



# Office of the Anti-Discrimination Commissioner

*Celebrating Difference, Embracing Equality*

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7 October 2008

Mr Len Armsby  
Director  
Legislation Development & Review  
GPO Box 825  
HOBART TAS 7001

Dear Mr Armsby,

***Re: Review of the Complaints Handling and Dispute Resolution Provisions of the Anti-Discrimination Act 1998***

Thankyou for the opportunity for the Office of the Anti-Discrimination Commissioner (OADC) to comment on the Review of the Complaints Handling and Dispute Resolution provisions of the *Anti-Discrimination Act 1998* (the Review). Please note that the OADC has provided comment in relation to Recommendation 59 of the Review in a separate submission.

The OADC comments as follows in relation to specific recommendations.

**Recommendation 5:**

*Amend the Act to provide for matters investigated by the Commissioner on his/her own motion be treated as complaints that may after investigation be referred to the Tribunal for determination.*

The OADC strongly supports this recommendation for the reasons given in the Review.

**Recommendation 7:**

*That the Commissioner should not receive oral complaints.*

The OADC supports this recommendation. However, the discussion under this section in the Review does not accurately reflect the OADC's practice. Officers have and will continue to provide assistance to complainants to write a complaint if required. The vast majority of complainants are able to write a complaint without assistance, but in some circumstances complainants require assistance. For example, new arrivals to Tasmania who are not literate in English or another language.

When officers reduce complaints to writing, it is a strict recording of the complainant's account solely in the complainant's own words. In the OADC's view, this should not create a conflict of interest or perception of bias. Rather, it is providing assistance to people who require it to achieve a level playing field. If this assistance was denied, it may in effect be discrimination.

It is also the OADC's experience that appropriate groups or services are not always available to assist people to make complaints. Many community legal organisations do not have funding to assist people with discrimination matters.

Recommendation 16:

*The Act be amended to allow for respondents to have a copy of the complaint as well as a summary of the complaint.*

The OADC strongly agrees that the Act ought to be amended to allow for the respondent to have a copy of the complaint. However, the OADC is of the view that it is unnecessary for a summary to be sent as well, as the OADC's current practice is to notify the parties of the live issues for investigation. When a complaint is accepted for investigation, the OADC notifies both parties in writing, identifying the live issues for investigation, regardless whether a summary or copy of the complaint is being forwarded to the respondent.

Recommendation 18:

*a) Amend the Act to include provision to close a complaint where the complainant has failed to make contact within 12 months of the last contact.*

*b) Provide that there is no power to revive a closed complaint or submit another complaint about the same matter.*

a) The OADC supports the ability to administratively close a complaint, but believes the recommended 12-month period is unworkable. Taken in conjunction with Recommendation 29 (Amend the Act to allow for extensions not exceeding an additional 6 months thereby effectively giving the Commissioner up to 12 months to investigate and conciliate a complaint), no file will be able to be administratively closed before it is required to be referred to the Tribunal. The OADC suggests that the Act be amended to enable the Commissioner to administratively close a complaint at any time if the OADC has made reasonable efforts to contact the complainant and the complainant has failed to respond.

b) The OADC notes the concern expressed in the Review that if a complaint can be revived after being administratively closed, it does not provide certainty to respondents. However, there may be exceptional circumstances where a complaint should be re-opened. For example, if a person was involved in a car accident and consequently in a coma for 12 months. If there is no option to re-open in these circumstances, it is potentially discriminatory on the basis of disability. The OADC supports the inclusion of a power for the Commissioner to revive a complaint that has been administratively closed if compelling reasons are provided.

Recommendation 21:

*The Commissioner must accept a complaint even if the discrimination is not the dominant or substantial reason for the alleged behaviour.*

The OADC strongly supports this recommendation. The OADC notes that currently s64(1)(a) of the Act states that the Commissioner can reject a complaint if it is trivial, vexatious, misconceived or lacking in substance. If there is a discriminatory reason for the alleged behaviour but it is trivial, a complaint can be rejected.

Recommendation 22:

*That section 97 not be amended to provide that the Commissioner must provide the Tribunal with a copy of his/her decision to reject or dismiss a complaint.*

The OADC strongly supports this recommendation. Section 97 does not relate to the Commissioner providing information to the Tribunal. Rather, s97 empowers the Commissioner or the Tribunal to request specified information from parties to a complaint or third parties, which is relevant to a complaint. As noted in the Review, in practice the Commissioner provides a copy of the letter rejecting or dismissing a complaint, setting out reasons for same, to the Tribunal.

Recommendations 25 and 26:

*Amend the Act to include a power to direct parties to early conciliation before the investigation or during the investigation of a complaint.*

*Amend the Act to allow for subsequent investigation following conciliation.*

The OADC supports the ability for the Commissioner to direct parties to early conciliation during investigation, but not before investigation. This is because prior to investigation the respondent isn't notified of the complaint. A respondent is only notified when a complaint is accepted for investigation. The OADC only supports the ability to direct parties to early conciliation after a complaint has been accepted for investigation and the respondent has been notified.

The OADC also supports an amendment to allow for investigation following conciliation. The OADC notes that the Review in this section states that matters may come to light in conciliation that could be further investigated and verified. This is problematic because s77 of the Act provides that "*anything said, written or done in the course of conciliation proceedings is not to be taken into account in any subsequent proceedings held in relation to a complaint*".

Section 77 reflects the common law that negotiations should be without prejudice. Section 77 is important in ensuring that discussion and negotiation is open and frank, which is more likely to lead to a successful resolution. The OADC does not support an amendment to s77.

The OADC's current practice is that if an early conciliation is held and the complaint is not resolved, the investigation recommences "on the papers". It is up to the parties

to put in writing any further issues that they believe warrant investigation. This could still be problematic if parties put in writing issues raised at conciliation.

However, the OADC believes that s77 will not be problematic if the Act is amended to allow for *further*, as opposed to subsequent, investigation in relation to the complaint following conciliation. The OADC believes that s77 will not apply to further investigation into a complaint because it is part of the same proceeding.

The OADC supports the ability to return complaints to investigation not just after an early conciliation, but also after conciliation held after an investigation is completed. The OADC also believes that the Commissioner should have the power to dismiss a complaint that has been returned to investigation after conciliation following the completion of an investigation. For example, the respondent to a complaint may raise a defence in conciliation that has not been previously raised. If the Commissioner is satisfied that the defence is applicable after further investigation, it is the OADC's view that the Commissioner should have the power to dismiss the complaint. The OADC further supports that such dismissals be reviewable by the Tribunal. Section 71 will need to be amended, or a new provision inserted, to reflect these changes.

Recommendation 29:

*Amend the Act to allow for extensions not exceeding an additional 6 months thereby effectively giving the Commissioner up to 12 months to investigate and conciliate a complaint.*

The OADC supports this recommendation on the proviso that the words "and conciliate" are removed. Currently, s78(2) of the Act refers only to the completion of an investigation. Conciliations are usually set down a month after the parties are notified that an investigation has been finalised to enable the complainant to prepare a settlement proposal and to allow parties to seek legal advice and arrange representation if they wish. It is the OADC's view that to include a reference to conciliation will place an onerous time restriction on the investigation and conciliation process.

Recommendation 50:

*That section 17 be amended to apply to all the attributes in section 16.*

The OADC strongly supports this recommendation. In addition, the OADC suggests that s22, listing the areas of activity, be amended to extend to all the attributes in s16. Currently, ss22(1)(f) and (g) apply to only the same attributes as s17(1).

Recommendation 56:

*That the definition of sexual orientation should not include transsexuality.*

The OADC strongly supports this recommendation. However, to ensure the same level of protection, it is necessary that the Act is further amended to include either transsexuality or gender identity as a separate attribute and that it is defined

accordingly. The OADC suggests that transsexuality or gender identity is included in s16 as a separate attribute.

Recommendation 57:

*Intersex should be defined in the Act and included as a separate attribute.*

The OADC strongly supports this for the reasons set out in the Review.

Recommendation 58:

*The term child be defined as a person under the age of 18 years.*

The OADC supports this recommendation, but notes that child is already defined in s3 of the Act as including a natural child, adopted child, stepchild, foster child or an ex-nuptial child. The OADC suggests the current definition could be amended as follows – “child” means a person under the age of 18 years, including a natural child, adopted child, stepchild, foster child or an ex-nuptial child.

We trust this will be of assistance in finalising the Review and the recommendations contained therein.

Please contact Ms Catherine Edwards, Complaints Manager, if you have any queries.

Yours sincerely,



Sarah Bolt  
**Anti-Discrimination Commissioner**