



# Equal Time

Number 61 August 2004

## CONTENTS

Discrimination and older gays	1
Video on respect	3
New Community Education Officer	3
Legal developments	4
Mediation an option for neighbourhood fights	5
Conciliations	6
New Board member	7
About the Anti-Discrimination Board	12

The contents of this publication are for information purposes only and should not be substituted for legal advice.

*Worried that you're not up on the latest developments in discrimination law?*

The Anti-Discrimination Board can provide on-site training in your workplace, custom-designed to meet your individual needs.

For more information contact Lesley Ashwood on (02) 9268 5520

## Discrimination and older gays: surviving aged care

*Older gays and lesbians face a discriminatory environment when it comes to ageing and aged care services, according to gerontology researcher Dr Jo Harrison of the University of South Australia.*

Dr Harrison says that the view of ageing as a negative, lonely experience is a serious barrier to overcoming discrimination on the basis of age in the gay and lesbian community. Connection to the gay community can contribute to a positive ageing experience, and many gay and lesbian people fear having to go to a nursing home in old age.

According to Harrison, aged care services operate within a dominant "heteronormative" framework in which heterosexual experience is seen as the central world view and the role of sexuality as a component of identity is not recognised.

Harrison says that heteronormative assumptions underpin many discussions of aged care practice, particularly when referring to relationships, family, household, taxation and superannuation. Terms like "never married", "spouse carer" and "widowed" reflect the assumption that all elderly people are heterosexual.

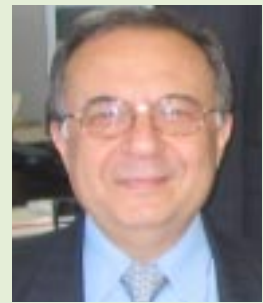
This can lead to a situation where an older gay man or lesbian is reluctant to disclose their sexuality and it is therefore unlikely that their needs will be met to the fullest extent possible.

Harrison discusses a case in which a lesbian being admitted to a home felt unable to reveal that the "friend" accompanying her at admission was really her life partner. The partner was therefore not given the same visiting and decision-making rights as the woman's children.

In fact, only a small percentage of the aged population ever requires nursing home care. But the fear of being "forced back into the closet" makes many gay and lesbian people reluctant to consider this as an option, and may influence their overall thinking about ageing.

A common viewpoint among health professionals is that a person's sexuality is "private" and not relevant to their

*Continued on page 3*



## From the President

It is just over a year since I began as President of the Anti-Discrimination Board. I have enjoyed the challenges of the past year and the steep learning curve involved in becoming more acquainted with the specific issues relating to each of the communities covered by anti-discrimination law.

We have reviewed practices and implemented some changes within the Board during this time. At present the Board has no backlog of complaints and is dealing with new complaints within 3-6 months of the lodging date.

The Board's annual report was tabled in parliament on Wednesday 19 October and is now available on our website. If you are unable to access the report on the web, please contact the switchboard on (02) 9268 5555 to request a print copy.

Amendments to the Anti-Discrimination Act were also passed on 19 October. Board staff will focus on developing information on the amendments in the next few months and will make it available as soon as the amendments are proclaimed.

In brief, the amendments do not introduce any new grounds of discrimination and relate to streamlining the complaint process, extending the time during which a complaint can be lodged to 12 months and increasing the President's discretion on certain aspects of complaints.

I believe that the amendments will improve the process for all involved in complaints that come to the Board. The next issue of *Equal Time* will explain the changes in more detail.

## New Community Education Officer

The Anti-Discrimination Board's new Community Education Officer, Rhonda Stewart-Crisanti, has a passion for educating the community about their rights under the Anti-Discrimination Act (ADA) and the nexus between industrial and discrimination issues.

Rhonda has worked with unions, community organisations, and in both the federal and state industrial relations commissions.

Since starting at the Board, Rhonda has provided anti-discrimination training sessions to West Works, Penrith, which assists people with disabilities, Al Zahra Muslim Women's Association, youth workers at Campbelltown and the Sydney University Students Union.

Rhonda has also met representatives from Asian Women at Work, the



Rhonda Stewart-Crisanti (3rd from right) with (L-R) Thuy Ho, Maria Yau, Van Trinh and Bich Thuy Pham from Behind the Label, Debbie Carstens from Asian Women at Work, consultant Kate McClear and Des Karlsson from Fairwear.

Chinese Australian Services Society and the Vietnamese Women's Association at the Behind the Label Education and Training Program Graduation Ceremony at Cabramatta. Behind the Label has helped over 100 Chinese, Vietnamese, Khmer and Lao speaking clothing outworkers to complete vocational training.

In the past, Rhonda was involved in the Fair Wear campaign to raise consumer awareness about labour

conditions in the clothing industry. She is keen to inform outworkers about their rights under the ADA.

Rhonda is looking forward to meeting community representatives at our training sessions for community workers. The next course will be *Non-Discriminatory Community Management* for community managers, to be held on 30 November. For more information phone (02) 9268 5555.

## Discrimination and older gays

*Continued from page 1*

treatment. Harrison argues that this is a barrier to a full understanding of a client's life experiences, and may also be a way of avoiding the need for change.

Harrison says that mass "outing" of elderly gay men and lesbians is not the answer, and they should not be required to overtly discuss their relationships. Gay men and lesbians who grew up prior to the advent of gay liberation may have lived their entire lives without revealing their sexuality and coming out may not be a feasible option for them.

This contrasts with mid-life gays and lesbians, who are more likely to have been through a "coming out" process and made choices about disclosure throughout their lives.

However, Harrison says the crucial thing is for aged care services to "avoid assumptions which limit opportunities for coming out, while respecting diversity around identity, life history and self-understandings".

This includes understanding the choice not to identify as lesbian, gay, or even different. Overseas research has shown that many older lesbians, for example, do not apply this term to their own same-sex relationships or life arrangements.

There are ways that aged care services can communicate to older gay men and lesbians through language, practices and symbols that can reassure them that an environment is non-discriminatory.

For example, application forms and interviews could refer to "significant people" rather than "husband or

wife". Anecdotal evidence suggests that such subtle signals of openness have encouraged older gay clients to discuss issues and concerns that may otherwise have remained unaddressed.

Overt homophobia and abuse of gay and lesbian clients by nursing home staff are very important issues in the aged care context. Although there are no documented cases in formal complaints to government bodies, anecdotal evidence suggests that the problem certainly exists.

Harrison tells of one elderly man who had come out to the occupational therapist at a day centre after she asked whether he had a partner and what was their name. This enabled him to express some concerns that would otherwise have remained unaddressed.

However the Director of Nursing subsequently asked him to wear latex gloves while at the centre and threatened to refuse service to him if he did not comply. The occupational therapist managed to resolve the issue but it was a struggle and they had limited support from other staff.

Another elderly man was transferred from a retirement village to a psychiatric hospital because the management disapproved of his "younger male visitors". There are other cases of nurses refusing to bathe a "suspected lesbian" and elderly people being threatened with outing if they complained about how they were being treated.

Transgender and intersex people are also particularly vulnerable to discrimination in aged care settings, to the point where they may avoid seeking assistance altogether. There is anecdotal evidence of denial of services, forcibly preventing cross-dressing and deliberate physical violence when people are revealed to be transgender.

Transgender people may also have medical issues related their original gender that emerge with ageing, such as osteoporosis or prostate

cancer. These may not be addressed because they may be too intimidated to seek medical advice of any kind.

Harrison says that aged care workers must develop a better understanding of diversity around sexuality issues in order to provide quality service to future clients who have not led closeted lives and need non-judgemental care and support. There have not yet been significant advances in this area in Australia.

Education of service providers is very important, and overseas evidence suggests that initiatives based on empowerment, involving gay and lesbian professionals from related organisations and organising speakers bureaux of older educators, have been particularly successful.

A Code of Ethics was developed for the Australian aged care industry in 2001, but this did not outlaw discrimination on the grounds of sexuality.

Recent legislative changes have addressed some of these concerns, but do not necessarily cover the special situation of older people who have lived a long life of non-disclosure. Areas such as superannuation, wills, next of kin and power of attorney are still problematic in this regard.

There have been developments in the USA in relation to ageing and sexuality. These include the establishment of a National Association of Lesbian and Gay Gerontology, the American Society on Ageing's Lesbian and Gay Ageing Issues Network, and some tertiary curricula that address gay and lesbian ageing issues. Some activist and support organisations are now also emerging in Australia.

An improvement in understanding of the needs of gay and lesbian clients of aged care services, leading to greater empowerment and self advocacy, may result in unexpected outcomes and new options for action not previously considered.

# Legal developments

## Part-time work case successful

The Administrative Decisions Tribunal has found that a transport company discriminated against a woman on the grounds of carers' responsibilities by imposing a requirement that its employees work full time.

The woman had asked to work three days per week for a period of time as she had been unable to find suitable child care but had arranged to take her daughter to her mother's place 25 kilometres away.

The company had refused on the basis that they needed the woman to work full-time as she was a manager, and they believed her proposal was unworkable. The woman subsequently resigned.

The Tribunal found in the circumstances the requirement to work full-time was unreasonable. It found that the company had failed to properly consider the woman's proposal and had responded to it in a "knee-jerk" way. The company was ordered to pay the woman \$16,000.

*Reddy v International Cargo Express* [2004] NSWADT 218

## Employer found vicariously liable for sexual harassment

The NSW Police Service has been found vicariously liable for sexual harassment because it did not take all the steps required to deal with the case and educate employees and managers about the issue.

When the female employee made the initial complaint, her supervisor told the man in question about the allegation but did not tell him that his behaviour was inappropriate.

The supervisor reported the complaint to an Inspector who then circulated a memo saying that sexual harassment would not be tolerated.

The conduct later resumed, and the Inspector spoke to the man again. When the man continued his behaviour, the woman made another complaint and the matter was referred to a detective, who found that there wasn't enough evidence to substantiate a complaint. The Inspector later told the woman her complaint had been investigated and the man had been required to sign an agreement about his behaviour.

The Administrative Decisions Tribunal said the police had taken the woman's complaints seriously and acted quickly on them. However, it found that the service had not taken all reasonable steps to prevent sexual harassment, as the memo sent by the Inspector did not explain what constituted sexual harassment, staff had not been trained in issues of sexual harassment in the workplace, and the man thought his behaviour was normal and part of the workplace culture.

The woman was awarded \$20,000 in damages, plus some of her costs.

*Dee v Commissioner of Police, NSW Police and Anor* (No 2) [2004] NSWADT 168 (16 August 2004)

## Colour blind man wins right to drive ambulance

The Administrative Decisions Tribunal has found that the NSW Ambulance Service contravened the NSW Anti-Discrimination Act by refusing to employ a man with a mild form of colour blindness.

The man is a trainee nurse and has had a commercial driving licence since 1995. He previously spent some years driving in underground mines where he was required to follow complex light systems and perform other tasks involving colour reference and identification.

The tribunal held that there is no evidence that people with protanopia (who can distinguish all colours except subtle differences between red and brown) are not safe drivers. It rejected the Service's claim that the man was unable to perform the inherent requirements of the job due to his disability, and recommended that further tests be conducted in work-like circumstances to determine his suitability for employment.

*Browne v NSW Ambulance service* [2004] NSWADT 192 revised 10 September 2004

## Lifting inherent requirement of store job

A storeworker has lost a case of unlawful termination after he was dismissed because he had a back injury and could no longer lift up to 20kg, or perform tasks involving repetitive bending or lifting.

A person with a disability must be able to perform the "inherent requirements" of the job in order to be considered for or to remain in that job. If they cannot perform these requirements, regard must be given to whether they could carry out the requirements with some assistance.

The Federal Court ruled that IGA Distribution was justified in dismissing the worker as lifting

heavy items was an essential part of his job at the distribution centre. This involved assembling orders, packing, filling and stretch wrapping supermarket items, and working in the general merchandise area.

The court ruled that inherent requirements should be judged on the original position performed by the employee and not any modified work performed during rehabilitation.

*Cucanic v IGA Distribution (Vic) Pty Ltd [2004] FCA 1226 (20 September 2004)*

### Customs Service meets obligations on family responsibilities

The Australian Industrial Relations Commission has found that the Australian Customs Service met its obligations to a man's family responsibilities and has dismissed his case of unfair dismissal against them.

The Customs Service generally requires its officers to move to new locations every two years. The officer was due for relocation from Cairns to Brisbane but asked to stay in Cairns to be near his children.

The Service offered him a number of options including staying for an additional year (which he did), staying in Cairns for a further period at a lower level and moving to Brisbane and being given "reunion" airfares and help to find another job back in Cairns. When he refused these offers and refused to move to Brisbane, he was dismissed.

The court ruled Customs' offers to the man were "fair and reasonable" in view of their operational requirements. It held that he was aware of the Customs rotation requirement and his refusal of Customs' offers was unreasonable.

*A S Webb v Australian Customs Service PR 948530 (28 June 2003)*

# Mediation an option for neighbourhood fights

"Jason" wondered what was going on when he saw his new neighbour, "Esther", blacking out the windows of the garage under her house.

Then he saw Esther and a ponytailed male friend moving stainless steel utensils and piping into the garage. He was mortified – the neighbours were cultivating drugs next door to his family!

Esther started to receive hate notes, dog droppings on the doorstep and slogans painted on the driveway. When Jason's nine-year-old called Esther's three-year-old daughter "Honeydew" names, Esther sought help from the Chamber Magistrate, who referred her to the local Community Justice Centre (CJC).

The Community Justice Centre arranged a mediation between Esther and Jason. In the mediation it transpired that Esther was a photographer and was converting the garage into a darkroom.

As is often the case, Jason had tried to communicate indirectly through behaviours rather than discussing the matter directly with Esther. Mediation at a CJC helps people like Jason and Esther to talk directly to each other about particular problems at the time and can also demonstrate more effective techniques for communicating in the future.

CJCs provide a range of alternative dispute resolution

services across NSW, including mediation, conflict management, resolving workplace disputes, and facilitated meetings. These services are free to anyone who requests them, and interpreters are provided as needed.

The conflicts may relate to neighbourhood disputes, civil and small claims, some family matters and any other issues that do not involve violence or criminal matters.

CJC mediators are selected to reflect the demographics of the community they work in. They are trained and accredited by the CJC and work on a casual basis as required. They live around NSW and can provide a service to all parts of NSW and all communities.

The CJCs are funded by the NSW Attorney General's Department and have four regional offices. Each office works to develop relationships with key referrers in their local area, including local courts and non-government organisations.

*For more information or to contact your local CJC, phone (02) 9790 0656 (Sydney Region), (02) 4228 0433 (Southern Region), (02) 4925 0333 (Northern Region) or (02) 4732 1933 (Western Region).*

# Conciliations

## Sexual harassment in employment

The complainant was a young woman who was a temporary employee in a small business. She alleged that the respondent had sexually harassed her by touching her and making suggestive remarks. She had spoken with a more senior woman in the company about the problem but nothing had changed.

The respondent denied the allegations but accepted that the complaint needed to be resolved. He agreed to provide a statement of regret and to pay \$2,000 – \$1,000 to the complainant and \$500 to each of two charities of her choice.

This satisfied the complainant because it demonstrated that she was not just in it for the money, but was concerned for other women who worked at the company in the future. The respondent also felt it demonstrated that she was not just trying to get money out of him.

## Sex (pregnancy) discrimination in employment

The complainant had worked as a receptionist for a health practitioner for a number of years. She alleged that when she told her employer she was pregnant, he suddenly became critical of her work performance. She went on stress leave and made a complaint of sex discrimination to the Board.

The complainant initially wanted to stay in her position as she felt she had done nothing wrong, but eventually decided that this was not viable. The complaint was resolved with the employer agreeing to provide her

with a statement of performance and a payment of \$5,000 for lost wages.

## Race discrimination by association and marital status discrimination in accommodation

The complainant was an Aboriginal woman who applied for housing with an Aboriginal Housing Corporation. She alleged that she was told by the real estate agent who was managing the property that she would not be offered the house because a Board member of the Corporation had told the agent that she didn't associate with other Aboriginal people, her children went to a non-Aboriginal pre-school and her husband was not Aboriginal.

The complainant made a complaint of race discrimination by association and marital status discrimination against the Corporation's Board. The Board said that the process of selection had not actually been completed and that the Board member had spoken to the real estate agent without the authority of the Board.

The complaint was resolved when the respondent agreed to provide the complainant with a letter of apology and a payment of \$2,000. The house had already been allocated to another applicant whom the Board considered to be in greater need.

## Carers responsibilities discrimination in employment

The complainant worked as a driver for a government department. She has five children and at the time her husband was

the primary carer for them. However, on one occasion her husband was unable to pick the children up from little athletics, so she changed shifts so that she would be off work at that time and could pick them up.

However, when she was due to finish work, her supervisor would not allow her to leave. She alleged that when she told the supervisor that she had to leave and pick up her children, the supervisor cast aspersions on her husband and why he couldn't pick them up.

The complainant made an internal complaint and requested an apology, but the supervisor refused to apologise unless the complainant also apologised. An internal mediation did not solve the problem. She then made a complaint to the Board.

At a conciliation conference it was agreed that the supervisor would apologise and a small amount of leave would be reinstated. However neither of these things occurred and she was required to work under the supervisor again. She became very stressed, went on sick leave and came back to the Board.

Eventually the complaint was resolved when the complainant made contact with the chief executive of the department. She received an apology, had her sick and recreation leave refunded, and received an amount to compensate for lost shift allowances while on leave and other expenses relating to the case.

## Disability discrimination in employment

The complainant was a woman of extremely short stature who applied to work at a food production company in her region. She had relevant qualifications but alleged that she was told she wouldn't be given a job as she was too short and would "fall through the boards" on the shop floor.

The complainant asked around and discovered that it was very unlikely that the boards would be a problem. She lodged a complaint of disability discrimination with the Board.

At conciliation, the company agreed to give her three months trial. She got through this and is still working there, although there have been some ongoing problems.

### Carers responsibilities discrimination in employment

The complainant was a teacher who asked to take leave without pay for two days a week, in effect working part-time. She needed to spend more time with her children because her husband, who was in the armed forces, was being sent away from home.

The school principal refused her request, allegedly saying that he didn't believe in leave without pay for carers' purposes.

The complaint was resolved when the school agreed to return the long service leave the complainant had been forced to take, and pay her \$3,200. She also agreed to withdraw a victimisation complaint she had lodged after the initial complaint.

### Disability discrimination in employment

The complainant had applied for a position with a government department. He passed all the tests to be admitted to train for the position but when he went for a medical he was found to have a sensory disability which he had not been aware of.

He was told that he was not eligible for the position due to the disability. He sought medical advice and got a remedial device, but was told he was still not suitable. The training program was about to begin so the situation needed to be resolved quickly.

The complaint was settled following intensive negotiations with the department agreeing to

allow the complainant to start the training.

### Age discrimination in employment

A man in his 60s was employed as a sales worker by a car dealer, but was put off before the end of his three-month probation. He alleged that this was because of age discrimination.

The man said that on one occasion his manager had called him a "senile old p....", and on another he had called him a "silly old fool" in front of other staff when he arrived late to a meeting.

The company said that if they had been concerned about the man's age they wouldn't have employed him in the first place. They said that he had been put off because his sales performance was not at the required level.

The complainant disputed the respondent's interpretation of the sales figures and said that his sales had been reasonable. The complaint was resolved when the company agreed to pay him \$5,000.

### Race discrimination in education

The father of a teenage Aboriginal boy made a complaint on his behalf after he was allegedly subjected to racial abuse by other students at his school.

The school accepted that the comments had been made but said they had taken action against the students involved and suspended them from school. They also said that there had been a series of incidents involving angry and irrational behaviour on the part of the complainant and he himself had been suspended several times.

The complaint was resolved when the school agreed to pay the complainant \$2,000 and waive his school fees.

# New Board member



Peter Wertheim has recently become the fourth member of the Anti-Discrimination Board, replacing Father Hugh Murray who left in September 2003.

Peter has practised as a Sydney lawyer since 1977. His practice has covered a wide range of legal areas, including commercial law, industrial law and human rights law. He holds arts and law degrees from Sydney University and a Master of Laws specialising in public international law from the University of NSW.

While in private practice he has been the Honorary Solicitor of the Aboriginal Medical Service and the National Association of Aboriginal Community-based Health Organisations since 1984. He has also served as Honorary Solicitor of the East Timor Association and the Australia International Fund for Disadvantaged Children in Vietnam.

Peter was the President of the Jewish Board of Deputies between 1996 and 2000, and was made a Member of the Order of Australia in 2003.

# 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, 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>