

Advance Australia Fairly *campaign under way*

Avoiding pregnancy discrimination in the workplace - see page 6.

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The Anti-Discrimination Board's Advance Australia Fairly campaign began with a flourish on October 9th with the launch of the first of two series of postcards profiling citizens of NSW from a variety of ethnic, cultural and religious backgrounds.

The postcards aim to highlight the role played in the life of NSW by people from different backgrounds, reflecting the strength of our culturally diverse society and highlighting values of respect and understanding. They will be distributed in venues such as cafes and cinemas in the next few months.

The first series consists of eleven cards, including two group cards and nine featuring individual personalities. Of the group cards, one features well-known sportspeople (Hazem El Masri, Sharon Finnan, Eliza Stankovic and Richard Chee Quee) and the other religious leaders (Archbishop Roger Herft, Sheikh Yahya Safi, Sister Susan Connelly and Rabbi Selwyn Franklin).

The individual cards feature broadcasters Jaslyn Hall and Indira Naidoo, Aboriginal leader Faith Bandler, University of NSW Chancellor and former Chief Executive of the Royal Alexandra Hospital for Children Dr John Yu, SBS Radio Head Tuong Quang Luu AO, restaurateur Tetsuya Wakuda, performer and writer Leah Purcell, human rights activist Sanushka Mudaliar and designer Jenny Kee.

At the launch, Board President Chris Puplick said that there has been a marked rise in vilification and violence towards Australians perceived to be of Middle Eastern origin or Islamic faith since the September 11 attacks in New York, and similar increases have been seen in other western countries.

He said that lack of leadership made it more difficult to overcome the upsurge in racial discrimination and harassment, and in fact popular fears are often the platform for political leverage.

Highlighting the media's pivotal role in any public debate about race or racism, Mr Puplick said that venom on the airwaves promotes violence in the community. 'The causal link between racial vilification and racial violence is well established,' he added.

Also speaking at the launch, Attorney General Bob Debus emphasised his government's commitment to combatting racial vilification and harassment, and to tackling systemic discrimination against Indigenous Australians.

The third speaker was Sister Susan Connelly, who spoke powerfully about the role of all religions in providing a moral code for behaviour toward one's fellow human beings, and for acting against racism and discrimination.

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From the President



Chris Puplick, President

You may have read in the *Daily Telegraph* recently about a gym in Lakemba that was granted an exemption by the Anti-Discrimination Board to operate for women only.

This gym is owned and operated by a Muslim woman, and her idea was to run a gym that was culturally sensitive to the needs of other Muslim women. This meant that there was a prayer room, the music was appropriate, and the women were able to exercise without feeling that their modesty was jeopardised.

In all, it was a fairly sound business proposition, although that aspect was of no concern to the Board. What concerned us was whether such an establishment would meet the special needs of a disadvantaged group.

Given that there are five hundred gyms in NSW that do not meet the needs of Muslim women, and that this one would meet the needs of a group of women with serious health considerations, we recommended to the Attorney General that an exemption be granted.

The Board recommends that exemptions be granted to different kinds of groups, such as health services for older men, employment agencies that specialise in recruitment for people over forty, and refugees where female victims of domestic violence prefer to be counselled by female staff. Our concern is that the exemption enables people who are being treated unequally, or who cannot enjoy facilities and services the rest of take for granted, to move one step closer to the level playing field that all human rights advocates dream about.

What the *Daily Telegraph* articles illustrate is the ease with which the real issues – in this case the promotion of equality – can be hijacked by a debate about racism, and how those who cannot attack people when the issue is one of

seeking equality can attack them when the issue is perverted into one of race.

We have seen this most spectacularly over a long period when it comes to the reporting of crime, and the recent work by Scott Poynting and others has alerted us to the racialisation of crime as a major threat to community harmony in this State.

The most recent manifestation of this has been in relation to the horrific rape trials which have been in the news recently. Issues of race were certainly involved in these incidents, but what has been obscured is that rape is always a gender issue, and attempting to portray it as an exclusively racial issue is a gross distortion. Rapists always blame their victims for something, and always deny the profound misogyny, disrespect for all women and power tripping that is involved in their inexcusable crimes.

It is just as distorting to try to hold an entire community responsible for the appalling and deviant behaviour of a few psychopaths or criminals. Again, there is nothing new about this. In the 1930s, the Sydney press associated all crime with the Jewish community; in the 1960s all crime was 'Mafia' and hence Italian-related; in the 1970s all crime was drug-related and hence the responsibility of the Vietnamese community. Now it appears all violence and crime is associated with the Arabic community. Tomorrow it will be someone else.

This is not simply a manifestation of some temporary aberration in the public discourse, it is symptomatic of a deep-seated racism in which those who commit crime must be different, and the most obvious form of difference is race. The truth of course is that most crime is committed by people who are not from any of these 'exotic' ethnic backgrounds – it is committed by the Anglo-Saxon-

Irish majority, and always has been.

The level of ignorance and fear that is manifested as racism towards the Arabic and Islamic communities at the moment is particularly frightening. These

communities have borne the brunt of successive waves of opprobrium, relating to the debate about 'boat people', the Tampa incident, the difficulties in the Middle East, September 11, crimes portrayed as being 'ethnic', and so on.

In this discussion, media figures are holding the Australian Muslim community answerable for the actions of Muslims worldwide. Alan Jones derides Sydney Muslims for not commenting on the stoning of a woman in Nigeria, yet I have never heard him demand that Sydney's American community come forth to protest when the death penalty is applied in the United States, or seen the Irish community in New South Wales blamed for violence in Belfast.

And it is not just here in New South Wales. In France, similar cases of pack rapes have caused antagonistic debates. In Denmark and the Netherlands, there is national discussion about the status and legitimacy of Muslim migrants who allegedly refuse to assimilate. There is a major debate under way in the United Kingdom about these same issues, compounded by recent experience of race riots in some British cities. All these debates contain ingrained assumptions about race and unfair stereotyping of whole populations.

The Anti-Discrimination Board continues to receive reports of racial vilification against people from a variety of backgrounds. Communities report both verbal and physical abuse and sadly, Muslim women who choose to wear the scarf are obvious targets. As horrendous as this is, is it really surprising, given the level of hostility towards Muslims in the media on an almost daily basis?

Same-sex relationships – more reforms needed

The Anti-Discrimination Board is very pleased that the NSW Upper House has already voted to change 24 pieces of legislation to recognise gay and lesbian couples. However, there are a number of critical areas that have been overlooked.

The additional reforms we seek are consistent with the Government's intention to amend laws that discriminate against lesbian and gay couples. For example, under the *Anti-Discrimination Act 1977 (NSW)* single people, married and heterosexual de facto couples are protected from discrimination on the basis of their marital status, but same-sex couples are not.

There are also some reforms the Government has proposed which do not go to the heart of the problems same-sex couples face.

The Government's *Miscellaneous Acts Amendment (Relationships) Bill*

2002 does amend the *Adoption Act 2000*, but only in relation to access to birth certificates. The Bill does not enable same sex couples to adopt.

In its review of adoption laws, the NSW Law Reform Commission recommended that the Government amend adoption laws so that same-sex couples would be eligible to adopt. The ADB strongly supports this view.

As the LRC has so aptly stated: 'Any assessment ... should ensure that unfair or unjustified assumptions are not made about the relevance of the applicants' sexual orientation or marital status to the applicants' suitability as adoptive parents.'

The Bill also amends the *Industrial Relations Act 1996*, but does not address the exclusion of non-biological same sex parents from entitlement to unpaid parental leave.

The Board has written to the Attorney General raising these omissions and anomalies and seeking the Government's views.

We have also reiterated our call for age of consent laws to be the same for homosexual men as they are for heterosexuals, for both human rights and public health reasons. Criminalising the consensual sexual behaviour of young gay men is inconsistent with efforts to reduce the risk of HIV and other infections.

The Board applauds all steps towards equality for all people in New South Wales. But until all legislation which discriminates against lesbians and gay men is finally a thing of the past, then the current amendments remain just that – steps. They are not the end of the story.



Raising a deaf child in a hearing world

David Healy was born in Wagga in 1962, unable to hear anything. *Up! A mother's journey to freedom with her deaf son* is a raw, honest and absorbing account of Leone Healy's experience as mother and primary care-giver to her profoundly deaf son.

Healy recounts her battle to teach her son to talk, against the backdrop of 'an unfeeling hearing world'; her fight to have opportunity deaf classes in regional areas; and her fury when David was refused admission to preschool.

She documents the many forms of discrimination David encountered, long before the slogan 'my disability, your handicap' challenged public prejudice. 'Unfortunately language is political, and can vilify and incite hatred', she writes.

The book recounts how workplace discrimination marred David's apprenticeship as a motor mechanic and scuttled his job prospects (before physical disability was included as a ground under NSW's Anti-Discrimination legislation). David subsequently used the *Anti-Discrimination Act* to challenge the lack of communication access when he was a student at the University of New South Wales.

Up! is Healy's salute to her son's strength in the face of persistent prejudice. It is also a retrospective, told with both the benefit and the burden of contemporary understanding. Healy regrets the time she wasted grieving for her deaf baby, and reviews her decision to teach David to talk against the backdrop of the Deaf Pride movement.

Although written to foster understanding of deafness, Healy emphasises that she does not speak for deaf people, but as an older hearing woman for whom a 'life rich with challenges' has had its own rewards.

Both Leone and David escaped the narrow clutch of community expectations: David is a tertiary educated professional, while Leone made the transformation from 'country housewife to local politician, sociologist and disability professional'.

Up! A mother's journey to freedom with her deaf son

by Leone Healy

Published by Book House

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'All who practise religion of any sort have the extremely serious duty to re-examine their interpretation of what their religion teaches and to re-assess their living of those teachings,' she said.

'There is no respectable religion which advocates anything other than justice and compassion. The practice of quoting ancient writings out of context, in the name of justifying domination and cruelty, is intellectually dishonest and is a recipe for further human disaster. We must stop using God to underwrite our greed and our fear.'

The postcards are also featured on the Advance Australia Fairly



Sister Susan Connelly speaking at the launch.

website at www.lawlink.nsw.gov.au/advanceaustraliafairly. The site includes more detailed information about some of the people on the postcards, 'e-card' versions of the postcards which can be emailed to friends, and a section for sending in profiles of people who are making a positive contribution to their community.

The second series of postcards will be launched on Tuesday 10th December in Young. It will feature people involved in more rurally-oriented activities including a winemaker, a group of rural workers and a group from the emergency services.



Postcard 'personalities' Indira Naidoo and Jaslyn Hall.

The Advance Australia Fairly campaign was initiated by the Board to address race-related issues and encourage discussion about migration, racism and community identity in NSW.

The campaign aims to promote respect for and understanding of community diversity in the context of human rights, to increase community understanding and respect for diversity, to foster community knowledge and capacity for action, and to counter racist stereotypes and vilification.

As well as the two series of postcards, the campaign will also feature two seminars on racism and the media, and a research project analysing the reporting of race issues in the media and making recommendations for regulatory change.

Beyond these walls...

The first seminar was held at Petersham Town Hall on October 18. Entitled 'Beyond these walls...', it brought together a number of speakers and media representatives to discuss issues relating to race, racism and media representation.

Able compered by Jaslyn Hall, the gathering generated some constructive discussion and ideas about how to move beyond the current climate of negative discourses about refugees and particular ethnic groups.

The keynote speaker was Emeritus Professor Donald Horne AO, who called for political leaders to reject the use of xenophobia for political gain. 'But this means more than more than not using xenophobic speech directly,' he said. 'It also means they should always speak out

Ali Roude from the Islamic Council of NSW (left) and Sheikh Yahya Safi (centre), who is on the religious leaders postcard, with Attorney General Bob Debus.





Seminar speaker Nooria Wazefadost with Holroyd High School Principal Dorothy Hoddinott.

against any xenophobic outbreak (including those that shriek for a season on talkback radio). They must not exploit xenophobia by strategic silences (standing by significantly saying nothing when prejudices are blaring out).’

Professor Horne also made the point that diversity is normal in any society. ‘Not only was white Australian society significantly split for most of its existence by Catholic-Protestant inter-hatreds; it is still split by differences between country and metropolitan areas and between economic classes – both of which were so great that they were one of the formations of our political culture. Nothing like that has come from the immigration programs,’ he said.

The morning session of the seminar focused on the stories of older and younger Australians

about their experiences of racism. Speakers included adult educator Joan Tranter, who spoke about growing up on the Cherbourg Mission in Queensland, Aboriginal youth leader Mark Yettica-Paulsen, SBS Radio Head Tuong Quang Luu AO, Nooria Wazefadost, a high school student from Afghanistan who is currently on a temporary protection visa, Omeima Sukkarieh from the Australian Arabic Communities Council, and youth leader Mohammed El-Asmar, who spoke about the effects of harassment and criminalisation on young people.

Also contributing to the morning session were two academics, Dr Sharon Pickering from the School of Social Science and Liberal Studies at Charles Sturt University, who spoke about recent media discourses surrounding asylum

seekers in the Australian media, and Associate Professor Scott Poynting from the University of Western Sydney, who spoke about the racialisation of crime.

The afternoon session was a lively panel discussion moderated by 702 ABC Sydney broadcaster Angela Catterns and stimulated by questions and comments from the floor. The panel included Allison Meadows from Mullinars Casting, Faten Dana from Arabic Radio 2MFM, Richard Lawson, Editor of the *Daily Liberal* newspaper in Dubbo, playwright Nick Enright, Stephanie Peatling from the *Sydney Morning Herald*, Stephen Mayne from Crikey Media, and academic and social commentator Eva Cox.



The seminar's keynote speaker, Emeritus Professor Donald Horne.

Discussion covered a range of topics such as what types of stories sell the most papers, the extent to which media owners and editors influence the type of coverage given to race issues, the ethnic and social composition of the journalist population and how communities can take action to improve their image in the media.

The second seminar will be workshop based, and will bring together media professionals and people from communities affected by the current media climate to share their knowledge. It will be held on November 29 at Bankstown Town Hall. For more information call Daniel O’Neill on 02 9268 5555.

Stephen Mayne makes a point at the seminar while Eva Cox looks on.





Pregnancy in the workplace

Recent statistics show that seven out of ten women in the 15-44 years age group are now in the work force. At the same time, the Anti-Discrimination Board has seen a 150% rise in complaints of pregnancy discrimination since 1997/98. It is therefore critical for employers to understand the legal framework relating to pregnancy in the workplace.

It is unlawful to discriminate against a woman on the grounds that she is pregnant or may become pregnant under both the *Anti-Discrimination Act 1977 (NSW)* and the *Sex Discrimination Act 1984 (Cth)*. Both Acts use a broad definition of employment which covers partnerships, part-time, casual and temporary work, and work under a contract for services or done on commission.

Both Acts have some exceptions. The NSW *Anti-Discrimination Act* may not apply to employment in federal agencies, and provides exceptions where the employer employs five or less employees, is a private educational authority or where the employment is in a private household. The Commonwealth *Sex Discrimination Act* does not cover employment in State Government departments or instrumentalities.

Both the 1993 Anti-Discrimination Board Inquiry into Pregnancy Related Discrimination and the more recent Human Rights and Equal Opportunity Commission National Pregnancy and Work Inquiry revealed a disturbing amount of discrimination against pregnant women at work. Stereotyped reactions to women

who are pregnant or may become pregnant result in reduced opportunities to obtain work or gain promotion, denial of training, lack of cooperation with medical requirements and in some cases dismissal from work.

Recruitment

Under the Commonwealth *Sex Discrimination Act*, it is unlawful to discriminate against a pregnant woman or a potentially pregnant woman in determining who to offer employment, or in the conditions of employment.

The NSW *Anti-Discrimination Act* covers pregnancy under sex discrimination, but provides an exception allowing employers to discriminate against a woman if she is pregnant at the date of application for employment or the date of interview. However, the Commonwealth *Sex Discrimination Act* does not contain this exception. Under both Acts, it is unlawful to discriminate against a woman on the basis that she **may** become pregnant.

Questions about intentions to have children or childcare should be avoided during recruitment. These kinds of questions can lead to a perception of discrimination even if they are not intended to screen people out, and in some instances Courts and Tribunals have found them to be discriminatory.

Pregnancy During Employment

Both the NSW *Anti-Discrimination Act* and the Commonwealth *Sex Discrimination Act* make it unlawful to discriminate against a pregnant woman in conditions of employment, in access to promotion, transfer and training, or by subjecting her to other detriment.

The kinds of treatment that pregnant women have complained to the Anti-Discrimination Board about include denial of pay increases, bonuses or other remuneration; denial of shifts or decreases in hours of work; denial of opportunities to attend training; denial of opportunities for promotion or transfer; harassment on the basis of pregnancy; complaints about work performance following disclosure of pregnancy; and removal from front line contact or more demanding tasks when the pregnancy becomes visible.

Employers should be mindful of their obligations under occupational health and safety legislation to ensure the health, safety and welfare of pregnant employees. This should be done in a non-discriminatory fashion, by identifying and reducing hazards rather than automatically excluding pregnant workers. Often the measures needed to ensure the health and safety of all employees at work are sufficient to protect pregnant employees.

The NSW *Anti-Discrimination Act* provides that the Act does not apply to anything that is necessary to comply with another law, such as occupational health and safety law. In this case the onus is on the employer to show that any discriminatory actions were necessary to comply with occupational health and safety legislation, and to date no employer has successfully argued this in a pregnancy discrimination case.

The NSW *Industrial Relations Act* requires an employer to temporarily adjust a pregnant employee's working conditions or hours to avoid exposure to a risk to her health and safety or that of her unborn child. If adjustment is not feasible, then the employee must

be transferred to appropriate work that is as near as possible to her present work in status and pay. If transfer is not feasible, then the employer must give the employee maternity leave or any available sick leave.

Pregnant employees are entitled to use their sick leave in the same way as any other employee. For example, restriction of an employee's use of sick leave to attend prenatal checkups may amount to discrimination. The NSW *Industrial Relations Act* also provides for special unpaid maternity leave for any period a doctor certifies as necessary for any pregnancy-related illness.

State and federal discrimination laws also provide an exception for an employer to give women rights or privileges connected with childbirth and pregnancy. This means, for example, that it is lawful to provide a pregnant woman with extra breaks if required, but not to provide the same conditions to men.

Termination of Employment

In general, it is unlawful to terminate a woman's employment on the grounds that she is pregnant or may become pregnant, even if this is only one of the grounds for dismissal.

Many pregnancy discrimination complaints concern dismissal and constructive dismissal, that is, making working conditions so intolerable for the employee that they resign. In some instances women are dismissed because of an employer's attitudes or beliefs about pregnant women, for example that they shouldn't be working at all, or that they should not be serving customers.

Poor work performance is often given as a reason for dismissal. There is nothing in anti-discrimination law to preclude an employer dismissing an employee for poor work performance, even if they are pregnant. However, employers are likely to face liability for discrimination if work performance issues have never been raised with the person until

they became pregnant, or where a non-pregnant employee with the same level of performance was not dismissed.

The NSW *Anti-Discrimination Act* provides a defence to a discrimination complaint regarding dismissal of a pregnant woman if the woman knew she was pregnant when she applied for the position or attended an interview for it, but this defence does not apply under the *Commonwealth Sex Discrimination Act*. Under the *Commonwealth Workplace Relations Act* there is an exemption to the prohibition of termination during pregnancy if the woman cannot perform the inherent requirements of the particular employment.

Maternity Leave

In NSW a female employee who is employed on a full time or part-time basis with twelve months continuous service (including authorised leave or absence) is entitled to maternity leave. This has been recently extended to include regular casual employees, that is, casual employees who work for an employer on a regular and systematic basis and have a reasonable expectation of ongoing employment on that basis.

Under both the NSW *Industrial Relations Act* and the *Commonwealth Workplace Relations Act* an employee is entitled to return to the position she held before going on maternity leave. If that position no longer exists, for example because of a genuine restructure, and there are other positions that the employee is capable of performing, then she is entitled to be employed in an available position that is as nearly as possible comparable in status and pay to her former position.

Employers should take care with the definition of casual. In many instances a position that an employer has termed casual may not actually be 'casual' in the legal sense. For example, a person who has regularly worked a full week for a number of years is unlikely to be classified as a

casual by a Court or Tribunal and may have some entitlement to maternity leave.

Management of Restructuring and Redundancy

Many pregnancy and sex discrimination complaints arise because pregnancy, or the fact that the person is on maternity leave, has been taken into account in decisionmaking about restructures and redundancies. It is not unlawful to restructure or abolish positions of pregnant employees or those on maternity leave, as long as the pregnancy or maternity leave does not form part of the decision making.

Another common cause of complaint is that employers have failed to consult with people on maternity leave about restructuring issues, when they have consulted with other employees. Particular concerns arise where positions are being advertised and those on maternity leave are not given an opportunity to apply.

When women return to work after maternity leave, they are likely to have carers' responsibilities, and it is unlawful to discriminate against a person on the basis of carers' responsibilities under the NSW *Anti Discrimination Act*. For further details refer to the Board's website at www.lawlink.nsw.gov.au/adb or refer to future issues of *Equal Time*.

In order to avoid direct or indirect discrimination on the ground of pregnancy, it is essential that all managers and staff are certain about people's entitlements and responsibilities. Timely and accessible grievance handling policies and training of all staff in their use is also essential.

There are many organisations that can assist you with determining whether workplace conditions are likely to be discriminatory or not. The Anti-Discrimination Board offers a free Employers Advisory Service, guidelines setting out employers' obligations and providing advice about developing policies, and education programs for management and staff.

Legal developments

Federal Magistrates Court of Australia

Horman v Distribution Group

Sexual harassment and sex and race discrimination in employment

Date of decision: 19 December 2001

■ This case looks at the issue of how to identify offensive conduct in the workplace, particularly in a situation where the respondent has previously engaged in conduct that some may regard as offensive.

Ms Horman, who worked for Repco Auto Parts as a spare parts interpreter, brought complaints under the federal *Sex Discrimination Act 1984* claiming that she was sexually harassed and discriminated against on the grounds of her sex, pregnancy and race at work. She alleged that her co-workers made sexually explicit remarks and remarks about pregnancy, and subjected her to racial harassment.

The company denied the allegations. They conceded that there had been 'horseplay' in the workplace, but claimed that Ms Horman had been a willing participant in and instigator of this activity. They also conceded that there had been conduct of a sexual nature, but claimed that this was not unwelcome.

The company argued that Ms Horman had brought her case because she had been made redundant and was not bona fide. They claimed that she had not followed the proper company procedures and had not complained of harassment during her employment.

Although Magistrate Raphael found that Ms Horman was not truthful in all her evidence, he accepted that Ms Horman's co-workers had made sexually explicit comments, asked her to show her breasts, called her a 'stupid f---ing bitch' and called her a 'wog', a 'half caste' and a 'wog bitch'.

Magistrate Raphael rejected the company's argument that as Ms Horman had participated in, encouraged or initiated conduct of a sexual nature in the workplace, a reasonable person would not have anticipated that she would be offended, humiliated or intimidated by conduct in the same vein.

Magistrate Raphael was inclined to the view that the applicant did use bad language in the workplace, but pointed out that this may be the only way a person feels able to resist unpleasant language. The fact that a person swears from time to time does not necessarily mean that others swearing at them will not be unwelcome.

The Magistrate concluded that in this instance the conduct complained of went beyond bad language to include direct insults and highly personal remarks or actions. He stated that although the conduct of the applicant excluded some of her complaints, those that remained were actions of which any reasonable person was entitled to complain. 'I found that everyone was entitled to draw a line somewhere and those activities crossed that line,' he said.

The magistrate found that Ms Horman had been sexually harassed and had been discriminated against on the basis of her sex and her race, and awarded her \$12,500 in damages.

This case makes it clear that employers can be liable for conduct of a sexual nature that is unwelcome to the person, if a reasonable person would be offended, humiliated or intimidated by the conduct.

The fact that a person may have taken part in similar conduct does not mean that such conduct towards them will be welcome, and does not preclude a breach of the law on sexual harassment. It is therefore important for managers to ensure that conduct such as sexual banter is such that it would not offend, humiliate or intimidate reasonable people.

Administrative Decisions Tribunal

Fairfax Publications v Kazak - Appeal Decision

Racial vilification

Date of decision: 25 October 2002

■ This case looks at the interpretation of the word 'incite' for the purposes of the NSW *Anti-Discrimination Act*, how the ordinary reasonable reader should be characterised in assessing whether a public act is capable of inciting hatred, serious contempt or severe ridicule for a person because of their race, and the importance of distinguishing between the reasonableness of a public act and its content in deciding whether it was done reasonably and in good faith.

In June 2000 the Administrative Decisions Tribunal found that an article published in the *Australian Financial Review* in December 1998 would incite hatred or serious contempt of Palestinians, and the respondent had not demonstrated that the article was published reasonably and in good faith.

The respondent appealed against the decision on several bases. The first was that the word 'incite' in s 20C should be interpreted to imply an intentional act, as this is the case in s 20D. The Appeal Panel held that sections 20C and 20D are distinguishable because 20D creates a penal provision and 20C is a civil provision, and that the ordinary meaning of 'incite' does not necessarily involve an element of intention.

Also, the Attorney-General stated in the Second Reading Speech introducing the racial vilification provisions that even though the word 'incite' was used in both 20C and 20D, there was no requirement for intent in relation to 20C. The Appeal Panel therefore rejected the appellant's submissions on this point.

The appellant also submitted that the Tribunal erred in applying the ordinary reasonable reader test to determine whether the article could incite hatred, serious contempt or severe ridicule. The Tribunal had held that the social and historical context in which a public act took place should be taken into account when assessing whether the act was capable of inciting hatred.

The Appeal Panel applied the decision of the New South Wales Court of Appeal in *Amalgamated Television Services Pty Ltd v Marsden*, and held that the test is whether the ordinary reasonable reader could understand that he/she is being incited, not whether he/she could reach such a conclusion after his/her own beliefs have been brought into play by the public act. The Panel also held that social and historical factors are only relevant to the extent that they can be presumed to be part of the ordinary reasonable reader's general knowledge.

The respondent had unsuccessfully argued in the Tribunal that the article was published reasonably and in good faith for several reasons: the article appeared on the opinion page, the respondent published letters and articles written in response, and the newspaper was providing a forum for debate on an important international issue. The Tribunal had rejected the contention that it was reasonable to publish such an article simply because it related to international politics.

The Appeal Panel found that the Tribunal was incorrect in linking the requirement of reasonableness with the content of the article. It held that publishing letters and competing views 'reasonably contemporaneously' with the article was relevant to whether the article's publication was reasonable. The Appeal Panel therefore set aside the Tribunal's decision and considered the merits of the complaint.

The appellant argued that the ordinary reasonable reader would possess a knowledge of the Middle East peace process and would be aware that he or she was reading an opinion piece. They also argued that the article only conveyed the

author's beliefs about the Palestinian leadership, not the Palestinian people.

The Appeal Panel accepted this, and found that although the article might be said to express serious contempt or hatred towards the Palestinian leadership, that does not constitute a contravention of the Act. However, the Appeal Panel rejected the appellant's submission that any public act presented as an expression of opinion was incapable of contravening s 20C, finding that the language used in the article is also relevant.

The Appeal Panel found that even if the article had incited hatred towards or serious contempt for the Palestinian people, the exception set out in s 20C(2)(c) would apply. It held that the rationale behind the decision to publish is relevant when assessing whether the act of publication was in the public interest, and this is revealed by the actions of the publisher over a period of time, such as giving a voice to both sides of a debate.

Federal Court of Australia

Thomson v Orica Australia Pty Ltd

Pregnancy discrimination in employment

Date of decision: 30 July 2002

■ This case clarifies the entitlements of women returning to work after maternity leave, and in particular the interpretation of their right to a position comparable to their previous one.

Ms Thomson was an accounts manager with Orica, a chemical company, when she went on maternity leave. She said that shortly before she was due to return from maternity leave she was told that she would not be allowed to resume her previous position as an accounts manager, which had been filled by a temporary employee in her absence.

She was offered a different position, although Orica claimed it was identical and equivalent to the one she had done before going on maternity leave, and had significant responsibility which called for her skills and experience.

Ms Thomson disagreed, and made a complaint of sex and pregnancy discrimination to the Human Rights and Equal Opportunity Commission.

The complaints were heard by the Federal Court, which found that she had in effect been demoted in status, even though her salary and conditions of employment remained the same.

The Court accepted that Ms Thomson's previous position was a more challenging one which involved more responsibility and was concerned with 'strategic customers' of the business. It found that the duties offered to Ms Thomson on her return from maternity leave were sufficiently different to make it clear she was being given a position of significantly lower status.

The Court also found that the unfavourable treatment of Ms Thomson was at least in part due to the taking of maternity leave. As maternity leave is generally a characteristic of women who are pregnant, it decided that Ms Thomson had been discriminated against on the ground of her pregnancy, and that she had been constructively dismissed.

This case makes it very clear that employers cannot effectively 'demote' employees by refusing to return them to their original position following maternity leave, and by offering them work that is of a lower status and level of responsibility. The fact that the salary and conditions remain the same does not preclude action being taken for discrimination. This recognises the impact that a 'demotion' has both in terms of distress to the individual woman who loses status and responsibility and also on their career development opportunities.

Generally a woman is entitled to return to the position she held before maternity leave was taken. If the position no longer exists, for example because of a genuine restructure, then she is entitled to any other available position for which she is capable of performing that is as nearly as possible comparable to her previous position.

Successful conciliations

Sex (pregnancy) and carers' responsibilities discrimination and victimisation in employment

■ The complainant alleged that her employer refused to allow her to return from maternity leave to her substantive position on a job-share or part-time basis. She alleged that the job provided to her on her return amounted to a demotion, and that the company refused her request to organise aspects of her work around the availability of her child-care.

She also alleged that the CEO bullied her after she raised the matter as an internal grievance, and lodged a further complaint alleging that she was constructively dismissed from her employment.

All these matters were conciliated on the basis of an ex-gratia payment of \$16,000.00.

Homosexual discrimination in registered clubs

■ The complainants were two women who alleged that they were ejected from a club by security staff when one complainant lifted the other during an alleged dance move. They also claimed that they were assaulted and vilified by security staff while being ejected from the premises.

The parties agreed that the complainants had previously been dancing together without incident, and that security staff had only approached when this manoeuvre occurred off the dance floor. The security staff denied any vilification and asserted that the complainants were only ejected when they became argumentative and violent, and had to be forcibly removed from the club.

The matter was resolved when the parties agreed to a statement of mutual regret about the incident.

Age discrimination in employment

■ The complainant had worked for his employer for many years. He alleged that he was repeatedly asked about his plans for retirement, and that he was made redundant when he made it clear that he was not intending to retire in the near future.

The company denied that pressure had been put on him to retire and said that the redundancy was genuine and based on a general restructure to define the future direction of the business.

The matter was resolved by the respondent paying the complainant's legal costs relating to an industrial claim about the terms of the redundancy itself.

Homosexual discrimination in employment

■ The complainant worked in the recruitment industry. He alleged that he was treated less favourably because of his homosexuality by many staff at the company, including his managers, and when he complained about this, his complaints were dismissed or were not followed up appropriately by management. He also alleged that he was victimised by being dismissed from his employment.

The matter settled by a payment of \$9,000, \$6,000 of which was paid to a charitable organisation in which the complainant worked as a volunteer. The organisation also agreed to provide training for all its staff on discrimination and harassment issues.

Sex (pregnancy) discrimination in employment

■ The complainant was a 16 year old shop assistant who had been employed under a traineeship. After a couple of months work, she became pregnant and told her employer. Her employment was

terminated several months later, and she was told this was because of work performance issues.

The complainant alleged that her employer had never raised the issue of work performance with her before. Her letter of termination cited another reason for her dismissal and did not mention performance issues.

Although the complainant found other part time employment of a similar nature which she was able to undertake for the rest of her pregnancy, the traineeship had apparently not been registered, and she was not credited for the time she had worked in it.

The matter was settled by the employer providing the complainant with a payment of \$4,000, an apology and a reference.

Disability discrimination in employment

■ The complainant has a work-related back injury. He alleged that he was denied appointment to a more senior position by his employer because he is on permanent restricted duties, despite his being the recommended applicant.

The complaint was conciliated when the employer agreed to reinstate the complainant's promotion and to backdate the promotion to the time of his selection, subject to any rights of appeal by other unsuccessful applicants. The employer also agreed to pay the complainant \$4,000.

Sex (pregnancy) discrimination in employment

■ The complainant advised her employer that she was pregnant and would be requesting 6 months leave without pay to give birth and look after her child. She alleged that her employer told her that because she had been employed

for less than 12 months she would have to resign from her employment.

The complaint was conciliated on the basis that the employer agreed to grant leave without pay and guaranteed to allow the complainant to resume her employment at the expiry of the leave.

Sex and age discrimination in employment

■ The complainant had been employed as an office cleaner. She alleged that she was denied ongoing casual employment as a machine operator, even though she had done the work for several weeks because of staff shortages. The work was later offered to several males under 18 years of age.

The complaint was settled on the basis of an apology and \$1,000 financial compensation.

Sexual harassment in employment

■ The complainant had been working as a sales person in the auto industry. She alleged that her manager had touched her inappropriately after yelling at her and using abusive language because he believed she had made a mistake.

The manager agreed that he had touched her on the arm in an effort to console her when she was upset. He denied that there was any sexual nature to the touching. The company agreed to pay the complainant \$2,000 to settle the complaint.

Disability discrimination in service provision

■ The complainant has paraplegia and uses a wheelchair. She alleged that when she rang to book a taxi, she was advised that people who require wheelchair-accessible cabs must make advance bookings.

The complaint was conciliated on the basis of an apology from the

manager and the distribution of a new policy to all bookings operators.

Carers' responsibilities discrimination in employment

■ Two women made complaints of carers' discrimination against the same company. They had proposed a job sharing arrangement which would have allowed each of them to fulfil their carers' responsibilities, while retaining the benefit of their experience for the company.

One woman had been on maternity leave and wished to return part time. The other had increased her work hours while the other was on maternity leave, but wished to return to part time work.

The company had declined their proposal, arguing that the job in question could not be shared. It did not look for other positions for the two women, even though new staff had been recruited recently.

The matter was settled by payments of \$4,000 to one woman and \$5,000 to the other.

Disability discrimination in employment

■ The complainant, who has moderate hearing loss, had worked for the respondent as a welfare worker. When her position was made redundant she applied for two new positions within the service, but her applications were not successful.

She alleged that the convenor of the interview panel spoke to her in an inappropriately loud voice and used inappropriate body language when she requested that some questions be repeated. She also alleged that inadequate arrangements were made to accommodate her disability during the interviews. She further alleged that she had been constructively dismissed by her employer because the new positions were essentially the same as the position she held.

The matter was resolved by a payment of \$2,000.

Resolve grievances with confidence – 2003 seminar program

A new course in grievance resolution is a highlight of the Anti-Discrimination Board's seminar program for 2003.

Following on from *Key skills in grievance handling*, the *Grievance resolution* course was initiated in response to frequent requests and has proved extremely popular since it was first run in July 2002. It looks at a range of strategies for resolving grievances and the impacts of different resolution options.

The course aims to give participants more confidence that they are acting according to principles of procedural fairness and natural justice, particularly in light of the complexity and variety of legal decisions on employment issues.

Other courses from the Board's well-respected program will give managers, human resources staff and other relevant employees the skills they need to identify and help prevent discrimination and harassment in the workplace.

Seminar dates

Harassment & bullying prevention
Tues 4 March, 9-1; Thurs 19 June, 9-1;
Tues 21 Oct, 9-1

EEO & harassment prevention for managers
Weds 5 March, 9-1; Thurs 26 June, 9-1;
Weds 29 Oct, 9-1

Skills training for contact officers
Thurs 13 March, 9-5; Tues 17 June, 9-5;
Thurs 23 Oct, 9-5

Key skills in grievance handling
Weds 19 March, 9-5; Weds 25 June,
9-5; Tues 28 Oct, 9-5

Recruitment
Tues 1 July, 9-1

How to implement EEO
Weds 2 July, 9-1

Grievance resolution
Thurs 3 July, 9-1

For more information about these courses or to register, contact John Hill on 9268 5520.

Tribunal decision means timeframe changes

A recent Administrative Decisions Tribunal (ADT) Appeal Panel decision has meant that the Anti-Discrimination Board can no longer apply its previous policy on the timeframe for accepting complaints.

The NSW *Anti-Discrimination Act* (ADA) says that a complaint must be lodged with the Board within six months of the act of discrimination occurring. Based on case law, the Board previously interpreted this to mean that a person who alleged they were discriminated against in a series of connected events could lodge a complaint up to six months from when the series of events finished.

Such complaints therefore contained allegations of discrimination that occurred more than six months before the complaint was lodged. However, in August this year the ADT Appeal Panel made a decision that means that the Board can no longer apply this policy.

In the case of *Bonella & Ors v Wollongong City Council* ([2001] NSWADT 194), five women librarians employed as assistant managers alleged indirect sex discrimination because they were refused the right to use motor vehicles privately under the Council's motor vehicle policy. The Tribunal found that complaint was substantiated and awarded each complainant \$7,500 general damages for humiliation and stress.

In the process the Tribunal considered whether the contravention occurred within six months of the lodgement of the complaint, and noted that the ADA has no capacity for lodging complaints of ongoing discrimination. It affirmed that the complainants must prove a contravention which occurred in the six-month period prior to making their complaint, but that account can be taken of relevant practices outside this period.

This decision means that a complaint to the Board can **only** include events that occurred within the six month period before the complaint was lodged. The complaint may only include events that occurred more than

six months before it was lodged if the President decides to accept these events as part of the complaint. These events can no longer automatically be included as part of the complaint.

The President will only decide to include events occurring more than six months after the complaint is lodged if he decides that there is 'good cause' to do this. Deciding on 'good cause' may include a consideration of the length of the delay, the reasons for the delay and any disadvantage that either party in the complaint might experience if the events were included. This process may take about three months, as each party must be given a period of time to provide their views to the President.

If the President decides to accept these events, then they will become part of the complaint and damages can be awarded if the allegations are substantiated. If the President decides not to accept these events, they can be used as background to the complaint, but the complainant cannot be awarded damages for them.

Complainants with complaints containing events that occurred more than six months ago should consider making the complaint to the Human Rights and Equal Opportunity Commission under federal discrimination legislation, if they have a right to do so. The federal legislation allows lodgement of complaints up to 12 months after the discriminatory event occurred. Beyond this the age of the complaint becomes a possible reason for termination, but does not require a positive decision to accept it for investigation as in NSW.

However, HREOC cannot accept complaints where proceedings have already been initiated in another jurisdiction. Recent advice from HREOC suggests that they view lodging a matter with the ADB as initiating proceedings, even if it is lodged outside the time limit and has not been accepted. Therefore complainants in this situation should get advice before deciding whether to lodge their complaint with HREOC or the Anti Discrimination Board.

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
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TTY (02) 9268 5522

Enquiries/Employers Advisory Service
ph (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
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Toll free — 1800 670 812

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

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