



**THE ASIA PACIFIC FORUM**  
OF NATIONAL HUMAN RIGHTS INSTITUTIONS

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Human Rights and Equal Opportunity Commission  
and the application of  
Convention 111 – Discrimination (Employment and  
Occupation) Convention, 1958 (15/6/1973)

**BRIEFING PAPER FROM**

**THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION**

**11<sup>th</sup> Annual Meeting**

**Monday 31 July – Thursday 3 August 2006**

**Suva, Fiji Islands**

## **Human Rights and Equal Opportunity Commission and the application of Convention 111 – Discrimination (Employment and Occupation) Convention, 1958 (15/6/1973)**

### **1. Laws and regulations which apply the provisions of the Convention**

The *Discrimination (Employment and Occupation) Convention 111* ("Convention 111") is brought into Australian domestic law by the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOCA). Convention 111 is scheduled to the HREOCA. The Commission's powers in relation to Convention 111 are contained in Part II – Division 4 of the HREOCA. Under section 31 of this Act the Commission has the authority to perform the following functions in relation to discrimination in employment and occupation including the following:

- To examine enactments and proposed enactments (when requested to do so by the Minister) for the purpose of ascertaining whether the enactments have the effect of nullifying equality of opportunity or treatment in employment or occupation
- To investigate any act or practice, including any systemic practice that may constitute discrimination and where appropriate try to resolve the complaint of discrimination by conciliation.
- Where the Commission is of the opinion that the act or practice constitutes discrimination and the complaint could not be resolved through conciliation, to report to the Federal Attorney-General on the complaint and make recommendations as appropriate.
- To promote an understanding and acceptance and public discussion and education programs on equality of opportunity and treatment in employment and occupation in Australia
- To prepare and publish guidelines for the avoidance of discrimination in employment and occupation
- To, where the Commission considers it appropriate to do so, with leave of the court, intervene in proceedings that involve discrimination in employment and occupation.

For the purposes of Part II – Division 4 of the HREOCA which deals with discrimination in employment or occupation under Convention 111, discrimination is defined in section 3 of this Act as follows:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social

- origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
- (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
  - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

but does not include any distinction, exclusion or preference:

- (c) in respect of a particular job based on the inherent requirements of the job; or
- (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

This definition of discrimination closely resembles the definition contained in Convention 111.

The *Human Rights and Equal Opportunity Regulations (1990)* extended the definition of discrimination in the HREOCA to include the following additional grounds.

- Age
- Medical record
- Criminal record
- Impairment
- Marital status
- Mental, intellectual or psychiatric disability
- Nationality
- Physical disability
- Sexual preference
- Trade union activity

Under the HREOCA, complaints relating to discrimination in employment or occupation under Part II – Division 4 of the HREOCA do not give rise to any enforceable legal right or remedy. While certain conduct may be found to constitute discrimination by the Commission, this legislation does not make the conduct unlawful. If the Commission finds that an act or practice constitutes discrimination, action that can be taken by the Commission is limited to preparing a report with recommendations which is provided to the Attorney-General for tabling in Federal parliament. These recommendations can include the payment of financial compensation. The Commission does not have the power to make

respondents to a complaint comply with or implement its recommendations.

The *Racial Discrimination Act 1975* (Cth) ("the RDA"), the *Disability Discrimination Act 1984* (Cth) ("the DDA") the *Sex Discrimination Act 1984* (Cth) ("the SDA") and most recently the *Age Discrimination Act 2004* (Cth) ("the ADA) are also administered by the Commission. These Acts make discrimination in certain areas of public life unlawful and give rise to an enforceable legal remedy. Under these Acts the Commission has the power to inquire into complaints of discrimination on certain grounds in the area of employment and attempt to resolve them through conciliation. If the complaint is not able to be resolved through conciliation or the President is of the view that the complaint should be terminated for one of the other reasons provided for in the HREOCA<sup>1</sup>, he may terminate the complaint. Once a termination notice has been issued, the affected person may commence proceedings in the Federal Court of Australia or the Federal Magistrates Court to have his or her case heard and determined.

The *Racial Discrimination Act 1975* makes it unlawful to discriminate against a person either directly or indirectly on the basis of their race, colour, national or ethnic origin in many areas of public life including employment, provision of goods and services and trade union membership. This Act also provides that it is against the law to subject a person to offensive behaviour based on racial hatred, if this conduct takes place in public and meets the objective test of being reasonably likely to offend.

The *Sex Discrimination Act 1984* makes it against the law to either directly or indirectly discriminate against a person on the basis of their sex, marital status, pregnancy or potential pregnancy in many areas of public life including employment, education, provision of goods, services and facilities and administration of Commonwealth laws and programs, which includes certain labour market programs and work for the dole schemes for people who are unemployed. It is also unlawful to dismiss a person from their employment on the grounds of their family responsibilities. Sexual harassment is also against the law. S46PW of the HREOCA also allows the President to refer a complaint regarding a discriminatory award to the Australian Industrial Relations Commission. This provision applies only to awards that have provisions which could constitute a breach of the *Sex Discrimination Act 1986*.

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<sup>1</sup> The grounds for terminating a complaint are contained in section 46PH(1) of the HREOCA. These include that the alleged unlawful discrimination is not unlawful discrimination, that the complaint was lodged more than 12 months after the alleged unlawful discrimination took place, that the complaint is trivial, vexatious, misconceived or lacking in substance.

The *Disability Discrimination Act 1992* covers direct and indirect discrimination against a person on the basis of their disability in many areas including employment, education, provision of goods, services and facilities and administration of Commonwealth laws and programs. Under the DDA disability is defined to include physical, intellectual, psychiatric, sensory, neurological and learning disabilities as well as physical disfigurement and the need to use equipment or assistance animals. The definition of disability extends to disabilities that presently exist, previously existed, may exist in the future or are imputed to a person.

*The Age Discrimination Act 2004* (Cth) makes direct and indirect age discrimination unlawful in key areas of public life including employment, education, access to goods and services and administration of Commonwealth laws and programs. Age is defined in the ADA to include 'age group'.

There is significant overlap between the grounds of discrimination covered in the provisions relating to Convention 111 in Part II – Division 4 of the HREOCA and the grounds of discrimination covered in the other Commonwealth anti-discrimination law. Where possible, complaints are handled under legislation which provides people with an enforceable legal right.

State and Territory anti-discrimination law also makes discrimination in employment unlawful on many of these grounds including sex, sexual harassment, marital status, pregnancy, race, disability, age, religion and sexual preference. Each state has equal opportunity legislation that enables aggrieved persons to make a complaint and try to resolve the matter through conciliation or have it determined by a tribunal.

## **2. Complaints to HREOC regarding discrimination in employment or occupation**

The following tables summarise the complaints received by HREOC from 1 July 2003 to 30 June 2006.

### ***Complaints received over the reporting period***

	<b>2003-04</b>	<b>2004-05</b>	<b>2005-06</b>
Racial Discrimination Act	159	167	259
Sex Discrimination Act	353	348	347
Disability Discrimination Act	483	523	558
Human Rights and Equal Opportunity Commission Act	118	125	123

Age Discrimination Act		78	106
<b>Total</b>	<b>1113</b>	<b>1241</b>	<b>1393</b>

***Employment related complaints received by area \****

<b>Racial Discrimination Act</b>	<b>2003 - 2004</b>	<b>2004- 2005</b>	<b>2005- 2006</b>
Employment	133 (42%) <sup>2</sup>	155 (43%)	149 (25%)
Right to join trade unions	-	-	-
<b>Sex Discrimination Act</b>			
Employment	556 (88%)	516 (85%)	564 (79%)
Superannuation, insurance	4	3	-
Application forms etc	-	-	-
Trade unions, accrediting bodies	1	4	4
<b>Disability Discrimination Act</b>			
Employment	484 (54%)	485 (49%)	478 (38%)
Superannuation, insurance	15	10	14
Application forms, requests for information	-	-	-
Trade unions, registered organisations	-	-	-
<b>Human Rights and Equal Opportunity Commission Act (ILO 111)</b>			
Race (ILO 111)	-	-	-
Colour (ILO 111)	-	-	-
Sex (ILO 111)	-	-	-
Religion (ILO 111)	11	16	16
Political opinion (ILO 111)	2	2	8
National extraction (ILO 111)	-	-	-
Social origin (ILO 111)	-	-	-
Age (ILO 111)	18	12	5
Medical record (ILO 111)	-	-	-
Criminal record (ILO 111)	27	26	41
Impairment (including HIV/AIDS status) (ILO 111)	-	-	-

<sup>2</sup> The figure in brackets expresses the number of complaints received under this area as a percentage of total complaints received by area under the Act.

Marital status (ILO 111)	-	-	-
Disability (ILO 111)	-	-	2
Nationality (ILO 111)	-	-	-
Sexual preference (ILO 111)	9	16	6
Trade union activity (ILO 111)	17	26	15

\* An area is included for each ground of complaint, so one complaint may have multiple and different areas and multiple grounds.

### **3. Convention 111 Complaints reported on to the Federal Attorney-General**

In 2005/2006 the Commission reported one complaint to the Federal Attorney-General, finding that the acts or practices complained of constituted discrimination under the Convention 111.

#### **HREOCA Report No 33 – Discrimination in employment on the basis of criminal record**

The President's report of his inquiry into a complaint of discrimination in employment on the basis of criminal record was tabled in Parliament in June 2006. The President found that the decision of the Emergency Services Telecommunications Authority ("ESTA") of Victoria to prevent Ms Gordon applying for employment as a communications officer on the basis of her criminal record constituted discrimination in employment. The President rejected ESTA's assertion that a person who has a criminal record that includes a serious traffic offence did not meet the character requirement for a communications officer. The respondents are currently considering the President's recommendations.

### **4. Policy and education work by the Commission in the area of employment and occupation**

The President, Aboriginal and Torres Strait Islander Social Justice Commissioner, the Disability Discrimination Commissioner, the Human Rights Commissioner, the Race Discrimination Commissioner and the Sex Discrimination Commissioner work towards meeting the objectives of Convention 111 through policy and education work, including research work on discrimination in employment. The following policy work has recently been undertaken which is relevant to discrimination in employment and occupation.

#### **Criminal record**

In November 2005 the then Human Rights Commissioner, Dr Sev Ozdowski, published ***On the record: Guidelines for the prevention***

*of discrimination in employment on the basis of criminal record.* The Guidelines were developed following a broad consultation process in which submissions were received from a wide range of organisations representing people with criminal records, individuals and employer groups. The Guidelines provide information regarding the rights and responsibilities of employers and employees in relation to employment and criminal record measures which may be taken to protect people against discrimination in employment on the basis of criminal record. The guidelines are available at [http://www.humanrights.gov.au/human\\_rights/criminalrecord/on\\_the\\_record/index.html](http://www.humanrights.gov.au/human_rights/criminalrecord/on_the_record/index.html)

### **Disability discrimination**

In 2005 the Commission held a National Inquiry on Employment and Disability to identify the reasons for the disadvantages faced by people with disabilities in the open workplace and to work towards practical, achievable solutions.

The Inquiry set up a number of specialist consultative groups consisting of government, business and disability peak bodies looking at specific issues identified as barriers. Forums were held nationally and a series of discussion papers issued. The final report was released in February 2006 which identified a range of strategies and programs to remove barriers to participation of people with disabilities in paid employment. HREOC continues to work with government, business and the disability sector on the issues and strategies that were identified by the inquiry. Government has already committed to implement a number of strategies including one stop information service for employees and employers, additional assistance with equipment and costs associated with employing people with disabilities, positive advertising and awareness programs targeting employers. The final report from the inquiry, ***WORKability II: Solutions - People with disabilities in the open workplace***, can be accessed at [http://www.humanrights.gov.au/disability\\_rights/employment\\_inquiry/final/toc.htm](http://www.humanrights.gov.au/disability_rights/employment_inquiry/final/toc.htm)

### **Family responsibilities**

*Striking the Balance* is a project launched by the Sex Discrimination Commissioner in February 2005 that aims to examine family responsibilities and paid work. A discussion paper was released on 22 June 2005. The project will build on the Commission's previous

work<sup>3</sup> but it will take the work and family debate further by engaging men and by considering the private world of the home as the flipside of the world of paid work. Women's increasing labour force participation rate and the ageing of the Australian population mean that the need to combine family responsibilities with paid employment is an increasingly important issue for a much greater proportion of the workforce. The project has generated a high level of public interest and debate and the final report is due to be released in 2006. A copy of *Striking the Balance: Women, men, work and family* is available online at [http://www.humanrights.gov.au/sex\\_discrimination/strikingbalance/index.html](http://www.humanrights.gov.au/sex_discrimination/strikingbalance/index.html)

### **Women in employment research project: A clearer picture of women's pay and conditions in the workforce**

The Human Rights and Equal Opportunity Commission (HREOC), the National Foundation for Australian Women (NFAW) and the Women's Electoral Lobby (WEL Australia) have teamed up to commission research on the current position of Australian women in the workforce. The aim of the research project is to ensure that comprehensive, accurate data about women's pay and conditions are publicly available to assist researchers and policy makers to track progress for women in paid work. The research is due to be completed by October 2006.

### **National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits**

The National Inquiry "Same Sex: Same Entitlements" was launched by the Human Rights and Equal Opportunity Commission on 3 April 2006. Between July and October public hearings will be held across Australia to obtain further testimonies and information from organisations who have made submissions and from people directly affected by these laws. The Inquiry intends to conduct an audit of Commonwealth, State and Territory laws in order to develop a full list of circumstances in which same-sex couples may be denied financial and work-related benefits and entitlements that heterosexual couples enjoy. The Inquiry will also be collecting individual stories about the impact of such laws on people in same-sex couples, and any children of same-sex couples. The Inquiry will make recommendations to the Federal Attorney-General, Philip Ruddock, and Federal Parliament as to how to address any discrimination.

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<sup>3</sup> See Human Rights and Equal Opportunity Commission, *A Time to Value, Proposal for a National Paid Maternity Leave Scheme* (2002) and Human Rights and Equal Opportunity Commission, *Pregnant and Productive*, Report of the National Pregnancy and Work Inquiry (1999).

## Information for employer and employees

In December 2004 the Commission launched a new employers' pack titled '**Good practice, good business**' – *eliminating discrimination and harassment in your workplace*. '**Good practice, good business**' includes a CD-Rom, brochures, posters and a new 'Information for employers' website. The pack contains resources for employers working in large and small business, as well as information about age, race and disability discrimination, sexual harassment and pregnancy, paid maternity leave and workplace bullying.

In June 2006 the Commission launched a new webpage, **Work out your rights**, providing information specifically for employees about their rights in employment under Commonwealth human rights and discrimination laws. Information about the resources available to both groups has been distributed through employer groups, government agencies, unions, community legal centres and peak interest groups.

### 5. Changes in the industrial relations environment

In March 2006 a new Commonwealth industrial relations legislative framework was introduced which has a significant effect on current industrial entitlements and the remedies available to employees in disputes with their employer. The legislation focuses on individual contracts moving away from the current award based system, reduces the role of trade unions and reduces the circumstances in which an employee can seek redress for dismissal. The legislation preserves the right for employees to pursue a claim of unlawful termination under industrial law where their employment was terminated because of age, race, sex, disability and other set grounds reflecting those covered by federal anti-discrimination laws. The legislation does not affect the right of a person to pursue a complaint under Commonwealth anti-discrimination laws or an alleged breach of ILO 111 and the Commission has received additional funding to handle an expected increase in complaints.

The Commission has publicly criticised the legislation, concerned that it may undermine the capacity of employees to balance their work and family responsibilities; does not contain sufficient mechanisms to advance pay equity or ensure equal remuneration for work of equal value; and may not adequately protect vulnerable employees.

