Anti-discrimination laws: trying again

Phil Teece

Manager, personnel & industrial relations
phil.teece@alia.org.au

It is more than thirty years since Australia began to introduce anti-discrimination and equal opportunity laws. But that certainly does not mean workplace inequality and inequity have disappeared. Just ask those librarians who gave evidence before the recent pay equity inquiry in New South Wales. Or consider the ALIA members who are still waiting for a hearing of their anti-discrimination claim, almost five years after their disadvantage became apparent.

The current flurry of legislative changes confirms that much remains to be done. Encouragingly, in three jurisdictions important adjustments have been made recently. Federally, the *Equal Opportunity for Women in the Workplace Amendment Act 1999* has finally passed through Parliament. It replaces the former affirmative action legislation, which throughout its life created problems among employers who [mistakenly] saw it as sponsoring reverse or positive discrimination. While it deals with these fears, the new Act retains the detailed reporting requirements that some employers objected to. An objects clause is introduced to make clear the legislation's intent. Broadly, its goals are to promote [i] merit as the basis for women's employment [ii] action by employers to eliminate all discrimination against women in employment and [iii] real workplace consultation between employers and their staff on equal opportunity for women. Importantly, a much broader definition of employment matters is introduced. This has the effect of bringing several new elements within the scope of the legislation — notably arrangements for dealing fairly with pregnant women and new mothers. The Act emphasises that practical issues involved in managing pregnant workers and their needs are fundamental responsibilities of the employer. All organisations with more than 100 employees must now prepare tailored workplace profiles as a basis for the action plans which must be lodged regularly with the redesignated Equal Opportunity Agency.

In New South Wales, a substantial review of the *Anti-Discrimination Act 1977* has been completed. That Act was among the trailblazers, coming years ahead of counterpart legislation in most other Australian jurisdictions. But this also means that its provisions were framed when community attitudes toward racism, sexism and a host of other prejudices were quite different from those prevailing now. Recognising this, the review recommends several major changes. These include new prohibitions against discrimination based on religious belief, political opinion and carer responsibilities. An employer obligation is proposed to provide reasonable accommodation for disabled, pregnant or breastfeeding workers. And, most importantly, it is recommended that in regard to indirect discrimination, the burden of proving that policies and practices are reasonable should rest specifically with respondents. Practically, this means that where organisational policy has the effect of producing unequal outcomes for a particular group [women or the disabled, for example] then it is for the employer to prove the policy is reasonable. The victims will not need to prove that the policy is unreasonable, merely that it does in fact have differential effect. A number of ALIA members will find this proposal most interesting — and can only lament that it has been so long coming.

At the other end of the scale, historically, comes Tasmania which for years was seen to be tailing the anti-discrimination field. Now, with commencement in December of its *Anti-Discrimination Act,* the state has possibly the most substantial legislation of any Australian jurisdiction. Where previously, unlawful behaviour was very narrowly restricted to sex discrimination, the new laws have extremely broad reach. Unlawful behaviour now extends beyond the more established areas, to take in discrimination based on religious activity, criminal record, medical history and association with persons in designated categories. Particular emphasis is placed on discrimination in awards, enterprise agreements and industrial agreements, and in administration of all state laws. Many of the grounds for discrimination are also proscribed by legislation in some or all of the other jurisdictions. But no other state covers the whole range of potential discrimination in the one Act. To underpin the legislation a new Tasmanian Anti-Discrimination Commission has been created with well-known lawyer Dr Jocelyn Scutt as its first Commissioner.

And finally, Tasmania is also showing the way in encouraging industry to take on more disabled workers. Major research commissioned for a recent University of Tasmania conference on disability in the labour market has found that disabled staff are at least as productive as other employees, and are substantially more loyal to their employers. The survey urges major companies to show the way by employing many more disabled workers.

Legislation rarely guarantees that people will be treated fairly at work. If the past thirty years have proved anything they have confirmed that some employers [hopefully a small minority only] will always take the risk, on the basis that any cost resulting from detection is usually smaller than the savings achieved by non-compliance over a lengthy period. Much the same can be said of occupational health and safety laws. Nonetheless, these current developments in anti-discrimination law are cause for optimism that discrimination at work will gradually diminish in the next few years.■