Oreb had been on leave suffering depression and anxiety, and was dismissed after six months because she was unable to say when she would be coming back.

The Administrative Decisions Tribunal decided that she had not been unlawfully discriminated against, as she had not been treated less favourably than other people who had been absent for six months and couldn't say when they would return. Also, Ms Oreb was not able to show that the problem could be solved in any other way - for example by getting in a temp, which would have reduced the hardship to her employer. If she had, her continued leave might not have imposed an unjustifiable hardship on her employer.

In another case, a prison guard who was assaulted by two prisoners suffered serious depression as a result. Over the next six years he had large amounts of sick leave and long periods on restricted duties. He claimed that he was discriminated against on the ground of his disability when his employer threatened him with dismissal.

Once again, the Tribunal decided that the amount of leave needed was not acceptable in the circumstances. It decided that,

given his illness and the stressful nature of the work, he could not meet the inherent requirements of the job without placing an unjustified burden on his employer (*Rabadi v Commissioner of Corrective Services*, [2002] NSWADT 23).

It is also unclear what accommodation might be required for a person's poor behaviour or performance. For most people with psychiatric disabilities, the disability is well-controlled, perhaps with medication, all or most of the time.

However, some may experience periods of illness, accompanied by difficult behaviour, such as irritability or withdrawal. Their performance might also be impaired, for example by poor concentration or lack of motivation.

If a person's behaviour is putting themselves or others at risk, it is undoubtedly reasonable to insist that they take leave until they are well. If the behaviour is persistent, it may be necessary to eventually terminate their employment. However, the only case law applying to this involves children with disturbed behaviour in school, and that is controversial and not very clear.

One example is the case of *Purvis v State of NSW (Dept of Education)* ([2002] FCA 503). Daniel Purvis has an intellectual disability which causes behaviour problems such as rocking, humming, swearing, hitting and kicking.

He was excluded from school and his father complained to the Human Rights and Equal Opportunity Commission that he had been discriminated against. The Deputy Disability Commissioner agreed, saying Daniel's behaviour was 'part of' and 'closely connected' with his disability.

On appeal the Federal Court said the DDC was mistaken. It said that Daniel was excluded because of his behaviour not his disability. It also said that the test was not whether Daniel was treated less favourably than others, but whether he was treated less favourably than others in the same or similar circumstances. Other students who behaved like Daniel would also have been excluded.

Accommodating disability

In any event, determining what accommodation may be required, and what might impose an unjustifiable hardship on an employer, involves an individual balance of costs and benefits. An employer who is concerned about the effects of a psychiatric disability is not entitled to insist that the person go back on his or her medication.

However the employer can ask for a medical or psychiatric report dealing with the tasks, responsibilities, skills and competencies needed in the particular job. An employee who refused to provide such a report would risk dismissal (*O'Brien v Recycled Resources Pty Ltd*, [2000] NSWADT 193).

Ideally, arrangements relating to accommodation will be arrived at by agreement between the employer, the employee and the employee's doctor, psychiatrist and/or case worker, or brokered by a workplace mental health consultant. An employment support service for people with mental illnesses might also be able to help, particularly if the person's continued employment is at risk.

In fact, failing to obtain help from an available support service may constitute less favourable treatment. In *Randell v Consolidated Bearing Co* ([2002] FMCA 44), the magistrate found that Mr Randall was treated less favourably in the same situation because CBC had

called in assistance for other trainees who were having difficulties. If he had received the available assistance and was still making mistakes at the end of his period of probation, CBC could have argued that he could not fulfil the inherent requirements of the job.

A management plan should set reasonable standards of behaviour and performance, outline the rights and responsibilities of both parties and include guidelines for dealing with any problems that might arise.

Harassment

People with mental illnesses are often reluctant to tell co-workers, and many experience harassment about their symptoms. Withdrawal, absent-mindedness, irritability, poor self esteem, sleepiness, fears, phobias and obsessions are just a few of the symptoms of a mental illness that might cause hilarity among unsuspecting workmates.

As is the case with other types of harassment, language can also cause distress, whether intentionally or unintentionally. Talk about 'psychos' or 'loonies' or 'mad

houses' can be seriously hurtful to someone who has, or whose family member has, a mental illness.

People whose disability has become known report harassment of a more hostile kind. The Board has heard of people accused of being 'on drugs', being ostracised or unfairly blamed for problems, and in one case being bullied by a boss who thought that all they needed was 'toughening up'!

As with any other type of harassment, employers have a responsibility to take reasonable steps to prevent harassment because a person has a psychiatric disability, or because a relative or friend has a psychiatric disability. Managers and supervisors should monitor issues such as the language used within the workplace.

Ignorance and thoughtlessness are the main culprits. Until people with mental illnesses can safely speak openly of their disabilities, psychiatric disability awareness training is probably the best way to get across the fact that mental illness is neither funny, inherently dangerous, contemptible, nor rare.

FOR MORE INFORMATION

The Anti-Discrimination Board has a number of publications to assist employers meet their obligations under anti-discrimination law. These include:

- *Anti-Discrimination and Equal Employment Opportunity Guidelines*
- *Harassment in the Workplace*
- *Guidelines for small business owners and managers*
- *Grievance Procedure Guidelines*
- *How to implement Equal Employment Opportunity in any organisation*

For a full list of the Board's publications for employers and other material such as posters, please contact Milly Stylli on 9268 5555.

discrimination transsexual discrimination discrimination bisexual discrimination di discrimination the neglected

In recent times there have been positive developments towards reducing discrimination against gay men and lesbians in areas such as crime prevention, police liaison and local government servicing. There are also strong gay and lesbian organisations working in the media, cultural, health and political arenas.

There have been far fewer positive initiatives in relation to transgender, transsexual, intersex and bisexual people, and they are extremely vulnerable to discrimination. Many people in these communities feel that the law has failed to respond to their needs as it has to other forms of minority or disadvantaged status, and they are therefore 'the neglected communities'.

There will be an opportunity to develop better responses to the needs of transgender, transsexual, intersex and bisexual people if the newly elected NSW government responds as expected to a 1999 review of the NSW *Anti Discrimination Act 1977* (ADA) by the NSW Law Reform Commission. The review proposed major changes which are mostly supported by the Anti-Discrimination Board, and we look forward to the advice of these communities as to how the reforms might best be achieved.

Legal coverage

Under the ADA, transgender, transsexual and intersex people are covered by the provisions relating to 'transgender', and bisexuality is

covered to some extent under the provisions relating to homosexuality. Some are concerned about these groupings, as it can be difficult to cover such entirely different lived experiences within these categories.

Other states and territories have taken very different approaches to anti-discrimination coverage for these communities. Depending upon the jurisdiction, complainants may need to rely on provisions relating to transgender, gender identity, gender history, transsexuality, homosexuality, sexuality, sexual orientation, impairment or disability.

Discrimination on the ground of being gay, lesbian, bisexual or transgender is not generally prohibited at federal level. The Commonwealth *Workplace Relations Act 1996* makes it unlawful to terminate a person's employment on the ground of 'sexual preference', which is not defined.

The *Human Rights and Equal Opportunity Commission Act 1986* gives the federal Human Rights and Equal Opportunity Commission power to inquire into acts or practices that may violate human rights or discriminate in employment or occupation. However, it is not unlawful to breach the human rights principles under the Commission's legislation, and the Commission does not have the power to enforce its recommendations.

The Australian Democrats have tried several times to introduce a bill into federal parliament to make

discrimination on the basis of sexuality or transgender status unlawful. Most recently, the Sexuality and Gender Status Discrimination Bill 1997 lapsed due to lack of support from either Labor or the Coalition parties.

Transgender discrimination

NSW anti-discrimination law counts a person as transgender if they live, have lived, or want to live as a member of the opposite gender to their birth gender. They do not have to be taking hormones or to have had gender reassignment surgery.

The ADA distinguishes between those who are 'recognised transgender persons' and those who are not. A recognised transgender person is someone who has a new birth certificate in their preferred gender, which can only be acquired if they have had gender reassignment surgery and certain other conditions are met. It is against the law to discriminate against anyone on the basis of transgender status, but only recognised transgender people can legally insist on being treated as a person of their preferred gender in most circumstances.

If a transgender person is *not* a 'recognised transgender person', the refusal to recognise their preferred sex in a situation where the same service, facility or employment opportunity is provided for both men and women could conceivably amount to indirect transgender discrimination. However, it is much harder to make out a complaint of indirect discrimination than to point to a specific legislative

intersex discrimination transgender discrimination communities discrimination

provision mandating certain treatment. This is a critical issue to transgender people, as being treated as a member of their preferred sex is central to any notion of fair treatment.

It is also unlawful to vilify a transgender person, that is, to do anything publicly that could encourage other people to hate, be seriously contemptuous of, or severely ridicule people who are transgender. This may include graffiti, public speeches or statements, public abuse, remarks in the media or symbols such as badges or clothing with slogans.

In the 2001/2002 financial year the Board received 64 enquiries relating to transgender discrimination and 11 formal complaints. We also received seven enquiries relating to transgender vilification, and two formal complaints. This constitutes about 1% of both total enquiries and total complaints.

Bisexual discrimination

Discrimination against people on the basis of male or female homosexuality is unlawful under the ADA. It is not unlawful to discriminate against a person on the basis of heterosexuality, which enables organisations to operate services and groups specifically for gay men and lesbians.

The Board accepts complaints of discrimination on the basis of bisexuality under the ADA's homosexual discrimination provisions, in circumstances where

a complainant's adverse treatment has resulted from the homosexual aspects of their life, or their perceived homosexuality.

The Board supports inclusion of bisexuality as a specific ground for unlawful discrimination, as many bisexual people experience discrimination particularly because of their bisexuality.

The Board does not support the replacement of 'homosexuality' with the broader ground 'sexuality', or the inclusion of heterosexuality as a ground, as the need for such changes has not been demonstrated, and there is a concern that they might be used to undermine organisations and services working to redress past injustices to gay men and lesbians. If the changes were made, then the amendments must include a special measures provision to permit acts of positive discrimination in certain circumstances.

Intersex issues

The definition of transgender under the ADA includes intersex people through a reference to people of 'indeterminate sex'. Although people with intersex conditions may be uncomfortable with this description, the Board will accept a complaint from a person with an intersex condition under this provision.

Complaints from intersex people *may* also be accepted under the disability discrimination provisions of the ADA. (It is conceivable that a transgender person could also lodge

a complaint under the disability provisions, but the Board does not encourage this as a matter of public policy.)

If intersex were explicitly added to the definition of disability, this might provide more certainty about people's rights and responsibilities under anti-discrimination law, and ensure that people with intersex conditions who wish to make a complaint of disability discrimination do not have to argue each time that their condition is a disability for the purposes of the Act.

In 2002 the Anti-Discrimination Board received only one intersex complaint, from a man who alleged that he had been discriminated against on the ground of his disability and homosexuality by a shop. This complaint was successfully conciliated by the Board.

One of the reasons the Anti-Discrimination Board has received so few complaints of unlawful discrimination from people who are intersex may be that many people with intersex conditions fear exposure of their condition, being acutely aware of the ignorance and prejudice that surrounds these conditions in Australia.

The Board held a public forum exploring the outstanding areas of law and public policy reform relating to transgender, transsexual, intersex and bisexual people in NSW on February 25, as part of the 2003 Gay Mardi Gras. This will be reported on in the next issue of *Equal Time*.

Legal developments

ADMINISTRATIVE DECISIONS TRIBUNAL

MM and AM v State of New South Wales (Department of Community Services)

Preliminary matter - construction of 'services' for purposes of Anti-Discrimination Act 1977 (NSW)

Date of Decision: 6 December 2002

This case looks at the interpretation of 'service' for the purposes of the NSW Anti-Discrimination Act, and whether the Department of Community Services (DOCS) provides a 'service' when it assesses applications by people to become foster parents. The case was a preliminary hearing on a point of law, and did not consider the allegations of discrimination.

The complainants, Mr MM and Ms AM, applied to DOCS to become foster parents, and their application was rejected. Both complainants alleged that DOCS discriminated against them on the ground of disability, and Ms AM alleged that she was also discriminated against on the ground of marital status. It was not in dispute between the parties that Mr MM has bipolar disorder.

DOCS argued that the decision of granting or refusing approval to persons to become foster parents involved the performance of a statutory duty only and did not constitute the provision of a 'service' for the purposes of the Act.

In reaching its decision about whether DOCS' determining of

the complainants' application did constitute a 'service', the Tribunal considered the judgments at the High Court in *IW v City of Perth* (1997). In this case the Court considered the meaning of the word 'services' for the purposes of the *Equal Opportunity Act 1984* (WA).

The majority held that 'services' was a 'word of complete generality [which] should not be given a narrow construction unless that is clearly required by definition or context'.

The Tribunal found the following passage from the judgment of Gummow J particularly relevant: 'There is no dichotomy here between the discharge of statutory functions and the provision of services to those seeking the discharge of these functions.'

The Tribunal also followed the general approach of the judgement in *Commissioner of Police, NSW Police Service v The Estate of Edward John Russell*, in which the court held that NSW police officers provide 'services' for the purposes of the *Anti-Discrimination Act* when dealing with a person who has been arrested and is in police custody.

The Tribunal declared that the way in which DOCS had conducted its defence to the complaint sought to induce a false dichotomy, which was not sustainable. The Tribunal held that even if one accepted that 'legislative' and 'quasi-judicial' activities performed by public authorities are not 'services', these

limitations had no relevance to the case of *MM and AM*.

The Tribunal also looked at the *Children (Care and Protection) Act* (1987), which governs the placement of children in foster care and the selection of appropriate people to be foster carers. The Tribunal described these sections of the Act as 'not particularly clear', but after considering several provisions in detail ultimately concluded that both the Minister and the Director-General of the Department of Community Services did provide 'services' within the meaning of the Act when they assessed applications by people to become foster parents.

The Tribunal emphasised that the judgement was not inconsistent with the fact that the Minister and the Director-General also provide 'services' to children at risk and to the wider community when DOCS assesses whether applicants would be appropriate foster parents.

The Tribunal held that although the interests of the relevant children are paramount when statutory powers are exercised to provide foster placements, this does not mean that the Minister and the Director-General are free to ignore laws such as the *Anti-Discrimination Act* when choosing people to be foster parents.

The Tribunal clearly stated, 'If it was the wish of the executive to be free of the constraints of the *Anti-Discrimination Act* when choosing foster parents it was open to the Minister and/or the Director-General to make an application for an exemption under s 126 of the Act.'

The Tribunal ordered that the complaints be listed for a further case conference to allow the parties to make submissions before proceeding to full hearing. The Department of Community Services is appealing the decision.

FEDERAL COURT OF AUSTRALIA

Jones v Scully

Racial vilification

Date of Decision: 2 September 2002

The applicant commenced proceedings in the Federal Court to enforce a determination made by the Human Rights and Equal Opportunity Commission that the respondent breached s 18C of the *Racial Discrimination Act 1975 (Cth)*. The prohibited conduct engaged in by the respondent consisted of distributing a range of anti-Semitic pamphlets in letterboxes and from a stall at a market place in Launceston.

The Court noted that the use of the phrase ‘reasonably likely’ in 18C(1)(a) in the Act created an objective test and consequently the applicant was not required to prove that any person was actually offended, insulted, humiliated or intimidated by the pamphlets in question.

The Court accepted that the phrase ‘offend, insult, humiliate or intimidate’ refers to conduct that has ‘profound and serious effects, not to be likened to mere slights’. As the Act provides no assistance about how the phrase should be interpreted, Hely J found the words should be given their ordinary English meanings.

The Court accepted that when assessing whether any of the pamphlets was reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people, the perspective of an Australian Jew, or Australian Jews as a group should be adopted.

The Court rejected the respondent’s arguments that she had not targeted Jews as a group and that the general statements made in the pamphlets only

referred to those Jews who were named or involved in particular activities. Hely J found that the general message conveyed by the pamphlets was that Jews share particular features that should be condemned, ridiculed or despised.

The Court declared that the respondent had engaged in conduct rendered unlawful by Part IIA of the *Racial Discrimination Act* by having distributed the leaflets in letterboxes and by selling the leaflets at a public market. The respondent was also restrained from repeating or continuing this conduct.

His Honour refused to award damages on the ground that damages would be neither an adequate or appropriate remedy in the circumstances.

FEDERAL COURT OF AUSTRALIA

Jones v Toben

Racial vilification

Date of Decision: 17 September 2002

These proceedings were commenced by the applicant to enforce a determination by the Human Rights and Equal Opportunity Commission that the respondent had breached s 18C of the *Racial Discrimination Act 1975 (Cth)*.

The respondent was held to be responsible for the actions of an unincorporated association known as the “Adelaide Institute” and for placing material on the Adelaide Institute’s website that vilified Jews.

Branson J, in deciding whether ‘publication of the material was reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate a Jewish Australian or a group of Jewish Australians’ adopted the approach

Hely J used when he considered the way s 18C of the Act should be interpreted in Jones v Scully above.

Branson J found that the offending material challenged and denigrated a crucial aspect of the perception of Australia’s Jewish community of its own history and the circumstances in which many Jews came to Australia to re-build their lives. She was therefore satisfied that to the extent that the material conveyed these imputations it was more probable than not that it would cause them hurt and pain as well as a sense of being treated contemptuously, disrespectfully and offensively.

Branson J held that it was ‘abundantly clear’ that race was a factor in the respondent’s decision to publish the material in question. She commented that she was ‘satisfied that it is more probable than not that there are members of the Australian Jewish community who will become fearful of accessing the World Wide Web to search for information touching on their Jewish culture because of the risk of insult from the material...’

The applicant originally sought an order from the Court that the respondent deliver a written statement of apology. Branson J held that it was not appropriate to compel the respondent ‘to articulate a sentiment that he plainly enough does not feel’. The applicant also sought a statement of retraction by the respondent. Her Honour refused to make this order on the ground that there is little difference between an apology and a statement of retraction.

The Court ordered the respondent to remove the offending documents from the Adelaide Institute’s website. The respondent was also restrained from publishing or republishing the same material.

Conciliations

For many years the Anti-Discrimination Board has received more complaints than we are able to handle, and so a queue of complaints has built up. The size of this queue has varied over the years depending on staffing and the number of new complaints being received.

At times the waiting time for the Board to investigate a non-urgent complaint has been over two years. Over time the Board has developed systems to better manage the complaints in the backlog so the parties are less disadvantaged by the delays, but the queue remains nevertheless.

In March last year the Complaints Branch began a project funded by the Attorney General's Department to reduce the backlog, in which waiting cases were grouped and dealt with together at some stages of the case resolution procedure rather than individually.

This approach has proved very successful. The project team (the equivalent of 3.5 full time staff) finalised 265 complaints between March 2002 and mid December 2002 (189 in Sydney and 76 in Newcastle), which exceeded the projected targets.

On this basis, the projected number of cases that the team will finalise over one year is 350. Comparing this with the Board's standard of finalising 60-80 cases per office per year for complaints that are within jurisdiction, it is clear that the backlog process deals with the cases more efficiently.

When the project began there was a concern that people whose matters were dealt with by the backlog project team may be disadvantaged because they may be given less personalised attention. These concerns seem not to have been justified, as backlog complaints are actually slightly more likely to be settled than non-backlog complaints (42.3% settled vs 38.5%).

It is not possible to deal with all complaints according to the backlog approach, as new complaints come in one by one and cannot be grouped. However, we are incorporating aspects of the strategy where possible to streamline our procedure for new complaints.

Following are some of the matters settled by the backlog team.

Sex discrimination in employment

The complainant alleged that she had experienced sex discrimination whilst working for a large government department. The area in which she had worked had few positions occupied by women.

She believed that two male colleagues in her section who were senior to her had treated her with less respect and taken her less seriously than they would have if she were a male. The complainant suffered stress and retired from work earlier than she had planned. The complainant had a long history of investigations and reports undertaken by independent consultants who were hired by the department.

The matter was finally resolved by financial compensation. It was also

clear during the conciliation that the department had made some changes to the workplace, including hiring women in more senior positions.

Sex (pregnancy) discrimination in employment

A young woman lodged a complaint of pregnancy discrimination against her ex-employer, who had sacked her while she was pregnant. The employer had not told the woman she was sacked because of her pregnancy, but there appeared to be no other reason to explain why she was chosen for dismissal above two other young women who began working there at the same time.

The employer had said that there was a downturn in business, but had apparently hired more staff soon after the woman was sacked. The matter was resolved with a financial settlement.

Sexual harassment in employment

A young woman lodged a complaint of sexual harassment against her former employer. She admitted that there had been a fair amount of general sexual banter and comments in the office that she had tolerated, but she became uncomfortable when the comments made by her manager were directed to her personally in an isolated situation.

The manager did not deny making the comments. The matter was settled by financial compensation to cover some of the wages the woman lost before she found other employment.

Other conciliations

Sex discrimination in service provision

The complainant alleged that he had been refused entry to a night club on the ground of his sex. The respondent said that the complainant was not refused entry but was advised that he could enter after the gender balance in club patrons was

restored. The complaint was settled when the complainant agreed to accept a written expression of regret, a copy of the club policy, and an invitation to attend the club.

Disability discrimination in employment

The complainant worked as a security guard for the respondent. After sustaining a workplace injury he was placed on a rehabilitation program but was later terminated from his employment under the statutory provisions of the Worker's Compensation Act.

He alleged that he was discriminated against on the ground of disability when his employer did not make genuine attempts to rehabilitate him and he was assigned tasks that were not suitable to his restrictions. He said he was still capable of performing security work with some minor limitations and was now employed as such with another employer.

The respondent acknowledged that it had not considered whether the complainant could perform the inherent requirements of the job with the provision of services or facilities prior to terminating his employment. The complaint was settled when the complainant accepted an ex-gratia payment of \$13,000.

Homosexual and HIV status vilification

The complainant alleged that his neighbours had vilified him on the grounds of his homosexuality and HIV status. Attempts to bring the respondents to conciliation did not succeed. The complaint was eventually resolved because the housing provider agreed to investigate more actively the possibility of pursuing the neighbours through other legal channels and offered the complainant priority housing.

Race for the Headlines

The Anti-Discrimination Board's report on racism in the news media, Race for the Headlines, will be launched on March 13. Ruth McCausland reports.

The media play a crucial role in the way that people view the world and their place in it. Australians turn to the mainstream media to gain information, analysis and sense about events that happen locally and globally on a daily basis. Through the media, the reader or viewer can feel connected, or disconnected, to the broader community or society.

The Board has seen the damage done by news that uses race as its angle. From media commentators who make blatantly racist comments, to an article that links the causes of crime to a particular racial or ethnic minority community, the media sends powerful and permeating messages about who is 'one of us' and who is not.

A climate where the boundaries of political and media discourse shift to allow, and even condone, the pillorying of certain minority groups arguably promotes violence against those communities – both discursive and physical.

Australians perceived to be 'Arabic' or 'Middle Eastern' and Muslim have experienced abuse, harassment and vilification. This has taken place in shopping centres, in streets, on public transport, in schools and workplaces.

This hostile environment intensifies whenever inflammatory media reports connect the causes

of social and political problems with particular minority racial or ethnic groups. This is an issue of human rights. All Australians - and those who seek asylum here - deserve not to be discriminated against on the basis of their appearance, beliefs or culture.

The media is vital in determining the way that we all understand the events and issues that surround us, and has the power to marginalise whole groups of Australians.

The Anti-Discrimination Board has embarked on the *Race for the Headlines* report because we believe that with this power comes responsibility - the responsibility of informed, fair and critical reporting.

That responsibility is to critique political rhetoric, to look beyond simplistic angles for reporting issues, to engage with the views and experiences of all Australians, and to challenge complicity and complacency in media practice.

Readers are welcome to attend the launch of *Race for the Headlines* at the Jubilee Room, NSW Parliament House, Macquarie Street, Sydney, on Thursday 13 March at 6pm.

For more information, contact Ruth McCausland on 9268 5555.

Board joins agency roadshow



(L-R) Rae Hamilton from the DFT, Michelle Fernando from Workcover, local elder Russell Ryan, Felicity Huntington from the Board, Chris Capper from the DFT and Nareen Young from the NSW Working Women's Centre.

The Anti-Discrimination Board's Aboriginal and Torres Strait Islander (ATSI) Outreach team has combined with other NSW government agencies for the first time to present a highly successful 'roadshow' forum for the Indigenous community in Dubbo.

The Board worked with other education specialists from the Department of Industrial Relations (DIR), the NSW Workcover Authority, the Department of Fair Trading (DFT) and the NSW Working Women's Centre to present the forum.

Entitled 'Marrambul Mali' (Do it right), it covered the rights and responsibilities of employers and employees in areas such as workplace harassment and discrimination, workplace safety

and workers compensation, awards and employment laws in NSW, and the services of the DFT.

The feedback from participants was extremely positive, and the agencies involved are now planning to hold similar forums throughout the state. The Board has also been working closely with the DFT in Western Sydney, and has run other joint sessions with the DIR.

As well as the joint forums, the team will be running training seminars for the Indigenous community throughout the year. For more information phone the Board's Aboriginal and Torres Strait Islander Enquiries/Community Liaison Officer on (02) 9268 5555 or 1800 670 812 from outside Sydney.

(L-R) Rae Fernando from Coonamble Local Aboriginal Land Council, Lorraine Wright from Western Aboriginal Legal Service, Phillip Wright from WALC, Claude Gordon from CDEP, Neville Merritt from Gilgandra LALC, and Colin Fuller from the Department of Corrective Services.



THE ANTI-DISCRIMINATION BOARD OF NSW

What types of discrimination do we deal with?

The NSW Anti-Discrimination Board can only deal with discrimination complaints that are covered by the NSW Anti-Discrimination Act. This means that we can only deal with a discrimination complaint if:

- it is based on any of the grounds listed below *and* happens in one of the areas of public life listed below; or
- it is racial, homosexual, transgender or HIV/AIDS vilification, that is, a public act of incitement to hatred, serious contempt or severe ridicule.

The laws do not allow us to deal with discrimination complaints based on other grounds (eg religion, political conviction), or based on events in your private life.

Grounds

- Sex (including sexual harassment and pregnancy)
- Race (including colour, nationality, descent, and ethno-religious or national origin)
- Marital status
- Homosexuality (male or female, actual or presumed)
- Disability (past, present, future, actual or presumed)
- Age
- Transgender (transsexuality)
- Carers' responsibilities (in employment only)

Areas

- Employment
- Education
- Obtaining goods and services (eg credit, advertising, access to public places, entertainment, government or professional services)
- Accommodation
- Registered clubs

Where we are

Sydney

Level 17, 201 Elizabeth St, Sydney NSW 2000
PO Box A2122, Sydney South NSW 1235
ph (02) 9268 5555, fax (02) 9268 5500, TTY (02) 9268 5522
Enquiries/Employers Advisory Service (02) 9268 5544

Wollongong

84 Crown St, Wollongong NSW 2500
PO Box 67, Wollongong East NSW 2520
ph (02) 4224 9960 fax (02) 4224 9961

Newcastle

Level 1, 414 Hunter St
Newcastle West NSW 2302
ph (02) 4926 4300 fax (02) 4926 1376
TTY (02) 4929 1489

Toll free number — 1800 670 812

Website — <http://www.lawlink.nsw.gov.au/adb>

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