

ANTI-DISCRIMINATION

Calling all ratbags and paint throwers

CAMILLA HUGHES says action is needed on a discriminatory exemption included in recent Northern Territory anti-discrimination legislation.

Tasmania became entitled to the dubious honour of being the only Australian State or Territory without its own equal opportunity legislation when the Northern Territory passed the *Anti-Discrimination Act* 1992 (NT) in the November sittings of the NT Legislative Assembly.

As is probably customary on these occasions, the Minister responsible for Equal Opportunity, Shane Stone, launched the legislation claiming it would be 'Australia's most progressive legislation on discrimination'.¹ Certainly the grounds of discrimination covered are broad: discrimination is prohibited on the grounds of race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association activity, religious belief or activity, political opinion, affiliation or activity and irrelevant medical or criminal record (s.19).

The inclusion of 'sexuality' was the culmination of a long campaign by the Territory gay community. When the legislation was announced in July 1992 the Northern Territory Government said sexuality would not be included (as it had been in earlier drafts) but later in the same month 'sexuality' was back in the Bill after further community consultation. The Acting Minister, Max Ortmann, announced the inclusion of 'sexuality' as a prohibited ground of discrimination with the following comments:

We are aware there is a strong underlying feeling in the community that this Bill should not single out one group of people more than any other.

It has been extremely encouraging to see the volume of correspondence it has generated from the so-called 'silent majority'.

Families with children are saying it is none of their concern what a person's sexuality is so long as it does not impinge upon them and the future of their children.

Certainly we are not responding to the ratbag minority and the paint throwers.²

So 'sexuality' was included, with no thanks apparently due to the ratbags and paint throwers, whoever they may be.

At the time the Northern Territory Government decided to include 'sexuality' it announced that the legislation would contain the following exemption:

37. Exemptions — Sexuality

A person may discriminate against another person on the grounds of sexuality in the area of work where —

- (a) the work involves the care, instruction or supervision of children; and
- (b) the discrimination is reasonably necessary to protect the physical, psychological or emotional well-being of children, having regard to all the relevant circumstances of the case including the person's actions.³

The exemption was borrowed from the Queensland *Anti-Discrimination Act* passed in November 1991.⁴ The Northern Territory Country/Liberal Party Government noted it had simply adopted a provision recently enacted by the popular Labor Government in Queensland.

There was immediate concern expressed on the announcement of the 'sexuality exemption' that homosexuals could be the subject of discrimination because of an unsubstantiated view that homosexuals cannot be trusted with children.

Max Ortmann stated in a media release: '(t)he legislation specifies 'sexuality' rather than 'homosexuality' because it is not specifically directed at homosexuals. Nor is it directed at any other particular minority.'⁵

Public criticism of the exemption alleged that it was directed to homosexual employees and based on:

- an assumed correlation between homosexuality and child molestation or sexual assault; and
- an assumption that gay teachers will attempt to convert or coerce children into becoming homosexuals.

On any view, the Act introduced discrimination as a novel method of protecting children. It might be thought a childcare worker, for example, who causes harm to children should be counselled/dismissed (or whatever disciplinary action is appropriate) because they have caused harm to children, not on the grounds of their sexuality.

There exist numerous mechanisms to protect against inappropriate behaviour by people looking after children. As well as the provisions of the *Criminal Code* concerning assault, etc. there are:

- selection procedures,
- staff appraisal and evaluation procedures,
- staff disciplinary and dismissal procedures,
- in-service training on child sexual assault indicators, and
- professional codes of conduct.

In addition, sexual harassment provisions have been introduced in the *Anti-Discrimination Act* itself.

If there is evidence that an employee was acting in a way harmful to children, there is little question that such actions should be reported to the police (and may have to be under mandatory reporting procedures) and would be grounds for immediate suspension and ultimately dismissal if the allegations could be proved. There would be no need of the exemption section to dismiss the employee. Neither, if there was evidence that a prospective employee had sexually assaulted children, would there be any need to justify a failure to hire that person by using the exemption section.

The Northern Territory Government conceded it was concerned about promotion of homosexual lifestyles in the classroom. Minister Shane Stone said on television:

Well this exemption is aimed at those teachers who would seek to cross the bounds and to promote homosexuality in the classroom as an alternate [sic] lifestyle.⁶

One would think school authorities already have procedures in place to deal with teachers who teach material thought to be harmfully inappropriate, or outside the syllabus. But in any case, there may be some difficulties in using the exemption in this kind of situation. Take the example of a gay or lesbian teacher dismissed for promoting gay lifestyles in the classroom. The school authority would have to show first, that a discussion of gay lifestyles was reasonably likely to be detrimental to the physical, psychological or emotional well-being of children. That would be difficult to prove. Second, it must be established that the dismissal was reasonably necessary to protect children. With other mechanisms in place to discipline teachers it would be difficult for the school to show the dismissal was reasonably necessary, rather than counselling or warning the teacher.

The conclusion that the exemption would be difficult to utilise in practice fosters the suspicion that the section was intended to 'send a message' about gay and lesbian employees rather than remedy a problem.

Conclusion

Ultimately the victory for the Territory's homosexual community⁷ has been the inclusion of sexuality as a ground of prohibited discrimination in the *Anti-Discrimination Act 1992* (NT). The victory has been marred by the ill-conceived s.37 'sexuality exemption'. There are doubts the exemption will be legally effective. Nonetheless, long-discredited and prejudicial assumptions about homosexual people have been resurrected and publicly affirmed, fuelling anti-gay sentiment in the Territory — surely not the desired effect of anti-discrimination legislation. Even if the section is never used, it will have the effect that many gay and lesbian employees working with children are fearful of disclosing their sexual preference in the workplace.

Territory 'ratbags and paint throwers' still have a job ahead of them to convince the Government to remove this discriminatory exemption.

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References

1. Stone, S., Media Release, 1 October 1992.
2. Ortmann, M., Media Release, 27 July 1992.
3. S.37 *Anti-Discrimination Act 1992* (NT). A child is defined as a person under the age of 18, see s.4.
4. S.28 *Anti-Discrimination Act 1991* (Qld). The wording of the Queensland exemption is virtually identical except it refers to 'minors' rather than 'children' and to 'lawful sexual activity' rather than 'sexuality'.
5. Ortmann, M., Media Release, 30 July 1992.
6. Sexuality Debate, *7.30 Report*, ABC Television, 26 August 1992.
7. Discrimination on the basis of 'bisexuality' and 'transsexuality' is also prohibited under the Act: see the definition of 'sexuality' in s.4.

ENVIRONMENT

Cross the road but do not breathe

SIMON RICE reports that Japanese citizens, with pro bono lawyers, take on business and government to forge a right to something more than personal property — to personal health

Japan is notorious as a breeding ground for industrial disease. Minamata disease, Itai-itai disease, Yokkaichi disease are the big ones; induced by air and water pollution, crippling and killing thousands of people over decades. It is not surprising that asbestos is used and abused as if it were as innocuous as cardboard.

The most infamous of the diseases, Minamata disease, was in fact mercury poisoning. Many thousands of people, residents of fishing villages on the coast of the Yatsushiro Sea, were affected by the consumption of fish and water poisoned by industrial waste. The poisoning caused paralysis, mental disorders and birth defects.

Although the pollution was at its worst in the late 1950s, it continues even today, at lesser levels. Minamata compensation cases have been running for over 20 years with little reward. A recent 'victory' has been reported (*Sydney Morning Herald* 26.3.93, p.8), in which 105 victims won a total of \$A6 million dollars in damages. Significantly the finding was against not only the polluting company, but also against the local area government.

Part of Japan's appalling record and reputation in this area might be explained by examining the gap between government and people. The ghost of a feudal hierarchy haunts relations between the rulers and the ruled. There is plenty of evidence that the people are not nearly as tolerant as the government of environmental abuse.

Fighting the good fight for pollution victims is the Japan Federation of Bar Associations (the JFBA). In effect, it is a law society; membership is a condition of practice as a lawyer. It is surprisingly active in campaigns involving issues which do not directly promote the profession, with a strong record in advocating pollution controls.

The JFBA commits itself to 'working on traditional human rights . . . to support liberty and rights of citizens . . . research and studies on . . . pollution, environmental protection and consumer problems [and] to reform the systems of justice and law' (Booklet 1988).

Although ironic in the light of Japan's aggressive exploitation of natural resources in its region, it is the JFBA which continues to lobby for international recognition of environmental standards. With an agenda like this, the JFBA has its work cut out in Japan.